FREE SPEECH BENCH GUIDE

1. Constitutional Provisions

- First Amendment – "Congress shall make no law … abridging the freedom of speech …"
  - The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Virginia v. Black*, 123 S.Ct. 1536, 1547 (2003).
- Const. Art. I, §5 is More Protective than the First Amendment (Sometimes) – "Freedom of Speech. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."
  - In some situations [e.g. prior restraint, and public forum time, place, manner restrictions], Const. Art. I, §5 is more protective than the First Amendment. In others, the two have been held to be coextensive. *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, ¶51 (2017).

2. First Amendment Applies To All Branches of Government

- Executive and Judicial Branches Lack Inherent Power to Abridge First Amendment. The executive branch makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to 'make' a law abridging freedom of the press in the name of equity, presidential power and national security where Congress has declined to do so. The Bill of Rights were offered to curtail and restrict the general powers granted to the Executive, Legislative, and Judicial Branches. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedoms of press, speech, religion, and assembly. To find that the President has inherent power to halt the publication of news by resort to the courts for injunctive relief would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make secure. "[N]o law" means no law. *New York Times Co. v. U.S.*, 91 S.Ct. 2140, 2143-44 (1971) (Pentagon Papers case).
- First Amendment Does Not Trust Government's Benevolence. The First Amendment does not entrust to the government's benevolence the power of suppressing speech found offensive to some portion of the public. Instead, the First Amendment must rely on the substantial safeguards of free and open discussion in a democratic society. *Matal v. Tam*, 137 S.Ct. 1744, 1769 (2017) (Kennedy, J., concurring).

3. Why First Amendment Free Speech – Ideas Matter, Even Offensive Ones

- Free Speech – The Most Majestic Constitutional Guarantee. Free speech is revered as the Constitution's most majestic guarantee, central to the preservation of all other constitutional rights. *Arlene's Flowers*, 187 Wn.2d 804, ¶38. The hallmark of the protection of free speech is to allow "free trade in idea," even ideas that the overwhelming majority of people might find distasteful or discomforting. *Virginia v. Black*, 123 S.Ct. 1536, 1547 (2003). If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *Texas v. Johnson*, 109 S.Ct. 2533, 2545 (1989).
- Courts Must Not Stifle Debate. Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and inflict great pain. Courts cannot react to that pain by punishing the speaker. As a nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate. *Snyder v. Phelps*, 131 S.Ct. 1207, 1220 (2011).

4. Punish Speech Abusers After Speaking Rather Than Censor Before

- A free speech theory deeply etched in our law is that a free society prefers to punish the few who abuse rights of speech after they break the law rather than to throttle them and all others beforehand. *Southeastern Promotions, Ltd. v. Conrad*, 95 S.Ct. 1239, 1246 (1975).

5. Anonymous Speech Is Protected By The First Amendment

- Fear of Retaliation or Ostracism. The ability to speak anonymously promotes the robust exchange of ideas and allows individuals to express themselves freely without fear of economic or official retaliation, or concern about social ostracism. Undoubtedly the most famous pieces of anonymous American political advocacy are The Federalist Papers, penned by James Madison, Alexander Hamilton, and John Jay, but published under the pseudonym "Publius." It is now settled that an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment. *McIntyre v. Ohio Elections Comm'n*, 115 S.Ct. 1511, 1516-17 (1995).
- Anonymous Online Speech Protected. Through the use of Internet chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. Although the Internet is the latest platform for anonymous speech, online speech stands on the same footing as other speech – there is no basis for qualifying the level of First Amendment scrutiny that should be applied to online speech. *Reno v. ACLU* 117 S.Ct. 2329, 2344 (1997).
  - *Thomson v. Doe*, 189 Wn.App. 45 (2015) (denial of attorney's motion to unmask anonymous defendant who wrote a negative Avvo online review affirmed).

6. Online Speech Is Protected By The First Amendment

- New Mediums for Communication. Online speech is equally protected by the First Amendment as there is no basis for qualifying the level of First Amendment scrutiny that should be applied to online speech. *Reno v. ACLU*, 117 S.Ct. 2329, 2344 (1997). Indeed, basic First Amendment principles of freedom of speech and press do no vary when a new and different medium for communication appears. *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2733 (2001) (video games).

7. Hate Speech Is Protected By The First Amendment

- Freedom to Express the Thought We Hate. A bedrock First Amendment principle is that speech may not be banned on the ground that it expresses offensive ideas. The First Amendment does not have an exception for hate speech, which is speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground. The proudest boast of the First Amendment is that a person has the freedom to express "the thought that we hate." For these reasons, courts have long prohibited suppressing speech based upon audience reactions to the offensive speech. *Matal v. Tam*, 137 S.Ct. 1744, 1751, 1767 (2017) (Kennedy, J., concurring); *Arlene's Flowers*, 187 Wn.2d 804, ¶38.
  - Some countries provide a victim of hate speech with redress under the civil law, criminal law, or both, such as Canada. *Her Majesty The Queen v James Keegstra*, 3 S.C.R. 697 (1990) (criminal statute upheld prohibiting promoting hatred against an identifiable group where teacher communicated anti-Semitic statements to students).

7. Hate Speech Is Protected By The First Amendment Continued

- Listener's Reaction Generally Irrelevant [But See Low Value Speech Below]. The fact that a speaker conveys a message which may be offensive to the listener does not deprive the message from constitutional protection. *Hill v. Colorado*, 120 S.Ct. 2480, 2488-89 (2000).
- First Amendment Requires Breathing Space. In public debate, our citizens must tolerate insulting and even outrageous speech to provide adequate "breathing space" to freedoms protected by the First Amendment. *U.S. v. Cassidy*, 814 F.Supp.2d 574, 582 (2011).
  - Overbearing, obnoxious or rude people are not to be penalized by antiharassment protection order statute. *Burchell v. Thibault*, 74 Wn.App. 517, 522 (1994).

8. Some Conduct Is Protected Speech Under The First Amendment

- Pure Conduct Not Protected. Pure conduct is not protected under the First Amendment or Const. Art. I, §5. *O'Day v. King County*, 109 Wn.2d 796, 802 (1988).
- Two Conditions Must be Met For Conduct to be "Inherently Expressive" as Protected Speech. The First Amendment protects conduct as speech if two conditions are met. *Arlene's Flowers*, 187 Wn.2d 804, ¶41 –
  - (1) Intent to Convey Message. An intent to convey a particularized message was present, and
  - (2) Message Understood by Viewers. In the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.
  - The inquiry becomes whether the conduct at issue was "inherently expressive."
- Protected Conduct as Speech – Examples. Protected conduct as speech include – picketing; parades; distributing leaflets outside Supreme Court building; marching, walking or parading while wearing Nazi uniforms; wearing jacket reading "F—k the Draft;" wearing black armbands to protest Vietnam conflict; sit-in to protest "whites only" area in public library; peaceful march on sidewalk around state house grounds to protest discrimination; peaceful display of red flag as a sign of opposition to organized government; and the American flag (burning, treating flag contemptuously by wearing small flag sewn into the seat of one's pants, displaying American flag upside down on private property, refusing to salute the American flag while saying pledge of allegiance). *Arlene's Flowers*, 187 Wn.2d at ¶47.

9. Speech On Public Concerns – The Essence Of Self-Government

- Public vs. Private Concern. Speech on matters of public concern is at the heart of First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection. Matters of purely private speech, however, are often afforded less rigorous protections because there is no potential interference with a meaningful dialogue of idea nor a threat to the free and robust debate of public issues. *Snyder v. Phelps*, 131 S.Ct. 1207, 1215.
  - Who, What, Where, When, How? Deciding whether speech is of public or private concern requires a court to examine the content, form, and context of the speech as revealed by the entire record. In considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said. *Snyder v. Phelps*, 131 S.Ct. at 1216.

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9. Speech On Public Concerns – The Essence Of Self-Government Continued

- Public Concern – Definition. Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of valid and concern to the public. The arguably "inappropriate or controversial character of a statement" is irrelevant to the question whether it deals with a matter of public concern. *Snyder v. Phelps*, 131 S.Ct. at 1216.
- Private Concern – Examples. Examples of private concern include dissemination of a particular individual's credit report or a government employer regulating videos of an employee engaging in sexually explicit acts. *Snyder v. Phelps*, 131 S.Ct. at 1216.

10. Public Streets, Sidewalks, & Parks Are Protected By First Amendment

- Public Place. A public place occupies a special position in terms of First Amendment protection. Public streets and sidewalks, including in residential areas, are the hallmark of a traditional public forum used for public assembly and debate. *Snyder v. Phelps*, 131 S.Ct. 1207, 1218; *Collier v. Tacoma*, 121 Wn.2d 737, 746-47 (1993) (the traditional public forum includes parks, streets, and sidewalks).

11. First Amendment Remedy For Unwanted Speech – Look Away

- Simply Avert Eyes to Protect Sensibilities. The right to free speech includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience. One reason the First Amendment tolerates vulgar language is because offended viewers can effectively avoid further bombardment of their sensibilities simply by averting their eyes. *Cohen v. California*, 91 S.Ct. 1780, 1786 (1974).
- Impermissible to Restrict Speech Where Less Restrictive Alternatives Exist. We are expected to protect our own sensibilities simply by averting our eyes when confronted with undesirable speech. Restricting speech when less restrictive alternatives exist is not permissible under the First Amendment. *U.S. v. Playboy Entertainment Group, Inc.,* 120 S.Ct. 1878, 1886 (2000).
- Private Person May Infringe Another's Speech. The First Amendment does not prohibit a private person's infringement of another's First Amendment rights. It forbids only such infringements which may be attributable to the government. But private action may constitute government action where the state is significantly intertwined with the acts of the private parties. *State v. Noah*, 103 Wn.App. 29, 48 (2000) (antiharassment orders).
    - Blocking Another from Social Media is Permissible. In sharp contrast to a telephone call, letter or email specifically addressed to and directed at another person, one does not have to look at another person's internet bulletin board, nor does a Twitter or other internet blog user have to see what is posted on another person's account. This difference is fundamental to a First Amendment analysis. Unlike an email or phone call, one is free to disregard a Tweet or blog. An offended person has the ability to protect his or her own sensibilities simply by averting one's eyes from the speaker's blog, and by not looking at, or by blocking, the Tweets. *U.S. v. Cassidy*, 814 F.Supp.2d 574, 577-78, 585-86 (D. Md. 2011) (8,000 Tweets received by two members of Buddhist sect which included critical and disparaging comments causing substantial emotional distress protected speech under First Amendment).

12. But No First Amendment Right To Force Another To Listen Or View

- Right to be Left Alone – Especially in One's Home. Accosting a person in an inoffensive way to offer to communicate with a view to influence the other's actions is not regarded as aggression or a violation of the other's rights. If, however, the offer is declined, as it may rightfully be, a persistent following and dogging the listener becomes an unjustifiable annoyance which is likely to soon turn to intimidation. No one has a right to press even good ideas on an unwilling recipient. The First Amendment does not demand that a listener take Herculean efforts to escape unwelcome speech. A person has a special privacy interest – a right to be left alone – especially in one's own home. Unwilling listeners have an interest in being left alone where the degree of captivity makes it impractical for the unwilling viewer to avoid exposure. *Hill v. Colorado*, 120 S.Ct. 2480, 2489-90 (2000).
  - Forcing Newsletter On Another Is Not Protected Speech – Conduct, Not Speech. A resident's behavior in forcing his hate-filled newsletter onto other residents is not constitutionally protected speech. *Trummel v. Mitchell*, 156 Wn.2d 653, ¶¶27-28 (2006).
- Delicate Balancing of Rights Required. Such situations demand delicate balancing between the First Amendment rights of the speaker and the privacy interests of the unwilling viewer. *Hill v. Colorado*, 120 S.Ct. at 2489-90 (2000) (content-neutral statute prohibiting person from approaching within 8 feet of another near an abortion clinic a valid time, place, manner restriction).

13. First Amendment Prohibits A Court From Denying Access To Government

- Rights to Free Speech and Petition Government Have Same Analysis. The First Amendment prohibits government from interfering with a person's freedom of speech and right to petition the government for a redress of grievances. Although the right to free speech and right to petition are separate guarantees, they are related and generally subject to the same constitutional analysis. *Wayte v. U.S.*, 105 S.Ct. 1524, 1532 n.11 (1985); *In re Meredith*, 148 Wn.App. 887, ¶15 (2009).
- Right to Petition Extends to All Government Branches. The right to petition government for a redress of grievances extends to all government branches and departments. The right of access to the courts is but one aspect of the right of petition. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 92 S.Ct. 609, 611-12 (1972). The right to petition includes the following rights, *In re Meredith*, 148 Wn.App. 887, ¶20 (2009) –
  - Complain to public officials and to seek administrative and judicial relief;
  - Petition any department of government, including state administrative agencies; and
  - File legitimate criminal complaint with law enforcement officers.
- Prior Restraint for Court to Deny Access to Government Upon Speculation Respondent Might Abuse Access. The First Amendment's petition clause prohibits courts from denying a person access to the government based upon speculation that the person will use such access in order to harass or commit libel. A citizen does not lose the right to petition the government merely because his or her communication to the government contains some harassing or libelous statements. *In re Meredith*, 148 Wn.App. at ¶¶23,26.

13. First Amendment Prohibits A Court From Denying Access Continued

- Prior Restraint for Court to Prohibit Reporting to Immigration Authorities. A person has a right to make a valid report to government authorities regarding another's lawful presence in the United States. Prohibiting a person from contacting any agency regarding his wife's immigration status during divorce proceedings is an unconstitutional prior restraint because the order was not specifically crafted to prohibit only unprotected speech. *In re Meredith*, 148 Wn.App. at ¶¶14,19,26 (possibility husband would continue to make harassing or libelous statements about wife if he contacted immigration agency regarding her status did not justify prior restraint on his rights to free speech and petition).

14. First Amendment's Right To Travel

- Right to Travel Within and Between States Protected. The freedom to travel is a First Amendment protected liberty interest. *Spence v. Kaminski*, 103 Wn.App. 325 (2000). The right to travel applies to intrastate as well as interstate commerce because the right to travel, which involves personal liberty, is not dependent on state lines. Both travel within and between states is protected. *Eggert v. Seattle*, 81 Wn.2d 840, 845 (1973).
- Right to Travel Does Not Include Interfering With Another's Right to be Left Alone. While the freedom to travel throughout the United States has long been recognized as a basic First Amendment right, the federal constitution does not create a right for any person to interfere with the rights of other people (which includes one's privacy right to be left alone). One's freedom of movement gives way to another person's freedom to be left alone and free of interference by the other. *State v. Lee*, 135 Wn.2d 369, 389-92 (1998) (stalking).
- Protection Order May Limit Right to Travel. While the freedom to travel is a First Amendment protected liberty interest, that freedom of movement cannot be used to impair the rights of another. Protection orders may curtail an abuser's right to move about when such movement is harmful or illegal, and interferes with the victim's right to be free of invasive, oppressive and harmful behavior. Protection order does not interfere with Respondent's legitimate freedom of movement or right to travel. *Spence*, 103 Wn.App. at 336 (2000) (RCW 26.50 DV protection statute constitutional).

15. First Amendment's Right To Travel – Geographic Banishment

- Banishment Orders Encroach on Right to Travel – Strict Scrutiny Applies. Court orders that banish individuals from geographic areas encroach on the right to travel. Appellate courts apply strict scrutiny when reviewing a trial court's banishment order because of the constitutional implications. To survive such review, the trial court must narrowly tailor the order to serve a compelling governmental interest. *State v. Sims*, 152 Wn.App. 526, ¶12 (2009). In making this determination, a reviewing court looks to the following nonexclusive factors, *State v. Alphonse*, 147 Wn.App. 891, ¶¶29,32 (2008) –
  - (1) Is the restriction related to protecting the safety of the victim of or witness to the underlying offense;
  - (2) Is the restriction punitive and unrelated to rehabilitation;
  - (3) Is the restriction unduly severe and restrictive where the defendant resides or is employed in the area from which he or she is banished;
  - (4) May the defendant petition the court to temporarily lift the restriction if necessary;
  - (5) Are less restrictive means available to satisfy the government's compelling interest; and
  - (6) Are there allegations of brutality, repeated stalking or harassment, or repeated violations of orders restricting contact.

15. First Amendment's Right To Travel – Geographic Banishment Continued

- Banishment Order Examples –
  - Banishment From County Invalid. *State v. Sims*, 152 Wn.App. 526 (2009) (lifetime banishment from Cowlitz County and city of Castle Rock to protect mental well-being of child molestation victim and family invalid because the order impermissibly impinged upon defendant's right to travel by not being narrowly tailored to the goal of protecting victim).
  - Banishment From City Invalid. *State v. Alphonse*, 147 Wn.App. 891 (2008) (banishment order prohibiting defendant from entering Everett, except for legal or judicial reasons, after he made repeated harassing phone calls to Everett police impermissibly impinged on his right to travel within the state because less restrictive means were available such as restricting contact and distance with specific officers, and restricting any uninitiated contact with police absent emergency circumstances).
  - Banishment From County Invalid. *State v. Schimelpfenig*, 128 Wn.App. 224 (2005) (lifetime banishment order prohibiting defendant from residing in Grays Harbor County, to protect the mental well-being of a murdered victim's family, vacated because the order failed strict scrutiny test where a more narrowly-tailored geographical restriction could have protected the victim's family from unwanted contact).
  - Banishment From County Valid. *Predick v. O'Connor*, 660 N.W.2d 1 (Wis.Ct.App.), *cert. denied*, 124 S.Ct. 809 (2003) (protection order banishing respondent from victim's county held constitutional where stalking conduct existed for over a decade, respondent repeatedly ignored previous orders, twice used her automobile as a dangerous weapon towards the victims, and expressed no remorse or inclination to discontinue dangerous fixation on victims) (*Predick* cited by *Alphonse*, 147 Wn.App. at ¶32, n.58).
  - 300 Feet From Clinic. *State v. Noah*, 103 Wn.App. 29, 43-44 (2000) (court declines to reach issue whether 300 foot no contact zone from psychotherapist's office was unconstitutional distance prohibition because order had long since expired).
  - One Mile From Victim's Residence Valid. *State v. Chapman*, 140 Wn.2d 436, 341, n.59 (2000) (trial court has authority to issue protection order prohibiting respondent from coming within one mile of protected party's residence under facts of case, but Supreme Court does not approve a one-mile restriction as an absolute).
  - Banishment From Magnolia Invalid. *Jacques v. Sharp*, 83 Wn.App. 532, 543 (1996) (protection order restraining respondent from "entering the area known as 'Magnolia' in Seattle, WA" too broad to protect petitioner's Magnolia residence).

16. Prior Restraint On Protected Speech Is Per Se Unconstitutional

- Prior Restraint Most Serious and Least Tolerable Infringement on First Amendment. Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case becomes a fully operative sanction only after judgment has become final, correct or otherwise. A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. *Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791, 2803 (1976) (trial court order restraining media from publishing defendant's statements during murder trial violated First Amendment).
- Prior Restraint is Censorship. Censorship laws requiring governmental approval before speech, protest or publication can occur are precisely the evil the Framer's intended to prohibit with enactment of the First Amendment. *Near v. Minnesota*, 51 S.Ct. 625, 630 (1931) (prior restraint doctrine extended to judicial injunctions).
  - A Prior Restraint is Per Se Unconstitutional Under Const. Art. I, §5. A prior restraint of constitutionally protected speech is per se unconstitutional under any circumstances pursuant to Const. Art. I, §5. *State v. Coe*, 101 Wn.2d 364, 374-75 (1984); *JJR Inc. v. Seattle*, 126 Wn.2d 1, 6 (1995) (under First Amendment, a prior restraint comes before a court bearing a heavy presumption against its constitutional validity).
- Prior Restraint Prohibition Includes Judicial Orders. A prior restraint is a judicial or administrative order forbidding communications prior to their occurrence. Simply stated, a prior restraint prohibits future speech, as opposed to punishing past speech. *Voters Educ. Committee v. PDC*, 161 Wn.2d 470, ¶37 (2007), *cert. denied*, 128 S.Ct. 2898 (2008).
  - Court orders that actually forbid speech activities (e.g. temporary restraining orders and permanent injunctions) are classic examples of prior restraints. *Alexander v. U.S.*, 113 S.Ct. 2766, 2771 (1993).
- Indefinite Wording in Protection Order is a Prior Restraint. Indefinite wording in an antiharassment protection order prohibiting speech wherein it is difficult to ascertain what future speech is prohibited is an impermissible prior restraint. *In re Suggs*, 152 Wn.2d 74, 84 (2004) ("Knowingly and willfully making invalid and unsubstantiated allegations or complaints to third parties which are designed for the purpose of annoying, harassing, vexing, or otherwise harming [protected party,] and for no lawful purpose." Held that order lacked specificity demanded by the US Supreme Court for a prior restraint on unprotected speech).

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17. Time, Place, Manner Restriction Not Prior Restraint – Speech Not Abridged

- Public Forum Time, Place, Manner Restrictions Require Compelling State Interest. Regulation of protected speech may not rise to the level of a prior restraint where the protected speech is subject to reasonable time, place, or manner restrictions. Speech in a public forum, whether a traditional public forum or a public forum by government designation, is subject to restrictions on time, place, and manner of expression where the restriction meets three criteria. *Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 350-51 (2004) (Const. Art. I, §5 requires "compelling government interest" for public forum speech. First Amendment requires lesser "significant government interest" standard). The restriction must –
  - (1) Be content-neutral (i.e. without regard to the message being communicated, as opposed to content-based where the content of the message is regulated);
  - (2) Be narrowly tailored to serve a compelling government interest; and
  - (3) Leave open ample alternative channels of communication.
- Public Forum Includes Parks, Streets and Sidewalks. Streets, sidewalks, and roadways generally constitute traditional public forums subject to the strictest free speech protections. *Collier v. Tacoma*, 121 Wn.2d 737, 746-47 (1993) (the traditional public forum includes those places which by long tradition have been devoted to assembly and debate, such as parks, streets, and sidewalks).
- Limited or Non-Public Forum Time, Place, Manner Restrictions. A regulation restricting expression in a limited or nonpublic forum must meet two criteria. *Lakewood v. Willis*, 186 Wn.2d 210, ¶11 (2016). The restriction must be –
  - (1) Viewpoint-neutral; and
  - (2) Reasonable in light of the purposes served by the forum.
- Protecting People From Harassment is a Compelling State Interest. Antiharassment protection order regulating time, place, or manner of speech is constitutional because the statute is content-neutral, narrowly tailored to serve a compelling state interest, and leaves open ample alternative channels of communication. A protection order does not become void because it restricts what would otherwise be constitutionally protected speech. The order will be upheld so long as the order contains valid time, place, and manner restrictions. *State v. Noah*, 103 Wn.App. 29, 41-42 (2000).
  - Sexually explicit comments and harassment by landlord an actionable claim for sex discrimination in housing under Washington Law Against Discrimination. *Tafoya v. State Human Rights Comm'n*, 177 Wn.App. 216, ¶¶28-29 (2013).

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18. Low Value Speech Is Not Protected By The First Amendment

- Low Value Speech – Not an Essential Part of Any Exposition of Ideas. First Amendment protections are not absolute. Since 1791, restrictions on the content of speech are permitted in a few narrow and limited areas, because the content is of such slight social value as a step to truth that any benefit that may be derived from the speech is clearly outweighed by the social interest in order and morality. *R.A.V. v. St. Paul*, 112 S.Ct. 2538, 2543-44 (1992) –
  - These areas of speech may be regulated under the First Amendment because while their content may constitute a part of the expression of ideas, the speech constitutes "no essential" part of any exposition of ideas. For example, it cannot be said that "fighting words" lack expressive content or are in all respects worthless and underserving of constitutional protection. Sometimes the words are quite expressive. However, fighting words constitute "no essential" part of any exposition of ideas.
- Content-Based Regulation Only Allowed With Low Value Speech. Even if a category of speech can be burdened as low value speech, the government may not make further content-based discriminations, except for certain narrowly drawn exceptions. *Bellevue v. Lorang*, 140 Wn.2d 19, 29 (2000).
- Determining Unprotected Speech Difficult. It is always difficult to know in advance what a person will say, which is why the risks of freewheeling censorship are formidable when drawing the line between legitimate and illegitimate speech. *Southeastern Promotions, Ltd. v. Conrad*, 95 S.Ct. 1239, 1246 (1975).
  - Labeling certain types of speech "unprotected" is easy. Determining whether specific speech falls within an "unprotected" area is much more difficult because the line between protected and unprotected speech is very fine. *In re Suggs*, 152 Wn.2d 74, 82-83 (2004).
- Punishment For Violating a Low Value Speech Regulation Is Constitutional. Punishment for the abuse of First Amendment liberty is essential to the protection of the public. Common law rules that subject a libeler to responsibility for a public offense, as well as for a private injury, are not abolished by the First Amendment. *Near v. Minnesota*, 51 S.Ct. 625, 630 (1931).
- Low Value Speech Categories. The following well-defined and narrowly limited classes of speech are unprotected by the First Amendment –
  - (1) Obscenity;
  - (2) Defamation;
  - (3) Fraud;
  - (4) Fighting Words. Incitement to illegal conduct;
  - (5) True Threats; and
  - (6) Criminal Conduct. Speech integral to criminal conduct.
- Remaining Speech Protected by the First Amendment. Speech that does not fall into these low value speech categories remains protected by the First Amendment. *U.S. v. Cassidy*, 814 F.Supp.2d 574, 582-83 (D. Md. 2011); *State v. Kilburn*, 151 Wn.2d 36, 43 (2004); *R.A.V.*, 112 S.Ct. 2538, 2543; *Virginia v. Black*, 123 S.Ct. 1536, 1547-48.

19. Low Value Speech – Defamation

- Defamatory Speech Not Protected by First Amendment. Defamatory speech does not enjoy the protections of the First Amendment. *Chaplinsky v. New Hampshire*, 62 S.Ct. 766, 769 (1942); *State v. Gohl*, 46 Wash. 408, 410 (1907).
- Opinion vs. Statement of Fact. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust, and wide-open debate on public issues. They belong to that category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Gertz v. Robert Welch, Inc.*, 94 S.Ct. 2997, 3007 (1974).
    - *Dickson v. Dickson*, 12 Wn.App. 183 (1974) (Statement by ex-husband that tenets of his religion do not recognize the validity of his divorce is protected speech, but his false assertions that she is still his wife and is insane are not protected. Statements are defamatory because they are injurious to her reputation and subjected her to scorn and ridicule. Injunction in divorce action upheld prohibiting claiming she is still his wife.).
- False Accusation of Criminal Activity Not Protected Speech. False accusations of criminal activity, even in the form of an opinion, are not protected by the First Amendment. There is a critical distinction between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime or is personally dishonest. *Vern Sims Ford, Inc. v. Hagel*, 42 Wn.App. 675, 683-84 (1986) (Van purchaser who mailed out flyer about purchase with false statements characterizing dealership and salesperson as thieves not protected by First Amendment.).
- Defamation and Antiharassment Protection Order. Since libelous speech is not constitutionally protected speech, such speech may provide a basis for an antiharassment order. *State v. Noah*, 103 Wn.App. 29, 39 n.1 (2000).
- Defamation Action. A defamation action consists of four elements: (1) a false statement, (2) publication, (3) fault, and (4) damages. Actual malice must be shown in cases involving both public figures and public officials. Rhetorical hyperbole and statements that cannot reasonably be interpreted as stating actual facts are protected under the First Amendment. *Duc Tan v. Le*, 117 Wn.2d 649, ¶27 (2013). When faced with a defamation claim, the court's aim is to strike a balance between the right to protect one's reputation and the constitutional right to free speech. *Thomson v. Doe*, 189 Wn.App. 45, ¶10 (2015).
    - Public and Limited Public Figures. The designation of a public figure rests on one of two grounds. In some instances, an individual may achieve such pervasive fame or notoriety that the person becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects in, or is drawn into, a particular public controversy and thereby becomes a public figure for a limited range of issues. *Camer v. Seattle Post-Intelligencer*, 45 Wn.App. 29, 42-43 (1986).

19. Low Value Speech – Defamation Continued

- Public and Limited Public Figures – Clear And Convincing Evidence Of Actual Malice. When a defamed plaintiff is a public [or limited public] figure, he or she must show actual malice. This heightened standard reflects the constitutionally protected interchange of ideas for the bringing about of political and social changes desired by the people. *New York Times v. Sullivan*, 84 S.Ct. 710, 720 (1964). The public figure must prove by clear and convincing evidence that the statement is uttered with actual malice, that is with knowledge of falsity or reckless disregard of the truth or falsity of the statement. *Alpine Indus. Computers, Inc. v. Cowles Pub. Co.*, 114 Wn.App. 371, 387-88 (2003).
- Speaker Provided Less Speech Protection Concerning Private Figure. When the challenged speech involves a purely private concern, there is no threat to the free and robust debate of public issues. Thus, the First Amendment provides less stringent protection for the speaker given the state's interest in protecting private reputation. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc*., 105 S.Ct. 2939, 2945-46 (1985).
- Commercial Speech is Provided Lesser Protection. The Constitution affords lesser protection to commercial speech than other constitutionally guaranteed expression. Commercial speech is expression related solely to the economic interests of the speaker and its audience, or speech proposing a commercial transaction. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 100 S.Ct. 2343, 2349-50 (1980).

20. Low Value Speech – Fighting Words (Incitement To Violence)

- Fighting Words Not Protected by First Amendment. Fighting words are excluded, not because their content communicates any particular idea, but because their content embodies a particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey. *R.A.V. v. St. Paul*, 112 S.Ct. 2538, 2548-49 (1992).
- Incitement to Immediate Breach of the Peace Required. Speech, although vulgar and offensive, is protected by the First Amendment, unless the speaker's utterances are "fighting words", i.e., words which by their very utterance inflict injury, or tend to incite an immediate breach of the peace. *Chaplinsky v. New Hampshire*, 62 S.Ct. 766, 769 (1942); Fighting words are words with personally abusive epithets which, when addressed to the ordinary citizen, are as a matter of common knowledge inherently likely to provoke a violent reaction. *Virginia v. Black*, 123 S.Ct. 1536, 1547-48 (2003).
  - Fighting words have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed. The test is what a person of common intelligence would understand would be words likely to cause an average addressee to fight. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. *Chaplinsky*, 62 S.Ct. at 770.
- Hostile Audience Reaction Does Not Justify Suppressing Speech. Fears of potential disorder do not justify police in breaking up a demonstration or arresting the protesters for disorderly conduct. Audience hecklers do not have a veto power over public, peaceful demonstrations. *Gregory v. Chicago*, 89 S.Ct. 946 (1969).
  - *Skokie v. National Socialist Party*, 373 N.E.2d 21, 26 (Ill. 1978) (Use of a swastika is a symbolic form of free speech entitled to First Amendment protections, and cannot be enjoined under "fighting words" exception to free speech, nor can anticipation of a hostile audience justify a prior restraint.).

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21. Low Value Speech – True Threats

- True Threats Not Protected by First Amendment. The First Amendment broadly protects speech, but not "true threats;" statements made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person. *State v. France*, 180 Wn.2d 809, ¶13 (2014).
  - A threat may or may not be constitutionally protected speech. A true threat must be distinguished from threats that constitute protected speech, because a true threat is not protected by the First Amendment. *Watts v. United States*, 89 S.Ct. 1399, 1401-2 (1969). True threats of violence are outside the First Amendment because there is an overriding governmental interest in the protection of individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur. *State v. Kilburn*, 151 Wn.2d 36, 43 (2004).
- Reasonable Person, in Speaker's Place, Foresee Listener Interpret Respondent's Statement as Serious Threat to Harm Body Or Kill? A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to inflict bodily harm upon or to take the life of another person. *State v. Williams*, 144 Wn.2d 197, 207-8 (2001).
  - Joke, Idle Talk, Political Argument. A true threat is a serious threat, not one said in jest, idle talk, or political argument. Whether a true threat has been made is determined under an objective standard that focuses on the speaker. The relevant question is whether a reasonable person in the speaker's place would foresee that in light of the entire context the listener would interpret the statement as a serious threat or a joke. *State v. Kilburn*, 151 Wn.2d 36, 43-46 (2004).
- Speaker's Subjective Intent to Carry Out Threat Irrelevant. A speaker's subjective intent to actually carry out the threat, or to not carry out the threat, is irrelevant for determining what constitutes a true threat. A true threat is determined by using an objective (reasonable person) test. *State v. Trey M.*, 186 Wn.2d 884, ¶16 (2016).
  - Intimidation a True Threat. The First Amendment does not require that the speaker actually intend to carry out the threat in order for a communication to constitute a true threat. Rather, a 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. Intimidation is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death. *Virginia v. Black*, 123 S.Ct. 1536, 1548 (2003); *Kilburn*, 151 Wn.2d at 48.
- Threat to Harm Financial Condition Not True a Threat. Threat to file $7,914,100 in liens against judges' properties unless judges took action demanded by defendant was not a "true threat" because the threatened harm was against the judges' financial conditions, not their health or safety. *State v. Stephenson*, 89 Wn.App. 794, 801 (1998).