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Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism

LAUREN GILBERT*

O, you are sick of self-love, Malvolio, and taste with a distempered appetite. To be generous, guiltless and of free disposition, is to take those things for bird bolts that you deem cannon bullets. There is no slander in an allowed fool, though he do nothing but rail; nor no railing in a known discreet man, thou he do nothing but reprove.¹

One of the prerogatives of American citizenship is the right to criticize public men and measures — and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.²

I. INTRODUCTION

Political satire is under attack in America. Since this country launched its war against global terrorism in September 2001, those who mock the President, his Administration, and even family members of high-ranking officials have come under assault from both government and non-state actors. “Men in Black” have shown up unannounced at the homes and places of business of persons perceived to be un-American or a threat to the President. Satirical speech, particularly speech that takes the form of attacks on the President or other high-ranking government officials, appears to be withering under the recent onslaught. Furthermore, surveys show that in 2002, the American public grew increasingly intolerant of dissent, including political humor that they considered offensive.

First Amendment scholars have expressed grave concern that lower federal courts have ignored the speech-protective language in *Watts v.*

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1. WILLIAM SHAKESPEARE, *TWELFTH NIGHT*, Art. 1, Scene V, lines 92-98.

2. *Baumgartner v. United States*, 322 U.S. 665, 673-74 (1944).

*United States*³ and *Brandenburg v. Ohio*,⁴ companion Supreme Court cases in 1969 that established, respectively, the "true threat" doctrine and the "clear and present danger" test. Of particular concern are the "reasonable person" tests juries are instructed to apply in determining whether certain speech rises to the level of a true threat. Scholars argue for a subjective standard based on the actual intent of the speaker⁵ and criticize courts for allowing juries to decide whether certain speech is protected.⁶ They argue that this is a question of law or "constitutional fact" for the judge to decide. Current intolerance of dissent and offensive humor, the argument goes, only underscores that giving juries — who often mirror popular views — greater decisional power in free speech cases would deal the First Amendment "a crippling blow."⁷

This Article examines the First Amendment implications of recent investigations undertaken by the federal government against persons engaged in satirical speech. It explores the democratizing and corrective function that political satire and parody historically have played in American politics. Governmental abuse of power under federal threat statutes is then explored, including 18 U.S.C. §§ 871, 876, and 879, which stifle satirical speech that takes the form of attacks on the President. This Article looks at various incidents in the context of the erosion of the "true threat" doctrine by lower federal courts, and then examines the implications of the Court's recent decision in *Virginia v. Black*,⁸ which appears to have restored the speech-protective aspects of that doctrine. The Article concludes that while lower courts improperly have instructed juries to apply an objective, "reasonable person" standard in determining whether certain speech constitutes a "true threat," appropriately instructed juries have an essential role to play in serving as a popular check on abusive government practices that seek to chill speech critical of government officials and their policies. The Article calls for a standard of conditional relevancy derived from Rule 104 of the Federal

3. 394 U.S. 705 (1969) (statement at anti-war rally that "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." was not a true threat, but rather, political hyperbole).

4. 395 U.S. 444 (1969) ("constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

5. G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 1063.

6. *Id.* at 1054.

7. See Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 765 (1986) ("The common wisdom is that if juries were given more decisional power in these areas, either by increasing the range of issues they could consider or by granting juries greater immunity from appellate review, free speech would suffer a crippling blow.").

8. 123 S. Ct. 1536 (2003).

Rules of Evidence that would allow such questions to go to the jury once the judge makes the initial determination that there is sufficient evidence of a subjective intent to threaten. Such a standard would balance the role of the judge and jury in such cases consistent with the First Amendment, and ensure that jurors continue to play a meaningful role in serving as an essential check on unaccountable government officials, as they did 269 years ago in the Peter Zenger trial.⁹

Part II of this Article sets the stage. It examines recent investigations by federal agents of persons engaged in satirical speech considered threatening to the President, as well as growing popular intolerance of dissent and offensive humor. It also looks at the role of the Secret Service in investigating perceived threats to the President, examining Secret Service practices and training materials, including threat assessment procedures. In each of the discussed cases in which the Secret Service launched an investigation, it appears that the Service ultimately came to the conclusion that there was no true threat. This section demonstrates how the Secret Service's actions have had a chilling effect on satirical speech, violating the spirit, if not the letter, of the true threat doctrine.

Part III examines the role of political satire in democratic self-governance. It looks at the various literary techniques used to achieve political satire, including parody, irony, political hyperbole, wit, and sarcasm. It examines how political satire has served as an essential vehicle for political and social change. It then looks at the protection the Supreme Court has afforded to political satire, and the underlying theories for protecting outrageous speech.

Part IV focuses on the true threat doctrine as applied to perceived threats against the President, his family, former Presidents, and other high-ranking government officials. I have chosen to focus on perceived threats against the President and high-ranking officials because of the apparent tendency of the Bush Administration to interpret satirical speech and political hyperbole as highly threatening, and to use the

9. The Peter Zenger trial in 1735 is considered the classic case of jury nullification. See, e.g., CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 34 (1998); Ric Simmons, *Is There Room for Democracy in the Grand Jury System?*, 82 B.U. L. REV. 1, 11 (2002). Peter Zenger had published criticisms of William Cosby, the Governor of New York under the British Crown, in the *New York Weekly Journal*. As a result, he was prosecuted for the common law crime of seditious libel. Zealously defended by his lawyer, Andrew Hamilton, Zenger was acquitted by the jury, even though his acquittal was contrary to the law of seditious libel. See JAMES A. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (S. Katz ed. 1963); *The Trial of Mr. John Peter Zenger* (1735), in 17 HOWELL'S ST. TRIALS 675 (1816). Historically, the Zenger trial has stood for the principle that criticism of government officials is fundamental to a free society and that juries can serve as an important check on oppressive regimes. See Schauer, *supra* note 7, at 761-62.

threat statutes, which were intended to punish actual threats of physical harm, to chill unwanted speech. I will show that, despite the speech-protective language in *Watts*, many of the circuits have interpreted the First Amendment narrowly, finding many cases of political hyperbole to rise to the level of a true threat whenever the context is distinguishable from *Watts*. This section examines whether the federal government is abusing its powers under 18 U.S.C. §§ 871, 876, 879, and related statutes to target persons, such as those in the case studies discussed below, who engage in unpopular speech critical of government officials and their policies. It also examines whether the lower courts have been complicit by lowering the standard set by the Court in *Watts* and conflating the true threat doctrine with the incitement standard. It looks in particular at how both federal agents and the lower courts have applied threat statutes to satirical speech and political hyperbole, and in so doing have undermined the fundamental principle set forth in *New York Times Co. v. Sullivan*,¹⁰ *Watts*, *Brandenburg*, and other seminal First Amendment cases.

Part V discusses the implications of the Court's recent decision in *Virginia v. Black* in revitalizing the true threat doctrine. It looks, in particular, at the Court's discussion of the true threat doctrine and how it applies that doctrine in examining the constitutionality of Virginia's cross burning statute. The Court in that case found that a state may, consistent with the First Amendment, ban cross burning carried out with intent to intimidate. It also found, however, that the evidentiary provision in the Virginia statute under which cross burning was *prima facie* proof of intimidation was unconstitutional, because it proscribed speech protected under the First Amendment.

A concluding section proposes an evidentiary standard based on principles of conditional relevancy for the courts to apply in determining whether certain speech constitutes a true threat. Under this standard, such questions would go to the jury only if the judge determined that there was sufficient evidence of a subjective intent to threaten for a jury to find that the defendant's statements or conduct constituted a true threat. The Article concludes that if the American people are to continue to care about freedom of speech, they must have input into the legal process, including the power, as jurors and citizens, to check the kinds of government abuses described below. The Article also concludes that there is a danger in attempting to distinguish political satire and political hyperbole in the print and broadcast media from satirical and hyperbolic statements by private individuals because such an approach would undermine one of the corrective and progressive pur-

10. 376 U.S. 254 (1964).

poses of political satire, which is to educate and provoke the polity to call for social and political change.

II. SATIRICAL SPEECH UNDER SIEGE

In its report *Freedom Under Fire: Dissent in Post-9/11 America*,¹¹ the American Civil Liberties Union (“ACLU”) details attacks on freedom of expression across the country by federal, state, and local government actors as well as by non-state actors. The Freedom Forum’s First Amendment Center has detailed similar incidents.¹² In one such case, A.J. Brown, a freshman at Durham Technical College in Raleigh, North Carolina, received an unexpected visit at her home from the U.S. Secret Service on October 27, 2001, in response to an anonymous tip that Brown had an “anti-American” wall poster in her apartment.¹³ The anti-death penalty poster showed George W. Bush holding a rope, with pictures of numerous hanging victims in the background. The poster read at the top, “We hang on your every word,” and indicated below: “George Bush: Wanted, 152 dead,” a reference to the fact that Texas had executed 152 people while Bush was governor.¹⁴ The Secret Service agents asked Brown whether she had information on Afghanistan or the Taliban, and had her fill out a form, but stopped short of taking any further action.¹⁵

In a similar incident in late August 2001, reported by the Freedom Forum, the Secret Service paid a visit to Jesse Ethredge, a 58-year-old Georgia man whose truck bore stickers attacking President Bush and Republicans. One sticker featured a child urinating directly above another sticker with the word “Republicans.” Other stickers read, “Thief, Liar, Two-Faced Murderer George Bush,” “Hell with Bush and All Damn Republicans,” and “Don’t U Blame Me.” The Secret Service asked Ethredge what the stickers meant, and what he would do if Bush were to come down his driveway, to which he replied, “I’d tell him to get out as fast as he come in it.” Apparently no further action was taken after the Secret Service determined that Ethredge posed no threat to the President.¹⁶

11. ACLU, *FREEDOM UNDER FIRE: DISSENT IN POST-9/11 AMERICA* (2003) [hereinafter *FREEDOM UNDER FIRE*].

12. See <http://www.firstamendmentcenter.org>.

13. *FREEDOM UNDER FIRE*, *supra* note 11, at 5.

14. *Id.* at 5-6.

15. *Id.* at 5.

16. Associated Press, *Man’s Anti-Bush Bumper Stickers Prompt Visit by Secret Service* (Sept. 1, 2001) (reprinted by the Freedom Forum at <http://www.freedomforum.org/templates/document.asp?documentID=14780>). The article also describes how over ten years ago, Ethredge, who worked as a civilian employee at Robins Air Force Base, faced a similar incident when he was ticketed for “provoking speech on a truck” after driving his camper shell onto the Air Force

In a third incident, in August 2001, John Fischer was arrested and charged with disturbing the peace in the mountain town of Estes Park, Colorado, when witnesses reported that he had handed out toilet paper and urged persons to throw it at the President's motorcade. The toilet paper rolls featured the smiling faces of President Bush, Vice President Richard Cheney, Secretary of State Colin Powell, Secretary of Defense Donald Rumsfeld, and Attorney General John Ashcroft, with the words "Bush Wipe," "Dick Wipe," "Colin Wipe," "Rump Wipe," and "Ash Wipe" on each roll. Secret Service agents directed the local police to take Fischer into custody and later questioned him at police headquarters to determine whether he posed a threat to the President.¹⁷ Although Fischer denied that he had told people to throw the rolls, he reported that he was held for over an hour and interviewed by Secret Service agents, who told him that the toilet paper rolls were missiles that posed a threat to national security.¹⁸ He was fined \$150 for distributing literature on a public street, a charge that the ACLU succeeded in having dismissed. No further action was taken, however, by the Men in Black.

It is intriguing and perhaps worth exploring that each of these incidents took place either immediately *before* or within weeks *after* the attack on the World Trade Center. Yet well before the events of September 11, 2001, the Bush Administration already appeared to have lost its sense of humor. On February 7, 2001, Glenn Given, managing editor of the *Stony Brook Press*, a student newspaper at SUNY-Stony Brook, wrote and published an editorial entitled, *Editorial: Dear Jesus Christ, King of Kings, All I Ask Is That You Smite George W. Bush*. In that editorial, he also asked Jesus to "claim the life" of the Vice President and the cabinet members, or to subcontract the work out to "some other biblical figure" or "some crazy mortal."¹⁹ Given said that the editorial was intended as political satire.²⁰ Yet a week later, on Valentine's Day, University Police and the U.S. Secret Service descended unannounced

base with a sign directed at Bush's father, which read, "Read my lips[:] hell with Geo. Bush." The ticket was dismissed, but Ethredge took the case to the Eleventh Circuit, where the court upheld the Air Force base administrative order banning "bumper stickers or other paraphernalia" that "embarrass or disparage the commander in chief." *Ethredge v. Hail*, 56 F.3d 1324 (11th Cir. 1995). The court found that the order did not violate the First Amendment where the order applied to a non-public forum, did not discriminate on the basis of viewpoint, and where military officials had sufficient justification to enact the order in the belief that such signs would undermine military order. *Id.* at 1328-29.

17. Telephone Interview with John Fischer (July 23, 2003).

18. Associated Press, *Free Speech on a Roll* (Aug. 15, 2001), available at <http://www.freedomforum.org/templates/document.asp?documentID=14623>.

19. Glenn Given, *Editorial, Dear Jesus Christ, King of Kings, All I Ask Is That You Smite George W. Bush*, STONY BROOK PRESS, Feb. 7, 2001, available at <http://www.rcfp.org/news/documents/ssprotest.pdf>. (last visited Mar. 13, 2004).

20. Telephone Interview with Glenn Given (July 21, 2003).

on the offices of the *Stony Brook Press*. They initially demanded to speak to the entire editorial board, but spoke with Given when he claimed responsibility for the editorial. They took him to a campus security office and questioned him for close to an hour without an attorney and without advising him of his rights. They convinced him to sign waivers allowing for the search of his home and a review of his medical records. They asked him whether he was a member of any dissident groups, if he had ever had any problems with the law, and if he had ever been institutionalized for psychiatric care. They told him that his editorial was not protected by the First Amendment, because it was incitement speech, and that they might file charges if they received additional complaints.²¹

Given agreed to sign the waivers, but, according to the Reporters Committee for Freedom of the Press, he did so under threat of arrest and without legal counsel.²² When the Secret Service searched his home, they went through his books and papers, looking for the Unabomber Manifesto and other literature that might indicate he was a subversive. Given reports that the school newspapers disappeared from their racks on campus, and that the remaining batch of undistributed newspapers disappeared from the loading dock.²³

Most recently, on July 21, 2003, the Secret Service visited the offices of the *Los Angeles Times* in an attempt to speak with conservative political cartoonist Michael Ramirez.²⁴ On Sunday, July 20, the *L.A. Times* had published one of Ramirez's cartoons, which was a take-off on the famous Pulitzer Prize winning photograph showing South Vietnamese General Nguyen Ngoc Loan summarily executing a Viet Cong prisoner in the streets of Saigon. The cartoon showed a man who resembled General Nguyen with a gun aimed at the head of a caricature

21. *Id.*

22. Telephone Interview with Gregg P. Leslie, Legal Defense Director of the Reporters Committee for Freedom of the Press (July 17, 2003). The Reporters Committee wrote to the Director of the Secret Service the next day. It demanded that the Secret Service issue a formal apology, that it educate its agents to be more sensitive to First Amendment issues, and that it clarify that it would not pursue charges against Given. See Letter from Reporters Committee for the Freedom of the Press, to Brian Stafford, Director, U.S. Secret Service (Feb. 15, 2001), at <http://www.rcfp.org/news/documents/ssprotest.pdf>. In response, the Secret Service issued a letter in which it defended its actions as within its authority to protect the life of the President. Furthermore, it cited to an editorial by Glenn Given in *Newsday*, where he indicated that he did not blame the Secret Service and was glad they took every call made to them seriously. See Letter from H. Terrence Samway, Assistant Director, Office of Government Liaison and Public Affairs, U.S. Secret Service, to Gregg P. Leslie, Legal Defense Director of the Reporters Committee for Freedom of the Press (Mar. 14, 2001) (on file with the author).

23. Telephone Interview with Glenn Given, *supra* note 20.

24. Cartoon in '*Times*' Prompts Inquiry by Secret Service, *L.A. TIMES*, July 22, 2003, at B14 [hereinafter *Cartoon Prompts Inquiry*].

of George W. Bush. This time, the executioner wore a uniform with the word "Politics" on it, and the scene took place against the background of Iraq. The Secret Service agent was not allowed by the *L.A. Times* to meet with Ramirez, but did meet with *L.A. Times* attorney Karlene Goller.²⁵ Later that week, Congressman Christopher Cox, chairman of the House Homeland Security Committee, accused the Secret Service of using "profoundly bad judgment" in seeking to question Ramirez, and demanded an apology for Ramirez, and a public explanation "both of how this happened and why it will not happen again."²⁶ Ramirez later commented that the cartoon was not intended to be an attack on President Bush, but rather to condemn those persons who sought to use the current situation in Iraq to assassinate the President's character.²⁷

John Wooden, editor of the website www.whitehouse.org, a parody of the official White House website, has a theory to explain the Men in Black's actions. He suggests that they are responding to what he refers to as the "Patriotism Gestapo," a growing group of private citizens who believe that political dissent is unpatriotic and who feel it is their duty to inform on their fellow Americans. Wooden would like to believe that Secret Service agents are simply doing their job, that when they receive a call regarding a possible threat to the President, they must respond, no matter how unlikely the threat may be.²⁸

To a certain extent, Wooden's view is supported by public documents on the operating procedures of the Secret Service. In 1998, the U.S. Department of Justice published a guide on "Protective Intelligence & Threat Assessment Investigations," which describes the process the Secret Service goes through in assessing whether a target of its investigations is a threat to the President or other public official.²⁹ The guide indicates that the "purpose of U.S. Secret Service threat assessment and protective intelligence activities is to identify, assess, and manage persons who might pose a threat to those we protect, while the goal of these activities is to prevent assassination attempts."³⁰ The guide describes the methodology the Secret Service uses in conducting an investigation, including identifying a possible target.³¹ It indicates that the investiga-

25. *Id.*

26. Associated Press, *Lawmaker: Questioning of Cartoonist Wrong* (July 22, 2003), available at http://www.dfw.com/mld/dfw/news/breaking_news/6360738.htm.

27. See *Cartoon Prompts Inquiry*, *supra* note 24.

28. Telephone Interview with John Wooden (June 12, 2003).

29. U.S. DEPARTMENT OF JUSTICE, PROTECTIVE INTELLIGENCE & THREAT ASSESSMENT INVESTIGATIONS: A GUIDE FOR STATE AND LOCAL LAW ENFORCEMENT OFFICIALS (July 1998) [hereinafter THREAT ASSESSMENT GUIDE].

30. *Id.* at iii.

31. The *Threat Assessment Guide* indicates that certain individuals come to the attention of the authorities after making a threat against a protected person or being accused of making a

tion should seek information about the facts that brought the subject to the attention of the authorities, and general information about the subject, including educational background, criminal history, interest in extremist ideas or radical groups, and mental health history.³² The guide underscores that the purpose of protective intelligence investigations is to prevent an attack rather than secure an arrest or conviction. Thus, the guide concludes, "any errors should be made on the side of safety and violence prevention."³³ Several targets of the Secret Service's investigations discussed above indicated that they were interviewed to determine whether they "fit the profile." Both Glenn Given and John Fischer said they were asked whether they had ever been institutionalized.³⁴ Glenn Given was pressured into signing a waiver for the release of his medical records.³⁵ The guide shows little concern, however, regarding the First Amendment interests at stake. Rather, it indicates that if the Secret Service is to carry out its mission, it must often err on the side of safety. Recent events suggest that the Secret Service is more prone to error than ever before,³⁶ and that rather than gathering evidence before opening a case, as the *Threat Assessment Guide* prescribes, the Secret Service is launching investigations against individuals where there is no conceivable threat to the President.

Some would argue that the Secret Service has a duty to respond to every reported threat, no matter how improbable the actual threat may be. But another incident, occurring in December 2002 and personally involving Wooden, casts doubt on his theory that private citizens with patriotic zeal are to blame for this recent rash of investigations. Unlike the other cases, this incident did not involve the Secret Service or a threat to the President of the United States; rather, it involved the Office of the Vice President. In December 2002, David S. Addington, Counsel

threat. *Id.* at 36. According to the guide, threats should always be taken seriously and investigated. *Id.* Once a case has been opened, the protective intelligence investigator is supposed to develop "an investigation plan with the primary goal of collecting information and evidence that will help determine whether an individual has the interest, motive and capacity to mount an attack on a target." *Id.* at 37. The guide indicates that most protective intelligence investigators rely on an interview with the individual who is the focus of the investigation as a key source of information. *Id.* According to the guide, it normally makes sense to gather preliminary information about a subject's background and interests before conducting an interview. *Id.*

32. *Id.* at 41.

33. *Id.* at 39.

34. Telephone Interview with Glenn Given, *supra* note 20; Telephone Interview with John Fischer, *supra* note 17.

35. Telephone Interview with Glenn Given, *supra* note 20.

36. Traditionally, the Secret Service was part of the Department of the Treasury. As part of the major government restructuring that took place following passage of the Homeland Security Act, the Secret Service is now part of the Department of Homeland Security. Homeland Security Act, Pub. L. 107-296, § 1703, 116 Stat. 2135 (2003).

to the Vice President, sent Wooden a letter on the Vice President's official stationery requesting that he remove from his website a parody of the Vice President's wife, Lynn Cheney. The parody contained a satirical biography and a picture of the Second Lady. The letter from the Vice President's counsel, while written as a "request" to delete the photographs and fictitious biographic statements, was perceived by Wooden as threatening in nature. The letter was in the form of a legal opinion, and cited court cases extensively. It contended that it was "important to avoid using her name and picture for the purposes of trade without her consent" and to "avoid portraying her in a false light."³⁷ The letter also stated that the website's disclaimer indicating that the site was a parody was inadequate.³⁸ Furthermore, the letter claimed that the use of the likeness of the presidential seal was a violation of federal law; the letter ignored the fact that the so-called likeness depicted a vulture rather than the American bald eagle.³⁹ The letter requested written confirmation that Chickenhead Productions, Wooden's company, would remove the photographs and fictitious biography from its website.⁴⁰

In response, Wooden doctored the photograph of Lynn Cheney to add a red clown nose and to black out one of her teeth. He then proceeded to publish the letter from the Vice President's counsel on the website.⁴¹ After Wooden's attempts to publicize the incident in the media initially fell on deaf ears, he contacted the ACLU, which took over the case and, as Wooden put it, "worked its magic."⁴² Once the ACLU confirmed that the letter came from the Office of the Vice President, the ACLU succeeded in publicizing the case in the *New York Times* and other national news outlets. Although the White House initially refused to comment on the story, within twenty-four hours officials were claiming that the letter was unauthorized.⁴³

Do these recent events reflect broad-based efforts across the United States by federal and state officials to limit dissent? Or are they the work of a growing group of private citizens who believe political dissent is un-American? Or, perhaps, are they not censorship at all, but rather the result of free market economics and standards of civility? In her recent book, *Treason*, Ann Coulter, a graduate of the University of

37. See Letter from David S. Addington, Counsel to the U.S. Vice President, to John A. Wooden (Dec. 12, 2002), available at www.whitehouse.org/administration/love_letter.asp [hereinafter Addington Letter].

38. *Id.*

39. See <http://www.whitehouse.org>.

40. Addington Letter, *supra* note 37, at 2.

41. See www.whitehouse.org/administration/love_letter.asp.

42. Telephone Interview with John Wooden, *supra* note 28. (June 12, 2003).

43. *Id.*

Michigan Law School, accuses American liberals of siding with the enemy whenever the United States is under attack.⁴⁴ She argues that “[l]iberals invented the myth of McCarthyism to delegitimize impertinent questions about their own patriotism.”⁴⁵ She cites the example of the 1988 presidential election campaign, when Massachusetts Governor Michael Dukakis accused then-Vice President George H.W. Bush of red-baiting in the style of Joe McCarthy after Bush pointed out that Dukakis had vetoed a bill requiring Massachusetts students to say the Pledge of Allegiance.⁴⁶ Yet even patriotism may have its limits. Coulter was dropped as a contributing editor from the *National Review Online*, when, after September 11, she urged the U.S. government to “invade [Muslim] countries, kill their leaders and convert them to Christianity.”⁴⁷

There are increasing signs that the American public, the federal government, and state and local governments across the country are unwilling to tolerate dissent in the current political climate, including dissent that takes the form of political satire, hyperbole, parody, or sarcasm. Similarly, many private actors that serve large segments of the public, including owners of shopping malls and major media producers, have demonstrated a disturbing intolerance of dissent and political hyperbole.⁴⁸

A survey commissioned by the Freedom Forum’s First Amendment Center, conducted in 2002,⁴⁹ indicates that, while the public supports the

44. ANN COULTER, *TREASON: LIBERAL TREACHERY FROM THE COLD WAR TO THE WAR ON TERRORISM* 1 (2003).

45. *Id.*

46. *Id.* at 3.

47. Ann Coulter, *This Is War: We Should Invade Their Countries*, NATIONAL REVIEW ONLINE (Sept. 13, 2001), at <http://www.nationalreview.com/coulter/coulter09130.shtml>. The bulk of the column was a tribute to Coulter’s friend Barbara Olson, the wife of U.S. Solicitor General Theodore Olson. Barbara Olson was among the passengers who died aboard the planes hijacked on September 11. Contextually, the column could be read as political hyperbole, in light of the anger Coulter felt at the events of September 11, and the tragic loss of her friend. After Coulter wrote in a follow-up column that Americans should be required to show passports to fly domestically and that airline security should focus more on “swarthy males,” the *National Review* let her go, stating that it did “not want to be associated with the comments expressed in those two columns.” See *Wannabe LP Candidate Ann Coulter Dropped* by National Review Online, LIBERTARIAN PARTY NEWS, Oct. 2, 2001, at <http://www.lp.org/lpnews/0111/coulter.html>.

48. See FREEDOM UNDER FIRE, *supra* note 11, at 7. See also David Bauder, *ABC Nixes ‘Politically Incorrect’*, ASSOCIATED PRESS, May 14, 2002.

49. First Amendment Center, *State of the First Amendment 2002*, at <http://www.firstamendmentcenter.org/PDF/sofa2002report.PDF>. The survey, commissioned by the Freedom Forum’s First Amendment Center and the *American Journalism Review*, was conducted by the Center for Survey Research and Analysis at the University of Connecticut, and consisted of a random sample of 1,000 adults ages 18 and over who were interviewed between June 12 and July 5, 2002. The sampling error was plus or minus 3% at the 95 percent confidence level. *Id.* at 39-40.

rights guaranteed in the First Amendment in the abstract,⁵⁰ 49 percent of the persons surveyed also believed that the First Amendment “goes too far in the rights it guarantees.”⁵¹ Furthermore, 42 percent of those surveyed in 2002 agreed that “the press in America has too much freedom to do what it wants,” while 49 percent agreed that the amount of freedom it enjoys is “about right.”⁵²

What explains this apparent paradox in the survey results? The Freedom Forum concludes that a growing number of Americans view the First Amendment as an obstacle to the war on terrorism.⁵³ While a substantial majority of Americans agree in theory that the freedoms protected by the First Amendment are important, in practice, the public appears increasingly willing to sacrifice some of its liberty for greater security.⁵⁴

Similarly, a significant percentage of Americans appear less willing to tolerate humor in books, on the Internet, and in the broadcast media that they consider offensive. In another survey commissioned by the First Amendment Center in 2002, results indicated that almost 40 percent of Americans favored greater government restrictions on comedy routines that made light of or trivialized tragedies like the World Trade Center.⁵⁵ The First Amendment Center concluded that “a significant percentage of Americans are reluctant to give full First Amendment protection to comedic speech, art or performances that could potentially insult or offend others. There appears to be a willingness to give up a little liberty in exchange for fewer hurt feelings.”⁵⁶

50. *Id.* at 22-23. When asked whether it was “essential that you have that right, important but not essential, or not important,” 75 percent agreed that it was “essential” that they have “the right to speak freely about whatever you want,” while 23 percent believed it was “important but not essential.” *Id.* Similarly, 68 percent agreed that it was essential that they have “the right to be informed by a free press,” while 26 percent believed it was “important but not essential.” *Id.*

51. *Id.* at 22. In the 2002 survey, 41 percent of the persons surveyed “strongly agree[d]” that the “First Amendment goes too far in the rights it guarantees.” This was a significant increase from 2001, when only 29 percent strongly agreed with this view. In 2002, 8 percent “mildly agree[d]” that it goes too far. The previous year, 10 percent had mildly agreed that the First Amendment went too far. Thus, while in 2001, 39 percent of the persons surveyed felt that the First Amendment gives us too much freedom, by 2002, this figure had risen to 49 percent. *Id.*

52. *Id.* at 24.

53. *Id.* at 2.

54. *Id.* at 3 (“Clearly, the terrorist attacks have taken a toll. Principles that sound good in the abstract are a little less appealing when your greatest fear is getting on an airplane.”).

55. First Amendment Center, *Comedy and Freedom of Speech* (2002), at www.firstamendmentcenter.org/pdf/ComedyandFreedomofSpeech2002.pdf. In that survey, 51 percent agreed that the media have “too much freedom to publish whatever [they] want[.]” *Id.* at 6. Moreover, 39 percent favored “government involvement to restrict public performances of comedy routines that make light of or trivialize such tragedies” as the World Trade Center attack or the Oklahoma City bombing. *Id.* at 8.

56. *Id.* at 2.

Growing intolerance of dissent and even political satire has begun to take the form of increasing government and private restrictions on core First Amendment values, including the freedoms of assembly, expression, and the press. So-called threat speech is one of the areas where the federal government still prosecutes individuals who speak out against the President and other high-ranking government officials. A growing body of decisions from the various federal courts of appeal has upheld jury verdicts finding that the speech in question was a “true threat” and not political hyperbole, despite the absence of any showing of a subjective intent to threaten.

America has enjoyed a proud history of political satire and political cartooning, dating to pre-Revolutionary War days.⁵⁷ Furthermore, it is a fundamental principle that the First Amendment protects the right to engage in debate on public issues and public figures, which is vehement, caustic and which, at times, subjects public figures to ridicule and unpleasantly sharp attacks.⁵⁸ When it comes to public figures, the First Amendment severely limits tort remedies, such as defamation and intentional infliction of emotional distress, that would insulate such individuals from hurt feelings. Public officials and public figures are expected to give up a certain degree of sensitivity in exchange for a place in the public spotlight.

The U.S. Supreme Court has recognized the importance of satire, parody, and political hyperbole in a number of its decisions. In *Hustler Magazine, Inc. v. Falwell*,⁵⁹ in a parody of a Campari liqueur ad, Larry Flynt portrayed Rev. Jerry Falwell talking about his “first time” in a drunken, incestuous rendezvous with his mother in an outhouse.⁶⁰ Falwell brought an action in federal court for libel, invasion of privacy, and intentional infliction of emotional distress. During discovery, when asked why he created the ad parody, Larry Flynt said that one of his objectives was to “assassinate” Falwell’s integrity.⁶¹ The trial court dismissed the action for invasion of privacy, and the jury found against Falwell on the defamation charge on the grounds that no reasonable per-

57. See Henry Ladd Smith, *The Rise and Fall of the Political Cartoon*, SATURDAY REV., May 29, 1954, at 7. Smith discusses how the earliest known example of political cartooning was one printed by Benjamin Franklin in the *Pennsylvania Gazette* in 1754. The cartoon shows a picture of a snake cut into sections with the caption “Join, or Die.” The cartoon was understood to be a call to unity among the colonies during the French and Indian War, with each segment representing one of the colonies. The cartoon would appear during the next twenty years as the colonies moved toward revolution. See BRUCE I. GRANGER, *POLITICAL SATIRE IN THE AMERICAN REVOLUTION: 1763-1783* (1960).

58. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

59. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

60. *Id.* at 48.

61. *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986).

son would have considered the parody to be fact.⁶² The jury found in Falwell's favor, however, on the claim of intentional infliction of emotional distress, and the Fourth Circuit affirmed.

The Supreme Court, in a decision written by Justice Rehnquist, reversed. The Court held that Falwell, a public figure, could not recover damages for emotional harm caused by the publication of the parody, no matter how outrageous it might be. The Court held that "the First Amendment prohibits such a result in the area of public debate and public figures" and that "[w]ere we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject."⁶³ The Court emphasized that the political cartoon is often "calculated to injure the feelings of the subject of the portrayal."⁶⁴ It refused to lay down a rule, based on the outrageousness of the attack. It decided that "'outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression."⁶⁵

Similarly, several years earlier, in *Watts v. United States*,⁶⁶ a 1969 companion case to the better-known *Brandenburg v. Ohio*⁶⁷ — the Court's most recent and most liberal pronouncement of the "clear and present danger test"⁶⁸ — the Court overturned criminal sanctions against Watts, a young man at a political rally charged with threatening the President. In that case, Watts had participated in a series of workshops at a political rally against the Vietnam War. Watts had received his draft card and was supposed to report to the Army.⁶⁹ In the presence of a government infiltrator, he stated to the group, "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."⁷⁰ Watts was convicted of threatening the President under 18 U.S.C. § 871(a), and the verdict was affirmed by the D.C. Circuit Court of Appeals.⁷¹ The U.S. Supreme Court found, however, that Watts's

62. *Hustler*, 485 U.S. at 49.

63. *Id.* at 53.

64. *Id.* at 54.

65. *Id.* at 55.

66. 394 U.S. 705 (1969).

67. 395 U.S. 444 (1969).

68. *Id.* at 447 ("the Constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

69. *Watts*, 394 U.S. at 706.

70. *Id.*

71. *Watts v. United States*, 402 F.2d 676 (D.C. Cir. 1968).

statement was not a "true threat," but rather, political hyperbole, made in the context of expressing his opposition to the Vietnam War and to the draft. The Court found that it had to "interpret the language Congress chose 'against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"⁷²

Nonetheless, since *Watts*, the Court has failed to grant certiorari to further clarify what kinds of statements against the President or high-ranking officials are protected under the First Amendment. Lower courts have begun to interpret the First Amendment's protections narrowly when a threat to the President is involved. In light of current doctrinal confusion in this area, and without a strong reaffirmance by the Supreme Court, the decisions in *Brandenburg*, *Watts* and even *Hustler* could be the latest victims of the war on terrorism.

III. POLITICAL SATIRE AND THE CONSTITUTION

When *Hustler Magazine, Inc. v. Falwell*⁷³ came before the U.S. Supreme Court in 1987, groups representing editorialists, political cartoonists, and other journalists warned that a decision in favor of Falwell would be a threat not only to parody and political satire, but to political speech in general.⁷⁴ The First Amendment enshrines the right to criticize government officials and those in the public eye. Satire and parody historically have been powerful vehicles for social criticism, going back to ancient times.⁷⁵ The Reporters Committee for Freedom of the Press and fellow amici expressed concern that if the Fourth Circuit's decision were allowed to stand, it would have a "dangerous and chilling effect" on "editorialists, cartoonists, commentators and comedians — in fact all those in the business of expressing their opinion about public figures."⁷⁶

A. *Some Definitions*

Political satire is a literary or artistic devise calculated to expose

72. *Watts*, 394 U.S. at 708 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. at 279-80 (1964)).

73. 485 U.S. 46 (1988).

74. Brief of Amici Curiae Reporters Committee for Freedom of the Press et al. at 6, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (No. 86-1278) [hereinafter Reporters Committee Brief].

75. J.A. CUDDON, *PENGUIN DICTIONARY OF LITERARY TERMS AND LITERARY THEORY* 641 (4th ed. 1998) ("The origins of parody are ancient. Aristotle refers to it in *Poetics* and attributes its invention to Hegemon of Thasos who used an epic style to represent men as being inferior to what they are in real life. . . . Aristophanes used parody in the *Frogs* where he took off the style of Aeschylus and Euripides.").

76. Reporters Committee Brief, *supra* note 74, at 2.

political or religious leaders and their follies to ridicule, often through the cruel exploitation of physical or mental traits or politically embarrassing events.⁷⁷ Satire is defined in the *Merriam-Webster Dictionary* as “biting wit, irony, or sarcasm used to expose vice or folly.”⁷⁸ According to the *Unabridged Webster’s Dictionary*, satire is “literary verse or prose the purpose of which is to ridicule or censure social or political abuses; the technique employs parody, irony, wit, mockery and humor.”⁷⁹ Satirical expressions of opinion are generally aimed at those in the public spotlight, and are designed to deflate or ridicule them.

Satire often has been justified by those who employ it as serving a corrective role.⁸⁰ According to this perspective, the best satire is implicitly constructive. It has also served as a tool for politically and culturally disempowered or marginalized groups. It seeks to expose vice and hypocrisy in the hopes that the satirist’s barbs will either be sufficiently embarrassing to cause the target to recognize his or her vice and correct it or cause the audience to recognize the need for change.⁸¹ It has been said that a satirist’s goals can be achieved “only to the extent that the audience responds to the attack.”⁸² As Jonathan Swift wrote in his own ironic self-eulogy:

As with a moral view design’d
To cure the vices of mankind:
His vein, ironically grave,
Expos’d the fool, and lash’d the knave.

Yet malice never was his aim;
He lash’d the vice but spar’d the name;
No individual could resent,
Where thousands equally were meant.
His satire points at no defect,
But what all mortals may correct⁸³

77. See, e.g., M.H. ABRAMS, *A GLOSSARY OF LITERARY TERMS* 166 (5th ed. 1988) (“Satire can be described as the literary art of diminishing or derogating a subject by making it ridiculous and evoking toward it attitudes of amusement, contempt, scorn or indignation.”).

78. MERRIAM-WEBSTER DICTIONARY 464 (Home & Office ed. 1998).

79. COMPLETE AND UNABRIDGED WEBSTER DICTIONARY 3762 (1963).

80. ABRAMS, *supra* note 77, at 166. See also Robert Harris, *The Purpose and Method of Satire* 1 (May 14, 2001), at <http://www.virtualsalt.com/satire.htm>. Satire is “a literary manner which blends a critical attitude with humor and wit to the end that human institutions or humanity may be improved. The true satirist is conscious of the frailty of institutions of man’s devising and attempts through laughter not so much to tear them down as to inspire a remodeling”). *Id.* (citing WILLIAM THRALL ET AL., *A HANDBOOK TO LITERATURE* (1960)).

81. See generally Harris, *supra* note 80, at 1-3.

82. *Id.* at 2.

83. Jonathan Swift, *Verses on the Death of Dr. Swift, D.S.P.D.* (1739), lines 314-16, 459-64, reprinted at <http://eir.library.utoronto.ca/rpo/display/poem2068.html> (last modified May 29, 2002).

Yet the satirist has no delusions about the redemption of his or her target. As Harris writes, the world of the satirist "is a world of hypocrisy in which social standing, church membership, titles and degrees, peer praise, lip service to morals, and wealth are all used to hide evils of the first order."⁸⁴ The satirist can only hope to expose vice or hypocrisy and to demonstrate the dangers if allowed to continue.⁸⁵

Rosenheim writes, "All satire is not only an attack; it is an attack upon discernible, historically authentic particulars The reader must be capable of pointing to the world of reality, and identifying the individual or group . . . which is under attack."⁸⁶ More importantly in terms of First Amendment protection, Rosenheim writes that "all satire involves, to some extent, a *departure from literal truth* and, in place of literal truth, a reliance upon what may be called a *satiric fiction*."⁸⁷ This clear departure from literal truth is what allows satire to survive an attack by those who claim that satire's contents are defamatory. In *Hustler*, the Court suggested that such literary or artistic attacks were a form of "opinion" rather than a statement of fact, and thus did not constitute defamation.⁸⁸

Satire, distinguished from other types of humor by the diminishing of a subject by ridicule, employs various literary techniques to achieve its ends. Some of these devices include mockery, parody, irony, hyperbole (or exaggeration), wit, and sarcasm, several of which have been challenged in the leading court cases.⁸⁹ Mockery is making one the "subject of laughter, derision, or sport."⁹⁰ Parody has been defined as the "imitative use of the words, style, attitude, tone and ideas of an author in such a way as to make them ridiculous."⁹¹ Parody is considered a form of satirical mimicry whose purpose may be corrective as well as condemnatory.⁹² Good parody is achieved by closely imitating the original while at the same time deliberately exaggerating certain features of the original that the parodist seeks to exploit.⁹³ Burlesque is a

84. Harris, *supra* note 80, at 4.

85. *Id.* at 2.

86. Brief of Amici Curiae Association of American Editorial Cartoonists et al., 1987 WL 864186 at *25 (Jun. 15, 1987), *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (No. 86-1278) (citing EDWARD ROSENHEIM, SWIFT AND THE SATIRIST'S ART 25 (1963)).

87. ROSENHEIM, *supra* note 86, at 17. (emphasis in original).

88. See *Hustler*, 485 U.S. at 52-55.

89. See *id.* (use of parody or burlesque); *Watts v. United States*, 394 U.S. 705 (1969) (use of political hyperbole); *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 286 (1974) (rhetorical hyperbole).

90. MERRIAM-WEBSTER ONLINE DICTIONARY (2004), at <http://www.m-w.com/cgi-bin/dictionary?book=dictionary&va=satire>.

91. CUDDON, *supra* note 75, at 640.

92. *Id.*

93. *Id.*

less subtle form of parody. It has been defined as a coarse or ridiculous caricature and as "a literary or dramatic work that seeks to ridicule by means of grotesque exaggeration or comic imitation."⁹⁴ Hyperbole is a form of exaggeration in expression, often used with comic effect, to reach those who will not listen as to what is possible.⁹⁵ Sarcasm is a bitter, sharp style of expression that cuts or taunts.⁹⁶ Wit is defined as "clever or apt humor."⁹⁷ Irony is subtle sarcasm or humor implying the opposite of what is expressed.⁹⁸

In *Hustler*, Falwell's attorney implored the Court to distinguish *Hustler's* ad parody from more traditional political cartoons.⁹⁹ The Court recognized that the ad parody was a "distant cousin" of political cartooning.¹⁰⁰ It was unwilling, however, to employ an "outrageousness" standard in judging political and social discourse, because such an approach was inconsistent with the First Amendment and would allow juries to impose liability on the basis of their personal likes or dislikes of a particular expression.¹⁰¹ Furthermore, it would be anti-democratic to protect only those forms of satire that appealed to more sophisticated sensibilities.¹⁰²

B. *Democracy, Political Satire, and Freedom of Expression*

In short, both political satire and parody often involve attacks on political or religious leaders using deliberate distortions of physical characteristics, statements, or politically embarrassing events.¹⁰³ Almost by definition, they often involve reliance on a literary fiction or fantasy. Furthermore, the purpose of satire and parody often is to make the object of the satire suffer, whether through the hostility that the satire produces in the minds of the reader or more directly, through the target's own awareness of the assault made upon him or her.¹⁰⁴ As discussed above,

94. MERRIAM-WEBSTER ONLINE DICTIONARY, *supra* note 90, at <http://www.m-w.com/cgi-bin/dictionary?book=dictionary&va=burlesque>.

95. See <http://www.literatureclassics.com/showterm.asp?IDNo=97>.

96. MERRIAM-WEBSTER ONLINE DICTIONARY, *supra* note 90, at <http://www.m-w.com/cgi-bin/dictionary?book=dictionary&va=sarcasm>.

97. *Id.* at <http://www.m-w.com/cgi-bin/dictionary?book=dictionary&va=wit>. *Id.* Aat 4707.

98. *Id.* at <http://www.m-w.com/cgi-bin/dictionary?book=dictionary&va=irony>.

99. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

100. *Id.*

101. *Id.*

102. See, e.g., *Alexander v. United States*, 418 F.2d 1203, 1207 (D.C. Cir. 1969) ("While evening telephone calls to the White House are an offensive, bizarre medium of communication — and this might well have led the jury to accept the utterances as threats — appellant's third grade education and excessive drinking increased the probability of expression in an unaccustomed way.").

103. *Hustler*, 485 U.S. at 53-54.

104. *Id.* at 54.

satire also serves a corrective role, either by bringing about a change in the target's behavior or convincing the audience of the need for social change.¹⁰⁵

In his dissent in the Fourth Circuit's decision in *Falwell v. Flynt*¹⁰⁶ denying the appellants' petition for a rehearing en banc, Judge Wilkinson remarked that "[n]othing could be more threatening to the long tradition of satiric commentary than a cause of action on the part of politicians for emotional distress."¹⁰⁷ Such a cause of action is based largely on the hurt feelings of the public figure in question.¹⁰⁸ Yet unless such claims are considered with the First Amendment clearly in mind, the elements for a claim of intentional infliction of emotional distress often will be present.¹⁰⁹

Indeed, a satirist aims to attack, and while his or her motives may often be to educate or to entertain the public, the satirist also may be motivated by ill will toward the target of his or her attack. In *Falwell v. Flynt*, when asked why he created the ad parody, Larry Flynt responded that one of his objectives was to "assassinate" Jerry Falwell's integrity.¹¹⁰ To establish malice, it is not enough to show the ill will of the speaker; it must be shown that the statement was made with knowledge that it was false or with reckless disregard of its truth or falsity.¹¹¹ Satire and parody, however, are often founded on a lie — putting a religious or political figure in an absurd situation. The purpose of the parody at issue in *Hustler Magazine, Inc. v. Falwell* was to portray Jerry Falwell as an immoral, incestuous, drunken hypocrite.¹¹² Jerry Falwell had held himself out publicly as a moralist and religious leader.

The jury found that the parody was not libel because it could not "reasonably be understood as describing actual facts about [the respondent] or actual events in which [he] participated."¹¹³ Similarly, the

105. See generally Harris, *supra* note 80, at 1-2.

106. *Falwell v. Flynt*, 805 F.2d 484 (4th Cir. 1986).

107. *Id.* at 487.

108. See Reporters Committee Brief, *supra* note 74, at 50.

109. See Brief of Amici Curiae Association of American Editorial Cartoonists et al., *supra* note 86, at 29. The elements of intentional infliction of emotional distress typically require that: (1) the defendant's conduct was extreme and outrageous; (2) the conduct was intentional or reckless; (3) it caused emotional distress; and (4) the distress was severe. See, e.g., *Hill v. Scott*, 349 F.3d 1068, 1079 (8th Cir. 2003). See also *Davignon v. Clemmey*, 322 F.3d 1, 8 (1st Cir. 2003); *Simo v. Union of Needletrades, Indus. & Textile Employees*, 316 F.3d 974, 992 (9th Cir. 2003); *Smith v. Amedisys Inc.*, 298 F.3d 434, 449 (5th Cir. 2002); *Sturdza v. United Arab Emirates*, 281 F.3d 1287, 1305 (D.C. Cir. 2002); *Hughes Training Inc. v. Cook*, 254 F.3d 588, 595 (5th Cir. 2001).

110. *Falwell v. Flynt*, 797 F.2d 1270, 1273 (4th Cir. 1986).

111. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. at 52 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

112. *Id.* at 48.

113. *Id.* at 49.

Supreme Court held that Falwell could not bring a claim based on intentional infliction of emotional distress because "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures."¹¹⁴ Furthermore, this right could not be circumscribed by an outrageousness standard that would be subject to a jury's biases.¹¹⁵

Political satire has been described as "the literary equivalent of a bucket of tar and a sack of feathers."¹¹⁶ If satire's chief instrument is a direct, crude, and often tasteless attack on public figures or institutions, why is it so important to democracy and so fundamental a component of the First Amendment? Why must we tolerate outrageous speech?

One theory is that political satire often serves as a bridge between citizens and government.¹¹⁷ It does this in several ways. First, it is a subversive form of engaging the polity that often goes beyond the bounds of good taste. It succeeds both by shocking and entertaining. Whether through the written word or through political cartoons, it is a means of mobilizing the electorate and overcoming political apathy.

As Gerald Gardner writes in *The Mocking of the President: A History of Campaign Humor from Ike to Ronnie*,¹¹⁸ the one feature that most totalitarian governments seem to have in common is the absence of a sense of humor. He writes:

In a dictatorship the practice of satire is a jeopardous pastime indeed. This is because no public figure willingly subjects himself to the barbs of the satirist if there is some way to dispose of the troublesome fellow So humor is considered subversive by the powers that be, who often pay it the compliment of suppression.¹¹⁹

Similarly, Morris Udall, former Democratic candidate for the presidency, writes that "what's most remarkable about America is not that any child can grow up to be President, but rather that any child or adult can safely makes jokes *about* the President — and not just in the privacy of his or her home."¹²⁰ Like Gardner, Udall also underscores that we tend to take for granted the fact that we live in a country "where laughter of, by, and for the people is not regarded as a dangerous and subversive force."¹²¹

In his book *Heartland*, Mort Sahl discusses the role of political

114. *Id.* at 51.

115. *Id.* at 55.

116. GILBERT HIGHET, *THE ANATOMY OF SATIRE* 155 (1962).

117. MORRIS UDALL, *TOO FUNNY TO BE PRESIDENT* xiii-xiv (1988).

118. GERALD GARDNER, *THE MOCKING OF THE PRESIDENT: A HISTORY OF CAMPAIGN HUMOR FROM IKE TO BUSH* (1988).

119. *Id.* at 12.

120. UDALL, *supra* note 117, at 1.

121. *Id.*

satire as a critical means of educating the public about social and political ills.¹²² He describes how the political nature of his comedy routines began to emerge in the mid-1950s, in the context of the Cold War and persistent intolerance toward dissident viewpoints.¹²³ To Sahl, stand-up comedy became a means of engaging his audiences in a political awakening. He describes how he was repeatedly told by producers and agents that “audiences were stupid”¹²⁴ and that he was “too intellectual for most people.”¹²⁵ He describes how agents would tell him, “I don’t think the average man will understand you.”¹²⁶ They advised him to change his routine so as not to threaten the audience.¹²⁷ He became convinced, however, that “intelligent comedy can muster an audience.”¹²⁸ He describes how, even more than political censorship, he confronted “intellectual discrimination against the audience, which is the most dangerous censorship of all.”¹²⁹ He describes intellectual discrimination as “the ultimate discrimination — to say that all people are intellectually inferior, to place a ceiling on them. My God, I felt that had to be contested and fought down to the wire.”¹³⁰

Sahl, described by Woody Allen as the father of modern comedy, made a career of being an iconoclast.¹³¹ Sahl writes that he has stood on the stage and attacked both the President and the Chief Justice, demanding that his audience think about it even if they didn’t laugh about it. He also describes how he would read entire passages from the Warren Commission Report to his audience, and make fun of it: “If you don’t have the skill to make the target humorous, you don’t have the right to have the audience’s time.”¹³²

In one central passage, he describes his relationship with his audience:

I’d walk into the hungry i, and I was a hero. And somehow it was never too intelligent for them. I found out, I guess, what teachers feel like. You know, it’s not a democracy, a school. And if you owe anything to the students, it’s to uplift them, to make knowledge

122. MORT SAHL, *HEARTLAND* (1976).

123. *Id.* at 21.

124. *Id.* at 12.

125. *Id.* at 30.

126. *Id.* at 32.

127. *Id.*

128. *Id.* at 12.

129. *Id.* at 15.

130. *Id.* at 33.

131. *Id.* at 98-99. Sahl’s first album was called *Mort Sahl, Iconoclast*. He often commented that no one knew what an iconoclast was. *Id.* at 43. The Merriam-Webster Dictionary describes an iconoclast as an image destroyer and as “one who attacks cherished beliefs or institutions.” MERRIAM WEBSTER DICTIONARY 256 (Home & Office ed. 1998).

132. SAHL, *supra* note 122, at 39.

attractive. If you leave it to them, they're going to say, "On a democratic basis we prefer recess and chocolate milk."¹³³

Second, besides its role in raising the political conscience of the electorate, satire can also serve as a bridge between people and their government by healing wounds left after a bitter election. As we learned in 2000, a contentious election can leave deep wounds that are slow to heal.¹³⁴ Humor can help heal these wounds when the electoral battle is over, and ensure a peaceful transition (or retention) of power. As Gardner wrote in 1988, "If we can laugh at the failure of our fallen hero or the feet of clay of the victor, some of the pressure is released. It is a consummation preferable to storming the palace."¹³⁵ Political satire educates and mobilizes the citizenry and serves as an escape valve for the release of heightened political pressures after a bitter political contest. As Gardner writes, "Humor lets us take the issues seriously without taking ourselves too seriously."¹³⁶

In addition, political satire serves another crucial role in democratic governance. Udall describes humor as the "best antidote for the politician's occupational disease: an inflated, overweening, suffocating sense of self-importance."¹³⁷ Similarly, Gardner writes, "[H]umor has the added merit of preventing the presidential candidate from developing messianic delusions To find yourself the target of these witty men is to be both humbled and freed of self-delusion."¹³⁸ As Judge Wilkinson noted in *Falwell v. Flynt*,¹³⁹ "Satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air."¹⁴⁰

IV. POLITICAL SATIRE AND THREATS TO THE PRESIDENT

When Glenn Given published his editorial in the *Stony Brook Press* calling on Jesus Christ to smite George Bush and the members of his Cabinet or to arrange for some other biblical figure or crazy mortal to do so, Given hoped the editorial would provoke a reaction from his readers.¹⁴¹ Except perhaps in his worst Orwellian nightmare, Given never

133. *Id.* at 31. The hungry i was a San Francisco nightclub.

134. GARDNER, *supra* note 118, at 12.

135. *Id.*

136. *Id.*

137. UDALL, *supra* note 117, at xiv.

138. GARDNER, *supra* note 118, at 13.

139. 805 F.2d 484 (4th Cir. 1986) (Wilkinson, J., dissenting).

140. *Id.* at 487.

141. Telephone Interview with Glenn Given, *supra* note 20.

imagined that the Secret Service would accuse him of incitement to violence or threatening the President.¹⁴²

According to Given, the Secret Service told him that his editorial was not protected speech.¹⁴³ Once the Secret Service had interrogated Given and searched his apartment, however, they realized that he did not pose a threat to the President. Thus, his article did not constitute a "true threat." They told him, however, that it could conceivably provoke a third party to act, and that this was incitement.¹⁴⁴ Certainly they did not expect Jesus Christ or Moses to smite Bush, but Given had indicated in his article that if Jesus were too busy, "Heck, even if you wanna get some crazy mortal to do it that's cool with me. All I ask is that you make sure that whoever does the job is thorough."¹⁴⁵ This was the language that they found to be incitement speech.

Similarly, A.J. Brown's poster, although intended as a condemnation of Bush's position on the death penalty, contained "Wanted" language that concerned the Secret Service. John Fischer, the creator of the Bush Wipes, was handing out toilet paper rolls to persons along Bush's motorcade route, and was accused of encouraging people to throw these so-called "missiles" at the motorcade. Jesse Ethredge, the Georgian with the anti-Bush bumper stickers, already had been accused of undermining military order after driving his sticker-laden car onto a military base ten years earlier. Michael Ramirez's cartoon showed a Vietnam military official with the word "Politics" on his shirt holding a gun to Bush's head against the backdrop of Iraq.

Interestingly, each of these cases might better be viewed as an incitement case rather than a true threat case, and yet each of these individuals also was investigated and interrogated by the Secret Service to determine whether he or she posed an actual threat to the President. In 1969, the U.S. Supreme Court had handed down a new standard for incitement speech along with a ruling on true threats in companion cases *Brandenburg v. Ohio* and *Watts v. United States*. Under *Brandenburg*, the most speech-protective articulation of the incitement test to date, the government cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁴⁶ It imposes a much higher threshold on the government than threat speech, requiring an intent to produce imminent, lawless

142. *Id.*

143. *Id.*

144. *Id.*

145. Given, *supra* note 19.

146. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

action, and a likelihood that such action will occur.¹⁴⁷

The true threat test, in contrast, requires the government to distinguish between an actual threat and mere political hyperbole. The government need not prove an actual intent to carry out the threat.¹⁴⁸ Rather, the threat itself is the proscribed conduct. The prohibition on true threats thus protects individuals not only from the likelihood that the threatened violence will occur, but also from the fear and disruption that threats of violence engender.¹⁴⁹

Although the tests are different and apply in different situations, the courts have often conflated the two, leading to doctrinal confusion.¹⁵⁰ Moreover, it would appear that many lower courts have not only used the "true threat" doctrine to circumvent the higher threshold required for incitement, but have weakened that doctrine still further by ignoring the speech-protective language in *Watts*. A majority of courts of appeal have adopted a "reasonable person" standard that no longer requires that the government present evidence of an actual subjective intent to threaten.

A. *Watts and its Wayward Progeny*

1. WATTS AND THE TRUE THREAT TEST

In *Watts v. United States*,¹⁵¹ the Supreme Court addressed what types of threats against the President under 18 U.S.C. § 871 constitute a true threat. *Watts* was an eighteen-year-old arrested during a public rally near the Washington monument and charged under 18 U.S.C. § 871(a)¹⁵² with threatening the life of the President. He made his state-

147. Perhaps the modern day example of incitement speech would be Osama bin Laden's calling on his followers to go out and commit terrorist acts. It was in part for this reason that the Bush Administration was able to persuade major media organizations to review bin Laden's videotaped statements before airing them, instead of airing the video live from al-Jazeera. The Bush Administration was concerned that bin Laden would use these speeches to send "secret messages" to his followers. See Mike Allen, *Rice Interviewed on Middle Eastern Network*, WASH. POST, Oct. 16, 2001, at A13.

148. See *Virginia v. Black*, 123 S. Ct. 1536, 1548 (2003).

149. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

150. See, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (citing *Watts v. United States*, 394 U.S. 705 (1969), enunciating the true threat doctrine for the proposition that "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech").

151. 394 U.S. 705 (1969).

152. 18 U.S.C. § 871(a) provided that:

Whoever knowingly and willfully deposits for conveyance in the mail or for delivery from any post office or by any letter carrier any letter, paper, writing print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of the President of the

ments during a small group discussion of police brutality. Most of those in the group were in their teens or early twenties, but present among them was a government infiltrator from the Army Counter Intelligence Corp.¹⁵³ After one participant told other members of the group that they “should get more education before expressing their views,” Watts angrily replied:

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.¹⁵⁴

At this, Watts and several members of the group laughed.¹⁵⁵ Based on this statement, Watts was arrested, charged with threatening the President under 18 U.S.C. § 871(a), and convicted by a jury of knowingly and willfully threatening the President.¹⁵⁶ The U.S. Court of Appeals for the D.C. Circuit affirmed his conviction.¹⁵⁷

The Supreme Court reversed. The Court recognized that the nation had an overwhelming interest in protecting the life of the President.¹⁵⁸ Nonetheless, while finding 18 U.S.C. § 871(a) constitutional on its face, it also held that the statute, in making “criminal a form of pure speech,” had to “be interpreted with the commands of the First Amendment clearly in mind.”¹⁵⁹ The Court found that, under the First Amendment, the statutory language had to be interpreted “against ‘the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.’”¹⁶⁰ It thus interpreted the statute consistent with the First Amendment, to require the government to prove that the defendant had made a true threat against the President.¹⁶¹

The Court agreed with Watts that his statement was nothing more than a “very crude offensive method of stating a political opposition to

United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 871(a) (1982).

153. *Watts*, 394 U.S. at 706.

154. *Id.*

155. *Id.* at 707.

156. *Id.* at 705-06.

157. *Id.* at 706 (citing *Watts v. United States*, 402 F.2d 676 (D.C. Cir. 1968)).

158. *Id.* at 707.

159. *Id.*

160. *Id.* at 708 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

161. *Id.*

the President.'"¹⁶² It also considered the context in which the statement was made, which was during a political discussion, and that the threat was conditional upon Watts's being inducted into the Armed Forces, something he vowed would never occur. In this context, the Court concluded that Watts's statement was political hyperbole and did not fit within the statutory language of a true threat.¹⁶³

2. WATTS'S WAYWARD PROGENY

Despite *Watts's* speech-protective language, the Supreme Court's failure to articulate a clear standard in that case or subsequent cases for what constitutes a true threat has contributed to the doctrinal confusion that has persisted for more than thirty years. Subsequent criminal cases in the various circuits involving threats to the President and other government officials have departed from *Watts*, often upholding jury verdicts of guilty despite evidence that the statements were not intended as threats. In the majority of these cases, the jury was instructed to apply a reasonable person standard to the question of whether a statement was a true threat or protected speech. Juries are being asked to determine whether a reasonable speaker, reasonable listener, or neutral observer would perceive a particular statement as threatening. They rarely are asked to determine whether a speaker actually intended a statement to be a threat.

While free speech proponents attribute part of the problem to what amounts to the negligence standard that the courts are applying, they also argue that juries should not be allowed to decide whether such speech is a true threat. Chief Justice Rehnquist, in rejecting a standard based on the outrageousness of the speech, warned in *Hustler Magazine, Inc. v. Falwell* that juries often will allow their personal dislike of particular speech to influence their decisions regarding whether certain forms of outrageous speech are protected.¹⁶⁴ Yet, despite Rehnquist's warning, there is strong disagreement over whether the jury has any role in deciding whether certain statements are protected speech. The same jury in *Hustler* that found the magazine liable for the intentional infliction of emotional distress also found that *Hustler* could not be held

162. *Id.*

163. *Id.* The Court made reference to the objective standard applied in some earlier cases, which had "found the willfulness requirement met if the speaker 'voluntarily uttered the charged words with 'an apparent determination to carry them into execution.'" *Id.* at 707 (quoting *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918)). The Court expressed "grave doubts" about whether this standard was appropriate. *Id.* at 708 (discussing *Watts v. United States*, 402 F.2d 686-93 (Wright, J., dissenting)). Nonetheless, the Court indicated the possibility that this interpretation might be correct. *Id.* This language thus opened the door to the doctrinal confusion that has ensued.

164. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).

responsible for libel because no reasonable person would perceive the statements in the ad parody to be true.

Frederick Schauer writes that “by removing majorities from any meaningful input into the consideration of free speech issues, we run the risk that those majorities will cease to see free speech as something they ought to care about.”¹⁶⁵ He suggests reaffirming the historic victory of John Peter Zenger to give juries the power the check abuses by the government.¹⁶⁶ He recognizes, however, that the prevailing view is that juries today are a threat to free speech.¹⁶⁷

A systematic review of much of the true threat case law can be found in a recent article, *Threats, Free Speech and the Jurisprudence of the Federal Criminal Law*, by Robert Blakey and Brian J. Murray.¹⁶⁸ The article demonstrates that a significant majority of the circuits, rather

165. Schauer, *supra* note 7, at 783.

166. *Id.* at 784-85.

167. *Id.* at 765 (“The common wisdom is that if juries were given more decisional power in these areas, either by increasing the range of issues they could consider or by granting juries greater immunity from appellate review, free speech would suffer a crippling blow.”).

168. Blakey & Murray, *supra* note 5. Robert Blakey is a professor at Notre Dame Law School and his former student Brian J. Murray, was a law clerk to a Ninth Circuit judge at the time of the writing. The article soundly condemns the use of an objective “reasonable person” standard in “true threat” cases as violating both First Amendment principles as well as principles of criminal law. It also argues that the question of whether certain speech or expressive conduct is protected or a “true threat” is a question of law for the judge to decide. *Id.* at 1052. It examines this case law in the context of the Ninth Circuit’s en banc decision in *Planned Parenthood of the Colombia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), which nullified a Ninth Circuit panel’s decision to strike down a \$107 million jury verdict against the American Coalition of Life Activists (“ACLA”) for disseminating various “WANTED” posters of abortion doctors and lists of abortion supporters over the Internet. *Id.* at 1088. The list of abortion supporters had lines drawn through the names of persons who had been killed by extremists. The en banc decision reversed the panel decision, thus upholding the \$107 million verdict against ACLA, on the grounds that its Internet postings constituted a “true threat” against the plaintiffs. *Id.* The article by Blakey and Murray sharply criticizes the en banc decision, suggesting that while it was made in the politically charged context of the abortion debate, it threatens the rights of dissenters in other contexts, as well. Blakey & Murray, *supra* note 5, at 835-36. Judge Kozinski wrote in his dissent that, “[w]hile today it is abortion protestors who are singled out for punitive treatment, the precedent set by this court — the broad and uncritical deference to the judgment of a jury — will haunt dissidents of all political stripes for many years to come.” *Planned Parenthood of the Colombia/Willamette, Inc.*, 290 F.3d at 1101. *Planned Parenthood* appears to be yet another example of the courts applying a weakened “true threat” test to circumvent the heightened standard of proof required in incitement cases. Under *Brandenburg*, in order to prove incitement, the prosecution would have had to establish that the dissemination over the Internet of “WANTED” posters and lists of pro-abortion individuals advocated the use of violence, that it was intended to incite or produce imminent lawless action, and that it was likely to produce such action. See *Brandenburg v. Ohio*, 395 U.S. 444, 448-95 (1969). Under the “true threat” standard applied by the en banc court, the court found that the Internet postings constituted a true threat because “‘a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person.’” *Planned Parenthood of the Colombia/Willamette, Inc.*, 290 F.3d at 1075 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). The court thus upheld the \$107 million verdict.

than looking at the intent of the speaker, rely on an objective test for determining what constitutes a true threat.¹⁶⁹ Most of the circuits do not look at whether the speaker actually intended to make a threat or to do the act he or she was threatening to do.¹⁷⁰ To summarize their research, Blakey and Murray find that the predominant approach appears to rely on whether a reasonable *speaker* would foresee his or her statements to be threatening. This approach has been adopted in the First, Third, Seventh, and Ninth Circuits.¹⁷¹ The next most common approach is to examine whether a reasonable *listener* would perceive the statement to be threatening. This approach has been adopted in the Fourth, Eighth, and Tenth Circuits.¹⁷² A third approach has been adopted in the Fifth and Eleventh Circuits, the Federal Circuit, and was recently applied by the District Court in the D.C. Circuit. Under this approach, the courts examine whether a *neutral observer* would construe the statements as a serious expression of intent to inflict bodily harm.¹⁷³

In contrast, the Second Circuit has articulated a true threat test that requires that the judge make the initial determination whether a defendant's communication is a true threat rather than speech protected by the First Amendment.¹⁷⁴ To qualify as a true threat, a statement must be so "unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose and imminent prospect of execution."¹⁷⁵ Once a statement meets this test, it is no longer protected speech and can be submitted to the jury.¹⁷⁶ Once such a showing is made, the government need prove only that the defendant intended to transmit the communication and that a reasonable person familiar with

169. Blakey & Murray, *supra* note 5, at 938.

170. *Id.* at 938-39.

171. *Id.* 940-70 (citing *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002); *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997); *United States v. Whiffen*, 121 F.3d 18 (1st Cir. 1997); *United States v. Kosma*, 951 F.2d 549 (3d Cir. 1991); *United States v. Hoffman*, 806 F.2d 703 (7th Cir. 1986)).

172. *Id.* at 970-82 (citing *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996); *United States v. Maisonet*, 484 F.2d 1356 (4th Cir. 1973); *United States v. Patillo*, 438 F.2d 13 (4th Cir. 1971) (en banc)).

173. *Id.* at 982-1002 (citing *United States v. Morales*, 272 F.3d 284 (5th Cir. 2001); *Metz v. Dep't of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986); *United States v. Callahan*, 702 F.2d 964 (11th Cir. 1983); *United States v. Adams*, 73 F. Supp. 2d 2, 3 (D.D.C. 1999) (District Court found that "the defendant's intention or ability to carry out the threat is irrelevant. The statute is violated so long as a reasonable person, hearing the threat, would consider it a serious expression of an intent to kill the President," thus suggesting a possible move away from the speech-protective approach used by the D.C. Circuit thirty years earlier in *U.S. v. Alexander*, 418 F.2d 1203 (D.C. Cir. 1969), discussed *infra* at 197).

174. *Id.* at 1003-06 (citing *United States v. Francis*, 164 F.3d 120 (2d Cir. 1999); *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976)).

175. *United States v. Francis*, 164 F.3d 120, 123 (2d Cir. 1999) (quoting *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976)).

176. *Id.* at 123.

the context of the communication would perceive it as threatening. The government need not prove that the defendant actually intended the statement to be threatening.¹⁷⁷

In the Sixth Circuit, the circuit court appeared to have adopted an objective, hearer-based approach to true threats. Nonetheless, in a recent decision, a district court in the Sixth Circuit relied on a standard similar to the standard adopted in the Second Circuit, requiring “an unequivocal, unconditional, immediate and specific threat conveying an imminent prospect of execution” for a statement to be a true threat unprotected by the First Amendment.¹⁷⁸ The Court of Appeals affirmed the lower court decision dismissing the indictment, but declined to address the First Amendment issues raised by the parties.¹⁷⁹

Blakey and Murray strongly criticize the use of an objective standard for evaluating whether certain speech constitutes a true threat.¹⁸⁰ They also criticize the courts’ reliance on jury verdicts for determining whether certain speech is threatening, arguing that such determinations should be questions of law for the judge to decide.¹⁸¹ Finally, in reviewing the Ninth Circuit’s decision in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, they argue against the use of “context” in determining whether a statement was threatening, especially when it involves a context over which the speaker, in that case a pro-life activist, has no direct control.¹⁸²

This Article focuses more narrowly on threats against the President and other high-ranking government officials. Much of the true threat case law involves threats to the President under 18 U.S.C. § 871. A smaller but significant number of cases involve threats to the Vice President or presidential successors under § 871, or threats to the President’s family or to former Presidents and their families under 18 U.S.C.

177. *Id.*

178. *Id.* at 1009 (citing *United States v. Baker*, 890 F. Supp. 1375, 1385 (E.D. Mich. 1995), *aff’d on other grounds sub nom.*).

179. *Id.* at 1009 (citing *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997)).

180. *Id.* at 1062-63.

181. *Id.* at 1054.

182. *Id.* at 1078-81.

§ 879.¹⁸³ Another group of cases involve threats under § 876.¹⁸⁴ The remainder of this section will examine several cases at the borderline between protected speech and true threats. Although I will focus on threats to the President, I also will look at cases involving politically charged language that led to prosecutions under one of these threat statutes. I will examine a post-September 11 district court case, *United States v. Lewis*,¹⁸⁵ from the Southern District of West Virginia, which would appear to reflect the predominant approach currently used by the circuits. In the following section, I discuss the Supreme Court's decision last term in *Virginia v. Black*,¹⁸⁶ which may breathe new life into the speech-protective version of the true threat doctrine articulated in *Watts*.

While I agree with Blakey and Murray that the First Amendment demands that a court require the prosecution to prove a subjective intent to threaten rather than apply the negligence standard used by most courts, I disagree that the question of whether certain speech is a true threat is solely a question of law for the judge to decide. I share Schauer's perspective that we need to be sensitive to restrictions on political speech by unaccountable government officials. As Schauer writes, "We rely on notions of popular sovereignty while restricting the people's ability to make any of the important decisions about how our leaders will be controlled."¹⁸⁷ The Peter Zenger case stands for the proposition that, at a minimum, juries should retain the ability to check the most extreme abuses of government. Leaving the decision of whether

183. Title 18 USC § 879(a) provides that:

Whoever knowingly and willfully threatens to kill, kidnap, or inflict bodily harm upon — (1) a former President or member of the immediate family of a former President; (2) a member of the immediate family of the President, the President-elect, the Vice President, or the Vice President-elect; (3) a major candidate for the office of President or Vice President or a member of the immediate family of such candidates; or (4) a person protected by the Secret Service under section 3056(a)(6); shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 879(a) (2000).

184. Title 18 USC § 876(c) provides that:

Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both. If such a communication is addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, the individual shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 876(c) (2002).

185. 220 F. Supp. 2d 548 (S.D. W. Va. 2002).

186. 123 S. Ct. 1536 (2003).

187. Schauer, *supra* note 7, at 782.

certain speech is a true threat to an unelected and unaccountable public official is arguably as much a threat to freedom of expression as leaving the decision to the passions of a jury.

Lower courts, however, largely have ignored *Watts*' speech-protective standard. Soon after the Supreme Court issued its *Watts* decision, the Ninth Circuit and D.C. Circuit handed down widely varying decisions interpreting 18 U.S.C. § 871 in light of *Watts*. In *Roy v. United States*,¹⁸⁸ decided four months after *Watts*, the Ninth Circuit made little attempt to distinguish *Watts*, adopting a standard that has survived in the circuit to this day and which is even cited by the U.S. Attorney's Office as the proper standard for prosecuting perceived threats.¹⁸⁹ The court construed the statute's willfulness requirement "to require only that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of the President."¹⁹⁰

The Ninth Circuit upheld the conviction of Richard Roy, a private in the U.S. Marine Corps who was stationed at Camp Pendleton waiting to be flown to Vietnam. At the last minute and against his wishes, he was reassigned to a post in the United States. The night before the President was scheduled to visit the base, Roy was joking with other Marines about the President's visit and how they were going to "get him with cannons and how everybody was going to shoot them off."¹⁹¹

Roy then went outside the barracks to a pay phone, picked up the receiver, and spoke to the telephone operator. The telephone operator testified that Roy said, "Tell the President that he should not come aboard the base or he would be killed." Roy testified that he said, "Hello, baby. I hear the President is coming to the base. I am going to get him."¹⁹² The telephone operator held the line to attempt to identify the caller. When Roy picked up the phone again, she asked for the caller's name, and Roy gave a fictitious name. He also testified that he told her that the statement about the President was a joke.¹⁹³ The call was eventually traced to Roy, who was awakened early that morning, taken into custody and charged and convicted with threatening the

188. 416 F.2d 874 (9th Cir. 1969).

189. See U.S. DEP'T OF JUSTICE, 9 U.S. ATTORNEY'S MANUAL § 1530 (Oct. 1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm01530.htm.

190. *Roy*, 416 F.2d at 877.

191. *Id.* at 875.

192. *Id.*

193. *Id.* at 876.

President.¹⁹⁴

In upholding the conviction, the Ninth Circuit appeared to make virtually no attempt to distinguish the facts of *Roy* from those in *Watts*, or to examine the case, as *Watts* requires, against the background of the First Amendment. Rather, the court simply found that the trial court was reasonable in interpreting Roy's statement that "I am going to get him" as a threat to take the life or inflict bodily harm on the President. The court looked at the legislative purpose of the statute, which was not only to prevent assaults on the President but to prevent the "detrimental effect upon Presidential activity and movement that may result simply from a threat upon the President's life."¹⁹⁵ Thus, the court, in briefly addressing the Supreme Court's statement in *Watts* that it had "grave doubts" about an approach that would impose liability based on the *apparent* intent of the speaker, appeared to rely on policy arguments in favor of protecting the President from perceived threats.¹⁹⁶

In contrast, two months earlier in *Alexander v. United States*¹⁹⁷ the D.C. Circuit reversed a conviction based on facts similar to those in *Roy* and remanded the case for a new trial. In this case, Alexander, who had been drinking heavily, made five successive calls to the White House on the evening of July 23, 1966.¹⁹⁸ The calls, lasting about 50 minutes, were directed to Secret Service agents, who taped them.¹⁹⁹ During those 50 minutes, Alexander made six statements of a threatening nature.²⁰⁰ "Typical statements were 'If I had a gun I would blow President Johnson's brains out' and 'Do you think I wouldn't do it if I had the artillery to do it with?'"²⁰¹ "The conversation also was interspersed with discussions of the 'war in Viet Nam,' the 'Russians,' and other controversial political topics."²⁰² The agents on the phone asked Alexander for his name, address, and phone number and he agreed to await the arrival of other agents.²⁰³ He was still in conversation with the first group of agents when the latter arrived to take him into custody. The agents detected the odor of alcohol, but concluded that he was in control of himself when he made the calls.²⁰⁴ Alexander was convicted of threatening the President under 18 USC § 871. His only defense was that he

194. *Id.*

195. *Id.* at 877.

196. *Id.* at 876-77 n.8.

197. *Alexander v. United States*, 418 F.2d 1203 (D.C. Cir. 1969).

198. *Id.* at 1204.

199. *Id.*

200. *Id.*

201. *Id.* at 1206 n.17.

202. *Id.* at 1204.

203. *Id.*

204. *Id.* at 1204-05.

was too intoxicated to form the specific intent to commit the crime.²⁰⁵

While Alexander's appeal was pending and shortly after oral argument, the D.C. Circuit upheld Watts' conviction, and Watts' case was appealed to the Supreme Court.²⁰⁶ The D.C. Circuit deferred its disposition of Alexander's case pending the Supreme Court decision in *Watts*; it issued its decision two months after *Watts* was decided.²⁰⁷ Unlike the Ninth Circuit's decision in *Roy*, the D.C. Circuit's *Alexander* decision closely followed the Supreme Court's reasoning in *Watts*. The D.C. Circuit found that it was necessary to determine whether Alexander's statements constituted a true threat in light of the Supreme Court's finding in *Watts* that Watts's statements "were a 'kind of crude offensive method of stating a political opposition to the President' which did not amount to a 'threat.'"²⁰⁸ It acknowledged the Supreme Court's warning in *Watts* that courts must interpret the language Congress chose against the background of the First Amendment and the principle that "'debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"²⁰⁹

The D.C. Circuit found that appellant was entitled to have the issue of whether his statement constituted a true threat submitted to a jury.²¹⁰ It found that a jury could have considered the defendant's statements to be political "hyperbole, expressing strong disagreement with the President and his policies, rather than as threats upon his life."²¹¹ The court also noted that the appellant had cooperated in informing the Secret Service agents of his whereabouts and waiting for their arrival, thus suggesting a less ominous motive.²¹² Noting the fact that appellant's third-grade education and excessive drinking suggested that he may have been expressing his beliefs in an "unaccustomed way,"²¹³ the court reversed the case and remanded it to the district court for a new trial.²¹⁴

These two cases, both decided in 1969, the same year as *Watts*, not only raise the question of what the proper standard should be for determining what constitutes a true threat, but also who should decide. In *Hustler Magazine, Inc. v. Falwell*,²¹⁵ Chief Justice Rehnquist expressed

205. *Id.* at 1204.

206. *Id.* at 1205.

207. *Id.*

208. *Id.* at 1205 (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)).

209. *Id.*

210. *Id.* at 1207.

211. *Id.* at 1206-07.

212. *Id.* at 1207.

213. *Id.*

214. *Id.*

215. 485 U.S. 46 (1988).

concern that a rule based on the outrageousness of certain speech would have an inherent subjectiveness that would allow a jury to impose liability based on its tastes or views, or its like or dislike for a particular expression.²¹⁶ His decision in *Hustler* mirrors concerns expressed by many First Amendment proponents that leaving the decision of what constitutes a true threat to a jury would strike a devastating blow to free speech. Yet the facts of these cases and the cases discussed below suggest that there may be circumstances where a properly instructed jury of one's peers would be more likely to view crude statements condemning political leaders as expressions of political opposition rather than a true threat. Contrary to Blakey and Murray's argument, I suggest that a properly instructed jury applying a subjective intent standard is equipped to determine whether certain speech constitutes a true threat. I argue, however, that the trial judge should make a threshold determination of whether sufficient evidence that the statement was intended as a threat exists before submitting the question to a jury.

How has the true threat test fared in recent years? Perhaps one of the most in-depth yet disappointing analyses of the true threat test is the Third Circuit's decision in *United States v. Kosma*.²¹⁷ The court upheld the conviction of Louis Kosma for making threats against President Reagan, applying an objective, reasonable person standard in interpreting the language of 18 U.S.C. § 871.²¹⁸ This case is significant because the defendant was charged under both 18 U.S.C. § 871 for making a threat against the President and under 18 U.S.C. § 879 for making a threat against a former President.²¹⁹ Even though both statutes require that a defendant have acted "knowingly and willfully" in making a threat, the district court found Kosma guilty of violating § 871 under an objective, reasonable person standard, but not guilty of violating § 879, because § 879 requires a showing of subjective intent; that is, that the maker intended the statement to be a threat.²²⁰ Based on psychiatric testimony, the district court found that Kosma did not intend the letter sent to ex-President Reagan on May 10, 1990, to be a threat, thus Kosma could not be convicted under § 879.²²¹ He could, however, be convicted under 18 USC § 871, the court found, because a "*reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to*

216. *Id.* at 55.

217. 951 F.2d 549 (3d Cir. 1991).

218. *Id.* at 557-59.

219. *Id.* at 552.

220. *Id.*

221. *Id.*

inflict bodily harm upon or to take the life of the President."²²²

The facts of the case demonstrated, however, that Kosma was not a reasonable person, thus raising serious questions about whether the objective, speaker-based test was appropriate in the context of criminal prosecutions. In fact, recognizing this, the government had moved to dismiss the complaint against Kosma without prejudice in October 1988, premised upon his agreeing to receive in-patient psychiatric care.²²³ When Kosma violated the terms of his agreement, the charges were reinstated.²²⁴

Kosma's attorney argued that Kosma's letters to the President, though crude, offensive and inane, did not constitute true threats but rather protected political speech under the First Amendment. He argued that the letters were Kosma's "unique way of commenting on President Reagan's fitness for office and his Administration's policies."²²⁵ The first communication was a postcard postmarked March 2, 1988, and addressed to President Reagan "C/O Ye Ol Whitehouse."²²⁶ The postcard stated:

Mr. Reagan: You are hereby invited to PHILADELPHIA. We are going to give you a 21 Gun-Salute. 21 guns are going to put bullets thru your heart & brains. You are a Disgrace to the Air-Force. You are a Disgrace to Teddy Roosevelt. You are a Disgrace to John F. Kennedy. You are a Disgrace to Nancy Reagan. . . . You are in Contempt of EVERYTHING that I represent, and standby, and believe. Officially: an Act of Contempt of Court. Your name is going to be removed from ALL documents, and books. OFFICIALLY: you were NEVER the "president" of anything!!²²⁷

Similar letters and mailgrams were sent to President Reagan and his press secretary, Marlin Fitzwater, in April and July, accusing Reagan of Crimes against Humanity, calling him "Lucifer" and "Saten," [sic] and imposing an official death sentence because "impeachment is too lienient [sic] for you."²²⁸

Despite Kosma's attorney's arguments that his speech was protected by the First Amendment, the court concluded that "there was no overtly political context for Kosma's letters."²²⁹ In distinguishing *Watts*, it found that "Watts' statements were made on the grounds of the

222. *Id.* at 557 (quoting *Roy v. United States*, 416 F. 2d 874, 877-78 (9th Cir. 1969) (emphasis in original)).

223. *Id.* at 552.

224. *Id.*

225. *Id.* at 553.

226. *Id.* at 550.

227. *Id.* at 550.

228. *Id.* at 551.

229. *Id.* at 554.

Washington Monument during a political rally in which police brutality was discussed" while Kosma, in contrast, "mailed his letters unsolicited to the President."²³⁰ Moreover, the court concluded that Kosma's "invitations" to Philadelphia "were not as conditional as those in *Watts*," because Kosma "specified the precise date, time and place of the President's '21 gun salute.'"²³¹ Third, while Watts directed his remarks at a group that laughed when he suggested he would kill President Johnson, the Third Circuit doubted that the staff of the White House mailroom was laughing when they received Kosma's letters.²³² The court noted that many courts of appeal had found a wide range of threats to be unprotected, including threats against the President.²³³ The court found that whether a speaker's language constitutes a threat was a matter to be decided by the trier of fact.²³⁴

The court then went on to examine the appropriate standard for judging a true threat. It rejected a subjective test as making it considerably more difficult to prosecute threats against the President.²³⁵ In so doing, however, it appears to have misconstrued the subjective standard, interpreting it "to require proof that the defendant made the alleged threat with specific intent to execute it."²³⁶ More recently, courts have defined the subjective standard as requiring proof that the defendant intended his or her statement to be a threat, regardless of whether the speaker intended to carry out the threat.²³⁷

In *Kosma*, the government did not challenge the district court's interpretation of § 879 as requiring subjective intent.²³⁸ Nor did the district court's opinion explain why § 879 should be treated differently.²³⁹ In a footnote, the Third Circuit briefly noted that there is arguably less reason to be concerned from a national security standpoint when a threat is made against a former President, thus justifying a less rigorous objective, reasonable person standard in evaluating threats against a sitting President.²⁴⁰ As in *Roy*, the court appeared to be relying on policy arguments in favor of an objective test, rather than a rigorous application of the threat statute consistent with the First Amendment.

230. *Id.*

231. *Id.*

232. *Id.* at 554.

233. *Id.* at 554-55.

234. *Id.* at 555.

235. *Id.* at 556.

236. *Id.*

237. *Id.* See, e.g., *United States v. Gordon*, 974 F.2d 1110, 1117 (9th Cir. 1992).

238. *Kosma*, 951 F.2d at 552 n.4.

239. *Id.* at 552 n.5.

240. *Id.*

A year later, in *United States v. Gordon*,²⁴¹ in a case applying 18 USC § 879 to another threat against ex-President Reagan,²⁴² the Ninth Circuit appeared to adopt a standard for evaluating true threats which considered not only whether a reasonable person would foresee the statement to be threatening, as required under *Roy*, but also, interpreted the “knowingly and willfully” language in the statute to require that the speaker have a subjective intent to make a threat.²⁴³ The court clarified the reasons for imposing a subjective standard; in citing to the legislative history, it found that Congress, in passing 18 USC § 879, had construed “knowingly and willfully” to require some evidence that the maker intended the statement to be a threat.²⁴⁴

It should be noted, however, that the requirement that a threat against the President be made “knowingly and willfully” in 18 U.S.C. § 871 is virtually the same as the language in 18 U.S.C. § 879, a more recent statute dealing with threats to the President’s family, and to former Presidents and their families. Yet, based on the legislative history behind § 879, the latter statute has been interpreted as requiring some showing that the speaker have a subjective intent to make a threat.²⁴⁵ In contrast, most circuits, including the Third Circuit in *Kosma*, still interpret 18 U.S.C. § 871 to require only a general intent to make the statement, rather than a specific intent to threaten.²⁴⁶

The distinction the lower courts have drawn between the intent requirements in § 871 and § 879, however, appears to be a distinction without a real difference. Both sections use the same language requiring that a defendant knowingly and willfully made a threat. Moreover, § 871 was first passed in 1916, during a very dark period in the nation’s First Amendment history,²⁴⁷ while § 879 was passed subsequent to the Court’s decision in *Watts* thus explicitly integrating the Court’s ruling. The Court in *Watts*, in finding § 871 constitutional on its face, interpreted the statute consistent with the First Amendment and the Court’s

241. 974 F.2d 1110 (9th Cir. 1992).

242. *Id.* at 1114. Gordon, who had completed a year of law studies at Boalt Hall in Berkeley, California, broke into former President Reagan’s home in California while he was absent. When apprehended by the Secret Service, he repeatedly told them that Reagan was the “anti-Christ” and that Gordon had to kill the anti-Christ. *Id.* at 1113.

243. *Id.* at 1117.

244. *Id.* at 1117 (citing H.R. REP. NO. 725, 97th Cong., 2d Sess. 4 (1982)).

245. *See, e.g., id.*; *United States v. Kosma*, 951 F.2d 549, 552 (3d Cir. 1991).

246. *See Kosma*, 951 F.2d at 557 (“In short, we believe that section 871 was intended to criminalize the mere utterance of a true threat, rather than the defendant’s intention to carry out the threat.”).

247. This was the same period when Congress passed the Espionage Act of 1918 outlawing speech critical of the government’s war effort. It was also the period when Eugene Debs’s conviction for sedition for criticizing World War I was upheld by the U.S. Supreme Court. *See Debs v. United States*, 249 U.S. 211 (1919).

evolving jurisprudence in this area. Moreover, the legislative history of § 879, in interpreting the meaning of “knowingly and willfully,” noted the doctrinal confusion among the lower courts regarding the *mens rea* requirement and could be read as applying to true threats in general.²⁴⁸

The most recent decision involving a threat to the President was in *United States v. Lewis*,²⁴⁹ a decision of the district court for the Southern District of West Virginia. The evidence showed that Edward Lee Lewis sent five letters in January 2002 in the midst of the anthrax scare, each of which contained an unidentified white powder, a cigarette butt, and a photocopied handwritten note.²⁵⁰ Letters were addressed to a private citizen, a county judge, a district court judge, the Governor of West Virginia, and President George W. Bush, and all but the letter to the private citizen read, “I were you [sic], I’d change my attitude.”²⁵¹ All of the persons exposed to the mailings believed that they were exposed to the lethal anthrax virus.²⁵²

Lewis was indicted on four counts of mailing threatening communications in violation of 18 USC § 876 (2002), one count of mailing a threat to the President in violation of 18 U.S.C. §§ 871 & 2(b) (2002), and one count of being a felon in possession of a firearm.²⁵³ At the close of the government’s evidence, the defendant timely moved for judgment of acquittal, which was denied.²⁵⁴ Later, after the jury became deadlocked, he moved again for acquittal or, alternatively, for a new trial on various grounds. Among these grounds, the defendant contended that the communications could not reasonably be considered threatening.²⁵⁵

The district court disagreed, finding that in the context of the post-September 11 anthrax outbreaks, the mailing of a powdery substance through the postal system could be interpreted as a threatening form of

248. See H.R. REP. NO. 725, 97th Cong., 2d Sess. 4 (1982) (“The Committee is aware that the term ‘knowingly and willfully’ as used in section 871 has not been uniformly construed by the courts With regard to section 879, the Committee recognizes the need to protect the safety of protectees of the Secret Service and their ability to function free of fear. Moreover, the Committee recognizes the fundamental interests shared by all Americans in free and uninhibited speech, especially where public figures are concerned. Therefore, the Committee construes a threat that is ‘knowingly and willfully’ made as one which the maker intends to be perceived as a threat regardless of whether he or she intends to carry it out.”).

249. 220 F. Supp. 2d 548 (S.D. W. Va. 2002).

250. *Id.* at 549.

251. *Id.* It turned out that the photocopied note was taken from a letter that Lewis’s ex-girlfriend, Gloria Fields, had sent to him. The return addresses on each envelope Lewis sent bore Fields’s name. When questioned about the letters, Fields denied sending them, but admitted that they were photocopies of her handwriting from a letter she had sent to Lewis. This led the investigators to Lewis. *Id.* at 549-50.

252. *Id.* at 549.

253. *Id.* at 550.

254. *Id.*

255. *Id.*

symbolic speech.²⁵⁶ The court adopted an objective, listener-based approach, finding that a reasonable recipient would interpret the mailed communication as a threat of injury.²⁵⁷ It denied the defendant's motion for acquittal and for a new trial.²⁵⁸

By 2003, virtually all of the circuit courts, rather than looking at whether a speaker had the subjective intent to make a threat under § 871, applied a variety of "reasonable person" standards to the question of whether a speaker had "knowingly and willfully" made a threat. In *Watts*, the Supreme Court in dicta had indicated that it had "grave doubts" that the willfulness requirement would be satisfied if a speaker "voluntarily uttered the words with 'an apparent determination to carry them into execution.'"²⁵⁹ Nonetheless, it indicated the possibility that such an interpretation might be correct, thus opening the door to conflicting constructions.²⁶⁰ Skelly Wright, in his dissent in *Watts's* case before the D.C. Circuit, had interpreted the "knowingly and willfully" language to require a subjective intent to carry out the threat.²⁶¹ Virtually all the circuits have rejected this position.²⁶² Similarly, the Supreme Court recently found in *Virginia v. Black* that a speaker need not actually intend to carry out the threat for it to constitute a true threat.²⁶³ Nonetheless, the lower courts have confused a subjective intent to carry out a threat with a subjective intent that a statement be threatening, finding that for purposes of § 871 and threats to the President that a "reasonable person" standard can apply.

In short, there is still a great deal of doctrinal confusion among the courts, with some courts looking at whether a reasonable speaker would perceive the statement to be threatening while other courts look at how a reasonable listener would perceive a statement. To add to the confusion, the Third Circuit suggested in *Kosma* that the "knowingly and willfully" language in § 871, regarding threats to the President, has a different meaning than the "knowingly and willfully" language in § 879, regarding threats to former Presidents, family members, and other government officials.²⁶⁴ The Third Circuit in *Kosma* acknowledged that § 879, which was passed subsequent to *Watts*, requires some evidence of subjective intent, but concluded that § 871 did not require subjective intent,

256. *Id.* at 558.

257. *Id.* at 559.

258. *Id.* at 560.

259. *Watts v. United States*, 394 U.S. 705, 707-08 (1969) (quoting *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918)).

260. *Id.* at 708.

261. *Watts v. United States*, 402 F.2d 676, 687 (D.C. Cir. 1968) (Wright, J., dissenting).

262. See *United States v. Kosma*, 749 F. Supp. 1392, 1398-99 (E.D. Pa. 1990).

263. 123 S. Ct. 1536, 1548 (2003).

264. 951 F.2d at 553-558.

despite the language in *Watts* that § 871 must be viewed against the background of the First Amendment.

B. *Virginia v. Black and the Revitalization of the True Threat Doctrine*

The Supreme Court's recent decision in *Virginia v. Black*²⁶⁵ may shed some light on the proper standard for evaluating whether speech or symbolic conduct rises to the level of a true threat. Justice O'Connor has left a legacy of carefully crafted compromise decisions, and *Virginia v. Black*, a consolidated case involving two separate prosecutions for cross burning with intent to intimidate, is no exception. In a plurality decision written by Justice O'Connor, the Supreme Court ruled that a state, consistent with the First Amendment, may ban cross burning carried out with an intent to intimidate.²⁶⁶ The Court also found, however,

265. 123 S. Ct. 1536 (2003).

266. *Id.* at 1549. This case is most likely to generate a great deal of scholarship regarding whether its ruling truly was distinguishable from the Court's earlier decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). This Article does not focus on that aspect of the Court's opinion, but briefly summarizes the Court's analysis and some of the questions it has raised. The Virginia Supreme Court had invalidated the Virginia statute on the grounds that it discriminated on the basis of content and viewpoint in violation of the Court's *R.A.V.* holding. In *R.A.V.*, the Court held unconstitutional a local ordinance that banned certain symbolic conduct, including cross burning, because the ordinance specifically targeted only those individuals who provoked violence on the basis of "race, color, creed, religion, or gender." The Court in *R.A.V.* found that the ordinance was unconstitutional as a content-based restriction on expression because the ordinance imposed "special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. The Court in *Virginia v. Black* distinguished its decision in *R.A.V.* on the basis that that the Virginia law in question outlawed all forms of cross burning when the purpose was to intimidate, not merely cross burning done on a particular basis such as race, color, creed, religion, or gender. *Black*, 123 S. Ct. at 1549. At least one legal scholar has suggested that this reasoning was somewhat disingenuous, since in virtually all cases, cross burning is done to intimidate on the basis of race, color, or creed. See *Key Rulings from Supreme Court Term Reviewed*, University of Virginia School of Law (Sept. 16, 2003), at http://www.law.virginia.edu/home2002/html/news/2003_fall/supctrv.htm. ("'Very few people burn crosses for warmth or illumination,' [Dean John Jeffries] observed. 'Throughout our history, crosses have been burned for the purpose of frightening and intimidating people and everyone knows it' . . . [Jeffries] said the court tried to draw a distinction between a law that forbid [sic] cross burning when it specified race, creed or gender for the victim (unconstitutional) and the Virginia one that applied universally (constitutional). The distinction ignores the cultural history of cross burning, he said, which is clearly about race and religion.") Nonetheless, the Court pointed out that in one of the two cases in question, "it is at least unclear whether the respondents burned a cross due to racial animus." *Black*, 123 S. Ct. at 1549. In *Black*, the Court noted that the defendants burned a cross in their African-American neighbors' yard because the neighbors had complained about the presence of a shooting range in one of the defendants' yards, not because of any racial animus. *Id.* The Court also noted that the First Amendment does not prohibit all types of content discrimination. In particular, the Court noted that where "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or view point discrimination exists." *Id.* For example, quoting *R.A.V.*, the Court noted that while threats of violence are outside the First Amendment, the federal government could choose to "criminalize only those threats of violence directed at the President . . . since the reasons why

that, as applied, the evidentiary provision in the Virginia statute, under which cross burning is *prima facie* proof of intimidation, was unconstitutional because it proscribed speech protected under the First Amendment.²⁶⁷ In so doing, the decision appears to have clarified the standard for what constitutes a true threat, reaffirming the Court's decision in *Watts*.²⁶⁸

In Part III of the Court's decision, the Court notes that the First Amendment permits a state to ban a true threat.²⁶⁹ The Court, citing *Watts*, defines true threats as "those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."²⁷⁰ The Court indicates that a speaker need not actually intend to carry out the threat.²⁷¹ The prohibition on true threats is intended to "protect 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."²⁷²

Nonetheless, the Court suggests, albeit implicitly, that the speaker must intend to make a threat for the threatening language or conduct to constitute a true threat.²⁷³ The Court identifies "intimidation" as 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

threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." *Id.* (citing *R.A.V.*, 505 U.S. at 388). Similarly, the Court noted, just as a state may regulate only that obscenity which is the most obscene, "[i]nstead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence." *Black*, 123 S. Ct. at 1549.

267. Virginia's cross-burning statute, § 18.2-423, provides:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

....

Any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons.

VA. CODE ANN. § 18.2-423 (1996).

268. In *Black*, the Court makes specific reference to the true threat doctrine as applied to threats against the President in explaining that the First Amendment does not prohibit all types of content discrimination. The Court noted that all threats of violence are outside the First Amendment, and that, just as Congress could choose to criminalize only those threats of violence directed against the President because such threats "have special force when applied to the President," the states could choose to single out cross burning, as opposed to all intimidating messages, in light of its long history as a signal of impending violence. *Black*, 123 S. Ct. at 1549.

269. *Id.* at 1547.

270. *Id.* at 1548.

271. *Id.*

272. *Id.* (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

273. *Id.*

death.”²⁷⁴ Cross burning involves intimidation if it is “intended to create a pervasive fear in victims that they are a target of violence.”²⁷⁵

Thus, cross burning is proscribable as a true threat where it is done with the intention of intimidating. Where, however, cross burning is not done to intimidate, but is used, for example, as a statement of ideology, a symbol of group solidarity, or a ritual at Klan gatherings to represent the Klan itself, its use is protected under the First Amendment, even where the effect of the cross burning is to intimidate.²⁷⁶ In Part IV of its *Black* decision, the Court concludes that the *prima facie* provision fails to distinguish among these different types of cross burnings, and is thus unconstitutional because it can “‘skew jury deliberations toward convictions in cases where the evidence of intent to intimidate is relatively weak and arguably consistent with a solely ideological reason for burning.’”²⁷⁷ The Court concludes that the “First Amendment does not permit such a short cut.”²⁷⁸

Justice O'Connor's plurality decision relies on two separate majorities of the Court to reach its result, and on separate concurrences from justices dissenting as to other parts of the opinion. The ultimate outcome, however, is clear: One cluster of six justices — Justices O'Connor, Rehnquist, Stevens, Scalia, Breyer, and Thomas — found that cross burning could be proscribed. A separate cluster of seven justices — Justices O'Connor, Rehnquist, Stevens, Breyer, Souter, Ginsberg, and Kennedy — found unconstitutional an evidentiary standard under which the act of cross burning was *prima facie* proof of intent to intimidate. Thus, seven justices, a substantial majority of the court, agreed that intent to intimidate cannot be inferred from the act of cross burning alone. Rather, whether a particular cross burning constituted a true threat depends on the facts of the case. Only the most conservative justices on the Court, Scalia and Thomas, would have upheld the *prima facie* evidence provision.²⁷⁹

Although *Virginia v. Black* did not involve threats to government officials, it has important implications for the application of the true

274. *Id.*

275. *Id.*

276. *Id.* at 1551

277. *Id.*

278. *Id.*

279. Justice Scalia argues in his dissent that the *prima facie* evidence provision is not inconsistent with the First Amendment because it does not preclude a finding by the jury that the speech was protected. Rather, the *prima facie* provision allows evidence of the cross burning to raise a presumption of fact that can be rebutted by the defendants with evidence to the contrary. *Id.* at 1552-53 (Scalia, J., dissenting). As noted above, Justice Souter argues that this presumption would allow for conviction where the “evidence of intent to intimidate is relatively weak, and consistent with an ideological basis for the burning.” *Id.* at 1561 (Souter, J., concurring).

threat doctrine in these cases as well. *Black* also calls into question the application of the objective, reasonable person standards applied by lower courts. In reaching its decision, the Court appeared to be reaffirming the high standard set forth in *Watts v. United States* for determining what constitutes a true threat. Furthermore, noting that all threats of violence are outside the First Amendment, the Court indicates, by way of example, that Congress could have chosen to criminalize only those threats directed against the President “since the reason why threats of violence are outside the First Amendment . . . have special force when applied to the President.”²⁸⁰ The Court uses this argument to support its position that a state can criminalize “cross burning” without criminalizing all forms of intimidating speech. The use of this particular example, rather than suggesting a different legal standard for judging threats against the President, underscores the Court’s position that the First Amendment permits the government to ban only a true threat. By rejecting a *prima facie* standard for finding intent to intimidate, based on the act of cross burning alone, the Court suggested that the government has the burden of proving that an intimidating act was intended to intimidate in order to be proscribable as a true threat.

VI. CONCLUSIONS

On July 21, 2003, when the Secret Service investigated Pulitzer Prize-winning cartoonist Michael Ramirez because of the cartoon he published the day before in the *Los Angeles Times*, the federal government demonstrated that it truly lacked a sense of humor. Ironically, Ramirez did not intend his cartoon to be an attack on George W. Bush, but rather, an attack on Bush’s detractors. Bush’s would-be executioner, who resembled South Vietnamese General Nguyen Ngoc Loan, wore a shirt with the word “Politics.” The cartoon was a scathing attack on those who sought to exploit the situation in Iraq to attack the character of the President, but the image of a foreign individual holding a gun to the Bush caricature’s head was enough to trigger a Secret Service investigation. Representative Christopher Cox, the Republican chair of the House Homeland Security Committee, remarked that the use of “federal power to attempt to influence the work of a political cartoonist for the *Los Angeles Times* reflects profoundly bad judgment.”²⁸¹ Cox demanded an apology and a promise that this would not happen again.²⁸²

As disturbing as this incident must have been for Ramirez and national news organizations across the country, the incident is important

280. *Id.* at 1549.

281. *Cartoon Prompts Inquiry*, *supra* note 24.

282. *Id.*

in drawing attention to how broad the powers of the Secret Service have become to investigate perceived threats. Furthermore, implicit in the above incidents is the message that if one engages in speech that attacks the President or other members of his Administration, the federal government will wield a heavy hand. The government's response to Glenn Given's editorial in the *Stonybrook Press* would seem to indicate an attempt by the government to label this form of political satire as a true threat. Similarly, its response to A.J. Brown's "Wanted" poster is equally disturbing. In both cases, the Secret Service was dispatched to determine whether these forms of expression constituted a true threat to the President.

It is conceivable that the Secret Service agents were relying on misinformation when they investigated Given, Brown, John Fischer, and Jesse Ethredge, or that they felt it was necessary to ensure that none of the targets of its investigations posed an actual threat to the President. The investigation of Michael Ramirez, however, hints at a more ominous motive. It underscores a pattern or practice of investigating individuals engaged in speech critical of the government for purposes of chilling that speech. Ironically, in the case of Ramirez, the Secret Service apparently did not even understand his cartoon, which was intended to be supportive of the Administration. Or perhaps it wanted to send a message to cartoonists and commentators everywhere not to engage in speech that satirizes or caricatures the current Administration. The White House's heavy-handed reaction to John Wooden's parody of Lynn Cheney only underscores such a motive.

The First Amendment enshrines the right to criticize government officials and those in the public eye. When *Hustler Magazine, Inc. v. Falwell* was before the Supreme Court, many journalists and political cartoonists warned that a decision in Falwell's favor would have a dangerous chilling effect on "editorialists, cartoonists, commentators, and comedians — in fact all those in the business of expressing their opinion about public figures."²⁸³ Historically, political satire has been a powerful vehicle for social criticism, often used by socially and politically marginalized groups. It is a literary device designed to ridicule or censure social and political abuses, and those in the public spotlight. It is often justified by those who employ it as serving a corrective role. It seeks to expose vice and hypocrisy in the hopes that the satirist's barbs will either sufficiently embarrass the target to recognize his or her vice and correct it, or cause the audience to recognize the need for social change.

Thus, recent efforts by the federal government to chill the speech of

283. See Reporters Committee Brief, *supra* note 74, at 6.

political cartoonists and satirists are particularly disturbing. Part II discussed recent surveys by the Freedom Forum's First Amendment Center, which indicated that while in the abstract the public supports the rights guaranteed in the First Amendment, nearly half of those surveyed believed that the First Amendment goes too far in the rights it guarantees.²⁸⁴ Another survey indicated that a significant percentage of Americans appear less willing to tolerate humor that they consider offensive.²⁸⁵ The Report concludes that people appear to be willing to "give up a little liberty in exchange for fewer hurt feelings."²⁸⁶

Schauer argues that "there seems little doubt that the views of contemporary juries in cases involving the claims of public officials and public figures against the press are in fact a roughly accurate mirror of the views of the population."²⁸⁷ If this is the case, then the above survey would tend to support the view of many proponents of the First Amendment that giving juries greater decisional power in free speech cases would deal a crippling blow to the First Amendment. Yet Schauer also argues that "by removing majorities from any meaningful input into the consideration of free speech issues, we run the risk that those majorities will cease to see free speech as something they ought to care about."²⁸⁸ He also argues that we cannot rely on notions of popular sovereignty while restricting the people's ability to make important decisions about how our leaders will be controlled.²⁸⁹

In true threat cases, judges should retain the power and responsibility to decide whether there is sufficient evidence of a subjective intent to threaten. I would call, however, for a standard of conditional relevancy derived from Rule 104 of the Federal Rules of Evidence that would send such questions to the jury once the judge makes the initial determination of sufficiency.²⁹⁰ Rule 104 of the Federal Rules of Evidence provides that preliminary questions, such as those concerning the admissibility of evidence, shall be determined by the court.²⁹¹ Section (b) of Rule 104 sets forth the standard for conditional relevancy. It provides that "[w]hen the relevancy of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condi-

284. See *State of the First Amendment 2002*, *supra* note 49, at 22.

285. See *Comedy and Freedom of Speech*, *supra* note 55, at 8.

286. *Id.* at 2.

287. Schauer, *supra* note 7, at 768.

288. *Id.* at 783.

289. *Id.* at 782.

290. See FED. R. EVID. 104.

291. *Id.* at 104(a).

tion.”²⁹² Such a standard is similar to the approach used by the Second Circuit in *United States v. Kelner*²⁹³ and reaffirmed in *United States v. Francis*,²⁹⁴ which held that in order to be a true threat, a statement must be so “unequivocal, unconditional, immediate and specific as to the person threatened as to convey a gravity of purpose and imminent prospect of execution.”²⁹⁵ Using this modified standard, once the judge has determined that sufficient evidence exists from which a reasonable jury could find a subjective intent to threaten, the evidence would be submitted to the jury. The jury would first determine whether the speaker had a subjective intent to threaten, and then determine whether a reasonable listener would have perceived the statement as a threat.²⁹⁶ Such a standard would balance the role of the judge and jury in such cases consistent with the First Amendment, while ensuring that jurors continue to play a meaningful role in serving as an essential check on unaccountable government officials.

This Article has demonstrated that political satire and parody often are important democratizing forces because they serve to engage the polity on some of the great social and political issues of our time. For this reason, the recent investigations of individuals who embrace satirical and outrageous speech suggest a major threat to freedom of expression. It is important that the new Department of Homeland Security ensure that, in light of the important First Amendment concerns at stake, Secret Service agents are trained in threat assessment, which takes into account the right to freedom of expression. The Secret Service’s investigative powers should not be used as a mechanism to chill speech critical of the President or his Administration.

If presented with the question, the courts might choose to adopt a contextual approach in distinguishing attacks on journalists from the investigation of private individuals, which often present less clear-cut cases. I would argue, however, that there is a danger in attempting to distinguish political satire and political hyperbole in the print and broadcast media from satirical and hyperbolic statements by private individuals. Such an approach would undermine one of the corrective and

292. *Id.* at 104(b). See also *Huddleston v. United States*, 485 U.S. 681, 690 (1988); *United States v. Branch*, 970 F.2d 1368, 1371 (4th Cir. 1992).

293. 534 F.2d 1020 (2d Cir. 1976).

294. 164 F.3d 120 (2d Cir. 1999).

295. *Id.* at 123.

296. In *Huddleston*, 485 U.S. at 690, the Court indicated that the trial court should examine all the evidence and decide whether the jury could reasonably find the conditional fact by a preponderance. It also noted that the trial court could allow the evidence in but at a later point decide whether sufficient evidence had been presented to permit the jury to make the requisite finding. If the court found that the proponent had failed to meet this minimal standard, it could instruct the jury to disregard the evidence. *Id.*

progressive purposes of political satire, which is to educate and provoke the polity to call for social and political change. Rather, the Supreme Court, when given the opportunity, should reaffirm its speech-protective holding in *Watts* and establish a legal standard consistent with *Virginia v. Black*, which would require the government to prove a subjective intent to threaten in order to establish a true threat. The Supreme Court should also recognize the importance of the jury system in serving as a popular check on abusive government practices that seek to chill speech, including outrageous speech, critical of government officials and their policies.