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Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After *Virginia v. Black*

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Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After *Virginia v. Black*

ADRIENNE SCHEFFEY*

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I. INTRODUCTION

After parking his car in the driveway, Brandon, a professional football player, turned to ensure he saw the signature hazard light flash when he pressed the “lock” button, indicating his car was locked. As he turned to walk inside, he felt a sharp pain shoot down his hamstring and thought to himself, “Man, my leg hurts. I hope it won’t keep me out of the game again next week.” Once inside, Brandon found himself thinking about the day’s game. It had been a good game, with his team winning 23-7, even though he had been unable to play because of his leg pain. Hoping to take his mind off of the game and his pain, he settled

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down on the couch to watch TV. Instinctively, Brandon pulled out his iPhone from his pocket and swiped through his apps. He pressed his thumb on the Twitter app, hoping to find that one of his friends had posted an interesting link to an article or a funny meme.¹ Instead, he found a slew of notifications—notifications from people he did not know, threatening his life over his unachieved football statistics.

After missing a game because of a hamstring injury, Brandon Jacobs, running back for the New York Giants, found himself in this situation,² resembling countless other professional athletes' experiences.³ In Jacobs' case, a fan sent out a tweet stating that if Jacobs did not "rush for 50 yards and 2 touchdowns," both Jacobs' and his family's lives would be in danger.⁴ Mere minutes after sending the first message, the user sent a second tweet, reaffirming that he meant what he said, declaring "thats [sic] yo life bruh and im [sic] not playing."⁵ Jacobs decided to show his followers what professional football players deal with and shared a screenshot of the tweets he had received.⁶ Soon after, the author of the tweets profusely apologized.⁷ Other professional football players have echoed that these incidents happen repeatedly.⁸ However, unlike Jacobs, most players brush the threats aside, believing the statements to be meaningless and therefore not worth more than a cursory glance.⁹ As another professional athlete, Nate Burleson wide receiver for the Detroit Lions explained, "[social media users are] using

1. A meme is a picture or image that projects a message, often through superimposed text. These pictures are often funny and frequently go "viral," meaning that they are rapidly shared by Internet users, typically on social media.

2. The details as to where Jacobs was when he received the tweet are fictional and were created by the author as an illustration.

3. See Dan Hanzus, *Brandon Jacobs Received Death Threat on Twitter*, NFL (Oct. 23, 2013), <http://www.nfl.com/news/story/0ap2000000268235/article/brandon-jacobs-received-death-threat-on-twitter> [hereinafter *Death Threat*]. Similarly, in December 2013, Matthew Stafford and his teammate, Calvin Johnson, received a tweet asserting that a fan had lost his fantasy football game by four points, and as a result he would shoot "four bullets for each [Calvin and Matthew]." See Ashley Dunkak, *Crazed Fantasy Football Fans Threaten Violence, 'Four Bullets for Each of You Bit****'*, CBS DETROIT (Dec. 19, 2013), <http://detroit.cbslocal.com/2013/12/19/crazed-fantasy-football-fans-threaten-violence-scare-players-off-social-media/> [hereinafter *Crazed Football Fans*]. The Twitter user's threats continued to escalate in subsequent tweets, with one tweet declaring "you should die if you can't catch and your [sic] a receiver." *Id.*

4. See *Death Threat*, *supra* note 3.

5. *Id.*

6. See *id.* Jacobs shared the tweets with other fans on his Twitter page to raise awareness of the threats athletes regularly receive. See *id.*

7. See *id.*

8. See *Crazed Football Fans*, *supra* note 3 ("The volume of hateful tweets is such that one does not have to look far to see individuals hurling expletives, encouraging a player to kill himself or even threatening a player . . .").

9. See *id.*

a screen as a buffer between them and the real world.’”¹⁰

Similarly, a British journalist received a bomb threat on her Twitter account from an anonymous user, with whom she had never had any previous communication, cautioning, “a bomb has been placed outside your home. It will go off at exactly 10:47 PM on a timer and trigger destroying everything.”¹¹ Unlike the aforementioned athletes, the British journalist felt obligated to report the threat and alerted authorities.¹² No bomb was found, but the police used countless resources to ensure the journalist’s safety.¹³ Like the athletes, the British journalist turned to the Internet with the information, asking her readers if she was right to have reported the threat, a threat she had actually believed lacked credibility.¹⁴

The British journalist described the threat as “cartoonish” to both the police, and later, her readers.¹⁵ In her article, she reflected that she never took the bomb threat seriously.¹⁶ So, if she did not feel threatened, should the tweet that she called the police about be considered a true threat under the law? What about the tweets sent to the football players? While many who receive threats on the Internet may disregard them as meaningless, our legal system often does not. As such, the difference between how individuals respond to threats and the way the law penalizes threats represents a pronounced tension between our current free speech jurisprudence and the statutes governing true threats.

The Free Speech Clause of the First Amendment¹⁷ represents the fundamental belief, espoused by our Founding Fathers, of a “profound national commitment . . . that debate on public issues should be uninhibited, robust, and wide open.”¹⁸ The Supreme Court has declined to extend protection, however, to speech that is “of such a slight social value as a step to truth that any benefit . . . is clearly outweighed by the social interest in order and morality.”¹⁹ Specifically, the Supreme Court permits restrictions on certain categories of speech including obscenity, fighting words, and true threats.²⁰ Accordingly, an individual’s right to

10. *Id.*

11. Catherine Mayer, *I Got a Bomb Threat on Twitter. Was I Right to Report It?*, TIME (Aug. 2, 2013), <http://world.time.com/2013/08/02/i-got-a-bomb-threat-on-Twitter-was-i-right-to-report-it/> [hereinafter *Bomb Threat*].

12. *See id.*

13. *See id.*

14. *See id.*

15. *Id.*

16. *See id.*

17. U.S. CONST. amend. I.

18. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

19. *R.A.V. v. St. Paul*, 505 U.S. 377, 399 (1992) (White, J., concurring) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

20. *See id.* (holding that the Supreme Court has longstanding precedent that “discrete

free speech is expansive but not absolute.²¹ Nevertheless, while broad categories of speech may be limited, the actual limits on speech currently permitted by the Supreme Court are minimal—allowing for broad protection of even valueless speech that may be outside the normal social bounds of good taste.²²

As a result, “in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”²³ In consequence, despite the fact that a tweet may be tasteless, or lack any societal value, these qualities alone do not provide a sufficient basis for proscription.²⁴ Instead, the presumption is in favor of protection unless the speech specifically falls into an unprotected class of speech.²⁵

As even speech of the lowest societal value is broadly protected, the need for a clear true threat standard is even more pressing.²⁶ Scholars note that true threat cases are becoming more prevalent in light of the expansion of ubiquitous access to the Internet and social media, because it is easier than ever before to disseminate information to large groups of people quickly, inexpensively, and for an extended or possibly indefinite period of time.²⁷ Moreover, courts have not addressed many of the free speech implications of widespread access to the Internet and social

categories of expression [are] proscribable on the basis of their content,” including child pornography; obscenity; time, place, and manner speech; and some but not all false statements).

21. See generally *Chaplinsky*, 315 U.S. at 571–72 (explaining that “it is well understood that the right of free speech is not absolute at all times and under all circumstances[, and that t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem”).

22. See *United States v. Stevens*, 559 U.S. 460, 470–72 (2010) (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.”). The Court in *Stevens* went on to state that the Supreme Court does not have “freewheeling authority to declare new categories of speech outside the scope of the First Amendment.” *Id.* at 472; see, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988) (protecting satirical speech in *Hustler* magazine that portrayed Reverend Jerry Falwell’s first sexual experience as “a drunken incestuous rendezvous with his mother in an outhouse”).

23. See *Boos v. Barry*, 485 U.S. 312, 322 (1988) (citing *Hustler Magazine, Inc.*, 485 U.S. at 56) (internal quotations omitted).

24. See *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 3 n.4 (D.D.C. 2012) (citing *Hustler Magazine, Inc.*, 485 U.S. at 48) (“[I]t goes without saying that the First Amendment applies to even the most tasteless of speech.”).

25. *Stevens*, 559 U.S. at 472.

26. *Hustler Magazine, Inc.*, 485 U.S. at 56 (holding that a cartoon crassly depicting a fictional account of Jerry Falwell’s first sexual encounter was protected).

27. Eric J. Segall, *The First Amendment, the Internet, and the Criminal Law, The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 TEX. TECH L. REV. 183, 184 (2011) (explaining that “the Internet is a game changer when it comes to criminal law and free speech [because of the author’s] belief that there is simply no pre-Internet analogy that allows speech to be disseminated so quickly, so cheaply, and to so many for such a long period of time”).

media.²⁸ Social media threats are not isolated to the professional football community or journalism communities.²⁹ New threats appear daily on Twitter, sometimes to celebrities, but other times the tweets are directed at average people—with less celebrity power to shame the speaker into apologizing.³⁰

Consequently, there is a pressing need for First Amendment jurisprudence to guide online speech as the Internet allows people to quickly, easily, and inexpensively reach a considerable number of people anonymously without regard to geographic location.³¹ This note focuses specifically on the need for a clear rule on the requisite level of intent required for speech to rise to the level of a true threat and therefore fall into the category of unprotected speech.³² While dictionaries define a

28. See generally *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (finding no precedent for the requisite level of scrutiny for analyzing Internet free speech issues).

29. A man, who sent over 8,000 mean-spirited tweets to a woman, including statements encouraging her to kill herself, was protected by the First Amendment when a court found that his tweets did not rise to the level of “true threats.” See Todd Wasserman, *Judge Rejects Twitter Cyberstalking Case*, CNN (Dec. 16, 2011), <http://www.cnn.com/2011/12/16/tech/web/stalking-on-Twitter-protected/>.

30. See *id.*; see also *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013) (finding a man’s Facebook post about his ex-wife to be a true threat), *cert. granted*, 134 S. Ct. 2819 (2014). Another example is that of the University of Alabama kicker who received death threats encouraging him to “drink bleach” or threatening to kill him and his family after he missed critical field goals in a school rivalry game. See *Alabama Kicker Gets Death Threats on Twitter Following Loss*, CBS NEWS (Dec. 3, 2013), <http://www.cbsnews.com/news/alabama-kicker-gets-death-threats-on-Twitter-following-loss/>. Aside from athletes, politicians have also been threatened via Twitter; for example, politician Ted Cruz attempted to negotiate a deal during the government shutdown of October 2013 and, in return, received Twitter death threats. See Margaret Chadbourn, *Police and FBI Probe Twitter Threat Against U.S. Senator Cruz*, REUTERS (Oct. 20, 2013), <http://www.reuters.com/article/2013/10/20/us-usa-cruz-twitter-idUSBRE99J09N20131020>. In another case, Selena Gomez received death threats based on her relationship with the popular teen icon Justin Bieber after pictures of the two in a loving embrace were released, exposing their relationship. See Jessica Derschowitz, *Selena Gomez Receives Death Threats over Justin Bieber Photos*, CBS NEWS (Jan. 4, 2011), <http://www.cbsnews.com/news/selena-gomez-receives-death-threats-over-justin-bieber-photos/>. Anna Gunn, a popular actress on the show “Breaking Bad” received countless threats on Twitter and Facebook based on fans’ hatred of the character she played on the show, *not* on her actual actions or personality. See Anna Gunn, Editorial, *I Have a Character Issue*, N.Y. TIMES, Aug. 24, 2013, at A21, available at <http://www.nytimes.com/2013/08/24/opinion/i-have-a-character-issue.html>. Finally, the list would not be complete without mention of at least *one* of the many Twitter death threats the President of the United States, Barack Obama, has received: “the secret service is gonna [sic] be defenseless once I aim the assault rifle at Baracks forehead,” tweeted a 21 year old who was later arrested for his tweets. See Carol Cratty, *North Carolina Man Accused of Twitter Threats to Kill Obama*, CNN (Sept. 6, 2012), <http://www.cnn.com/2012/09/06/justice/obama-threat-arrest>.

31. See Segall, *supra* note 27, at 185; *Bomb Threat*, *supra* note 11; see also *Petition for a Writ of Certiorari* at 8, *Jeffries v. United States*, 134 S. Ct. 59 (2013) (No. 12-1185) [hereinafter *Jeffries Petition for Certiorari*].

32. This note focuses on whether a speaker must have some subjective intent to threaten for a statement to constitute a true threat. The note will not focus on the standard for the speaker’s intent to communicate. Currently, *Virginia v. Black*, the most recent case to define true threats,

threat as “an expression of an intention to inflict evil, injury, or damage,” courts have been unable to settle on what this “expression of an intention” is.³³ This note will emphasize the need for clarity in this area of free speech in light of the ease of communicating, and therefore threatening, over the Internet, specifically in the context of true threats.³⁴ Furthermore, this note will assess the current strengths and weaknesses in the existing tests and will advocate for the test that appears to be best suited for digital communication.

In assessing true threat jurisprudence, Part II of this note addresses the backdrop for the underlying elements creating a tension in true threat jurisprudence. This Section includes an overview of both the existing social media landscape and Supreme Court precedent leading up to the most recent decision on true threats: *Virginia v. Black*.³⁵ Part III addresses the circuit split on the requisite intent needed for speech to constitute a true threat. This Section also addresses the confusion that has overwhelmed the circuit courts because of the murky Supreme Court precedent. Part IV analyzes how the current framework is ill-equipped to deal with rampant Internet threats and suggests an alternative by addressing flaws in the current precedent. This note concludes, in Part V, with a proposition for how courts can proceed in light of the fact that precedent provides no consistent test for determining what constitutes a true threat.³⁶ Courts will need to consider how they will address threats going forward. As a result of the increased incidence of issues involving Internet speech alongside ambiguous precedent, without clear true threat jurisprudence, courts risk stifling Internet speech.

provides the following definition: “True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” 538 U.S. 343, 359 (2003) (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)) (internal quotations omitted).

33. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 2382 (10th ed. 1999); see also *United States v. Jeffries*, 692 F.3d 473, 483–84 (6th Cir. 2012) (Sutton, J., dubitante) (stating that every dictionary definition of “threat” has an intent component). While not all threats that fall into the dictionary description of a threat are punishable by law, the courts still struggle with whether the intent of the speaker must be considered and to what extent. See *id.* at 478–79 (discussing different perspectives for interpreting threats); see also *Virginia v. Black*, 538 U.S. 343, 359 (2002) (citing *Watts*, 394 U.S. at 708) (finding that the goal of proscribing true threats is to protect individuals from “fear of violence and the disruption that fear engenders, as well as from the possibility that the threatened violence will occur”).

34. See *supra* notes 27–30 and accompanying text.

35. 538 U.S. 343 (2002).

36. See *infra* Part III.

II. BACKGROUND

A. *The Setting: Ubiquitous Social Media*

The prevalence of, and access to, widespread speech is unprecedented worldwide with millions of users communicating daily through social media.³⁷ Using Twitter as an example, as of January 2015, Twitter had over 284 million active monthly users around the world who send more than 500 million tweets per day.³⁸ Twitter allows people a kind of constant and immediate access to each other that they have never had before.³⁹ People can communicate with others in an essentially anonymous manner by merely mentioning another Twitter name in a tweet.⁴⁰ Twitter users can communicate up to 140 characters to their “followers” and can directly communicate with others through direct messages or mentions of the other’s username.⁴¹ It is the policy of most social media sites, including Twitter, that so long as a user’s account is “private,” and not “public,” users can choose to control who they communicate with, by prohibiting or blocking all contact with any given person or never choosing to connect with them at all.⁴²

37. As of September 2014, Facebook had 703 million daily active users on average and 1.35 billion monthly active users, 1.2 billion of whom were using their phone to access the site. *See, e.g., Company Info*, FACEBOOK, <http://newsroom.fb.com/company-info/> (last visited Jan. 11, 2015).

38. *See Company*, TWITTER, <https://about.twitter.com/company> (last visited Jan. 11, 2015). Twitter also owns Vine, a service for sending six-second video clips, which has an additional 40 million users. *Id.* In all of those communications, if even one percent were to consist of true threats, that would mean that there were approximately five million tweets sent and received daily that could give rise to potential lawsuits. Without guidance as to what constitutes a threat and awareness about this standard, these cases alone could overwhelm the already overworked judicial system. *See Federal Judicial Caseload Statistics 2014*, U.S. DISTRICT CTS., <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/D00CMar14.pdf> (last visited Apr. 3, 2015) (showing that at the end of 2014, there were still over 74,000 cases pending before federal district courts).

39. *Id.* (“Our mission: To give everyone the power to create and share ideas and information instantly, without barriers.”); *see also* Segall, *supra* note 27, at 195–96.

40. *See About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016> (last visited Jan. 11, 2015) (stating that any user with a public profile can reach out to another user through a tweet).

41. *See, e.g., About Direct Messages*, TWITTER, <https://support.twitter.com/articles/14606-what-is-a-direct-message-dm> (last visited Jan. 11, 2015). Other forms of direct communication between Twitter users are known as “@Replies” and “Mentions.” *Id.* “@Replies” will only be seen by a user if they are following both the sender and recipient of the update. “Mentions” will only be seen if they are posted by someone that the user is “following.” *Id.* Finally, users with protected accounts can only send replies to people they have approved to follow them. *Id.*; *see also What Are @Replies and Mentions*, TWITTER, <http://support.twitter.com/articles/14023-what-are-replies-and-mentions> (last visited Jan. 11, 2015). Additionally, users can report online abuse directly to Twitter, but Twitter recommends also getting the authorities involved. *See Online Abuse*, TWITTER, <https://support.twitter.com/articles/15794-online-abuse> (last visited Jan. 11, 2015).

42. Twitter allows for public or private (protected) Twitter accounts. Public accounts can be

As a result of these privacy settings, some courts have held that the First Amendment expansively protects speech on Twitter, because people may join and leave discussions as they please.⁴³ Thinking back to the journalist discussed at the beginning of this note, one might wonder why she did not simply make her profile private or why she allowed people she did not know to contact her so freely. Could she have protected herself by only allowing those she personally knew to follow her? Theoretically, yes. However, because this journalist, like many others, believes that open access to Twitter provides great benefits, from her perspective a public Twitter page is necessary.⁴⁴

Whereas Twitter's 140-character limit and ability to create virtual anonymity feeds the temptation for many users to instigate "shouting matches" with each other, threats in these "shouting matches" rarely indicate real danger in the eyes of public figures, including the journalist discussed here.⁴⁵ Further, Twitter is an indispensable tool for journalists and average users everywhere because it provides interaction with large audiences and a venue to spur public debate worldwide, which sometimes leads groups to rally to enact change.⁴⁶ The fact that much of this speech may be anonymous does not deny it First Amendment protection, nor does it make it more likely to fall into an unprotected class of speech.⁴⁷ To the contrary, some courts have noted that communication between Twitter users is voluntary and completely severable at any point in time, and as such, Twitter speech is afforded a higher level of First Amendment protection than if the speech were mandatory or the audi-

followed by anyone without approval (allowing for communication with any follower) and can be seen online by anyone, even those without Twitter accounts. Protected Twitter accounts require each person to be individually approved for communication and profile visibility. *See About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016> (last visited Jan. 11, 2015). Another form of social media that allows users to post pictures and comment on them, Instagram, similarly allows for private profiles to be seen only by approved users, while public profiles can be seen by all. *See FAQ*, INSTAGRAM, <http://instagram.com/about/faq/> (last visited Jan. 11, 2015). Users will only see the posts of those who they are "following" and any comments their friends may post. *Id.*

43. *See, e.g.*, *United States v. Cassidy*, 814 F. Supp. 2d 574, 577–78 (D. Md. 2011) (finding that communication on Twitter is completely voluntary, making it much different than an e-mail or personal telephone call).

44. *See Bomb Threat*, *supra* note 11.

45. *Id.*

46. *Id.*

47. *See Talley v. California*, 362 U.S. 60, 65 (1960) ("Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes."); *but see Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 162–63 (2002) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)) ("[A] State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.'").

ence were somehow captive.⁴⁸

While Internet speech can bring great benefits, such as the ability to quickly warn large groups of imminent danger, it can also supply equally formidable dangers. Internet speech provides the means for a user to widely disseminate false information or to incite violence.⁴⁹ Social media gives a new power to each individual's speech, thus increasing the need for guidance from the courts on the parameters of protected speech.⁵⁰ Given that "liking" something on Facebook has been held by the Fourth Circuit to be a form of free speech,⁵¹ is liking someone else's threatening status on Facebook enough to constitute a "true threat"? If this simple action could be a true threat, what level of intent would courts have to ascribe to the "liker"? While this note does not fully resolve these issues, it will explain the need for clarity in the true threat intent jurisprudence, emphasizing the need for consistency in the digital world.

B. *Where It All Began: United States v. Watts*

The true threats doctrine was first articulated in *United States v. Watts*, a case involving a young man who threatened to kill the President.⁵² In *Watts*, a young man attending a rally at the Washington Monument joined an open discussion about police brutality.⁵³ Opposing views were expressed and one member of the discussion instigated an argument with the defendant by proclaiming that young people should get an

48. *Cassidy*, 814 F. Supp. 2d at 577–78 (finding that Twitter communications are completely voluntary and, therefore, are much different than an e-mail or personal telephone call). Despite holding that Twitter is voluntary, in part because users can block whoever they choose, anyone can be included in a "hashtag," where users can talk about a common subject that is then compiled into a searchable database by Twitter. For example, if one wanted to say that they were unhappy with Justin Bieber, they could do so by posting a tweet that said "I hate #JustinBieber," and Twitter would clump that together with tweets from other users who use "#JustinBieber." See *Using Hashtags on Twitter*, TWITTER, <http://support.Twitter.com/articles/49309-using-hashtags-on-Twitter> (last visited Jan. 11, 2015).

49. See Christina DesMarias, *Twitter Used for Social Good and to Incite Disorder*, PC WORLD (Sept. 25, 2011, 7:28 AM), http://www.pcworld.com/article/240574/Twitter_used_for_social_good_and_to_incite_disorder.html (last visited Jan. 11, 2015) (listing examples of occasions where Twitter was used to incite violence and riots).

50. See Jennifer E. Rothman, *Freedom of Speech and "True Threats,"* 25 HARV. J.L. & PUB. POL'Y 283, 286 (2001) ("[I]nterest in threats has been sparked primarily by the proliferation of widely disseminated Internet speech.").

51. *Cf. Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 54–56 (1994)) ("In sum, liking a political candidate's campaign page communicates the user's approval of the candidate and supports the campaign by associating the user with it. In this way, it is the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech.").

52. 394 U.S. 705, 705–06 (1969) (per curiam).

53. *Id.* at 706.

education before expressing their views.⁵⁴ In response, the defendant Watts spoke out averring that he had been given a 1-A draft classification and “[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.’ ‘They are not going to make me kill my black brothers.’”⁵⁵ The lower court found that Watts had violated a statute that proscribed threatening the President.⁵⁶ Watts, however, claimed he did not actually intend to shoot the President.⁵⁷ Instead, he contended that he merely expressed disapproval with the President’s politics; in other words, his speech was just political hyperbole.⁵⁸ On appeal, the Supreme Court found that while the statute was valid, because there were compelling reasons for banning threats against the President, it was still necessary to consider the First Amendment to ensure that “what is a threat [is] distinguished from what is constitutionally protected speech.”⁵⁹

In defining a true threat, the *Watts* Court made two important findings. First, the Court cast doubt on the intent standard, which, at the time, turned on whether the speaker intended to carry out his threat.⁶⁰ Despite support from the lower courts, *Watts* essentially removed this interpretation of intent from the true threat jurisprudence.⁶¹ Second, the *Watts* Court clarified that just because language is “crude” or “vituperative, abusive, and inexact,” does not render it unprotected—instead, the context of speech must be assessed through the “reaction of the listeners.”⁶² The Court emphasized that when evaluating context, it is important to consider the “expressly conditional nature of the statement.”⁶³ Nevertheless, following *Watts*, whether a threat is conditional has been largely ignored as a factor in the lower courts.⁶⁴ By looking at the con-

54. *Id.*

55. *Id.*

56. *Id.* at 705; *see also* 18 U.S.C. § 871(a) (1962) (“Whoever knowingly and willfully . . . makes any such threat against the President . . . shall be fined not more than \$1,000 or imprisoned not more than five years, or both.”).

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

58. *Id.* at 708.

59. *Id.* at 707.

60. *Id.*

61. *Id.* at 707–08. The Second Circuit, for example, concluded that the pertinent inquiry was whether the speaker could carry out a threat, rather than whether the threat was merely conditional. *See* *United States v. Kelner*, 534 F.2d 1020, 1027 (2d Cir. 1976) (holding that when a threat “on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific . . . as to convey a gravity of purpose and imminent prospect of execution,” it is a true threat).

62. *Watts*, 394 U.S. at 707–08.

63. *Id.* at 708.

64. *Id.* at 707–09. *But see* *United States v. Sutcliffe*, 505 F.3d 944, 961 (9th Cir. 2007) (finding that conditional language is not dispositive); *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990) (finding that conditional language is present in most threats because “the threatener hopes . . . he won’t have to carry out the threats”); *United States v. Hoffman*, 806 F.2d

text and reaction of the listeners, the Court concluded that Watts' statement was not a "true threat," but instead merely an expressive way of stating he disagreed with the President.⁶⁵ The Court emphasized the importance of protecting Watts' speech because it was political in nature, and therefore it was the exact type of speech the founding fathers intended the First Amendment to protect to the utmost degree.⁶⁶

In *Watts*, the Supreme Court made clear that not all threatening words fall outside of the protection of the First Amendment, stating, "what is a threat must be distinguished from what is constitutionally protected speech."⁶⁷ There, the Court found the speech of the defendant to be protected speech as political hyperbole, not a threat.⁶⁸ Yet, *Watts* did not provide a clear standard for the requisite level of intent needed for a true threat.⁶⁹ Instead, the Court relied on precedent that merely required an intent to communicate.⁷⁰ Simultaneously, the Court cast doubt on this standard in the opinion's dicta.⁷¹ In an opinion that came months after *Watts*, the Ninth Circuit clarified that for a statement to constitute a true threat, the prosecution need not show that the speaker actually intended to carry out the threat, but left the rest of the intent standard clear as mud.⁷²

703, 711 (7th Cir. 1986) ("[T]he conditional nature of [the] statement does not make the statement any less of a 'true threat' simply because a contingency may be involved.").

65. *Watts*, 394 U.S. at 707. Perhaps supporting political speech is so important, not only because of the importance of free debate in the political realm, but also because this debate has a historical tendency to turn into distasteful name calling and untrue statements. The tactic of "mudslinging" has been used for years to encourage others to vote against a particular candidate. *United States v. Bagdasarian*, 652 F.3d 1113, 1114 (9th Cir. 2011) ("[M]udslinging has long been a staple of U.S. presidential elections. . . . [Looking at] the experience of our Founding Fathers[, i]n the country's first contested presidential election of 1800, supporters of Thomas Jefferson claimed that incumbent John Adams wanted to marry off his son to the daughter of King George III to create an American dynasty under British rule; Adams supporters called Jefferson 'a meanspirited, low-lived fellow, the son of a halfbreed Indian squaw, sired by a Virginia mulatto father.' Abraham Lincoln was derided as an ape, ghoul, lunatic, and savage, while Andrew Jackson was accused of adultery and murder, and opponents of Grover Cleveland chanted slogans that he had fathered a child out-of-wedlock."). More recently, in the 2012 U.S. presidential election, President Obama endured racial slurs as well as claims by his opponents that he was Muslim and foreign born. *Id.*

66. *Watts*, 394 U.S. at 708.

67. *Id.* at 707.

68. *Id.*

69. *Id.* at 707–08.

70. *Id.*

71. *Id.* (discussing the intent to communicate standard, the Court expressed that "perhaps this interpretation is correct, although we have grave doubts about it"). This note does not focus on the intent to communicate standard in the digital world, as this is another vast area of true threat jurisprudence that would be the proper subject of another paper.

72. *Roy v. United States*, 416 F.2d 874, 877 (9th Cir. 1969) ("[E]ven though the maker of the threat does not have an actual intention to assault the President, an apparently serious threat may cause the mischief or evil toward which the statute was in part directed."). However, it is

After *Watts*, very little guidance could be derived from Supreme Court precedent to clarify the standard for true threats until 2003 when *Virginia v. Black* was decided. As a consequence of the minimal guidance, courts turned to cases interpreting other categories of unprotected speech, such as fighting words, incitement, and imminent lawless action, in attempts to create a consistent test for true threats.⁷³ This only further muddled the true threat's test.

C. *The Confusion Continues: Virginia v. Black*

On April 7, 2003, the day *Virginia v. Black* was decided,⁷⁴ there was no Facebook,⁷⁵ no Twitter,⁷⁶ no Instagram,⁷⁷ and certainly no Snapchat.⁷⁸ Yet, *Black*, a case largely concerned with speech based on viewpoint discrimination, changed the way that courts evaluate true threats.⁷⁹ *Black* was the first time the Supreme Court entangled itself, perhaps unintentionally, in the debate about whether the true threat doctrine required the speaker to have subjectively intended his or her statement to be threatening.⁸⁰ In *Black*, the defendants were accused of burning crosses in violation of a Virginia law banning all cross burning conducted with the intent to intimidate.⁸¹ While the majority of the opinion

important to note that in this case the speaker was threatening the life of the President, and the operator who took the phone call knew that the caller was stationed at a military base near weapons. *Id.* at 878.

73. See *Virginia v. Black*, 538 U.S. 343, 359 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (describing the hierarchy of speech and categorizing true threats as “fighting words”); see also Paul Crane, “*True Threats*” and the Issue of Intent, 92 VA. L. REV. 1225, 1230 (2006) (“[T]he classification of true threats as unprotected speech is clearly congruent with [Chaplinsky’s] rationale of regulating expression that by its ‘very utterance inflicts injury.’”) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). See generally Segall, *supra* note 27. For a good example of lower courts conflating the fighting words standard with true threats, see *United States v. White*, 670 F.3d 498, 512 (4th Cir. 2012) (analyzing the intent standard of true threats using *Bradenberg v. Ohio*, 395 U.S. 444 (1969), which defined the parameters of incitement to imminent lawless action, not true threats).

74. 538 U.S. 343 (2003).

75. See *Our Mission*, FACEBOOK, <https://newsroom.fb.com/Timeline> (last visited Jan. 11, 2015).

76. See *Milestones*, TWITTER, <https://about.Twitter.com/milestones> (last visited Jan. 11, 2015).

77. See *Press*, INSTAGRAM, <http://instagram.com/press/> (last visited Jan. 11, 2015) (Instagram launched on October 6, 2010).

78. J.J. Colao, *The Inside Story of Snapchat: The World’s Hottest App or a 3 Billion Dollar Disappearing Act*, FORBES (Jan. 6, 2014, 8:00 AM), <http://www.forbes.com/sites/jjcolao/2014/01/06/the-inside-story-of-snapchat-the-worlds-hottest-app-or-a-3-billion-disappearing-act/>; see also SNAPCHAT, <https://www.snapchat.com/> (last visited Jan. 11, 2015).

79. See generally Crane, *supra* note 73 (analyzing and explaining the discord in circuit courts regarding the intent standard for true threats after *Black*); see also *infra* Part IV.

80. *Jeffries* Petition for Certiorari, *supra* note 31, at 8.

81. The statute read in full:

It shall be unlawful for any person or persons, with the intent of intimidating any

focused on the nuances of content-based proscriptions of speech, the Supreme Court ultimately found that the statute in question, with regard to true threats, was constitutional.⁸² The Court reasoned that the statute did not interdict pure speech because it banned only the subset of cross burning that amounted to true threats.⁸³

In briefly defining true threats, the Court transformed the requisite level of intent required for speech to constitute a true threat with one sentence.⁸⁴ Citing *Watts*, the Court defined true threats as, “encompass[ing] those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁸⁵ This one sentence impelled a debate in the lower courts regarding the requisite level of intent required for a statement to cross the threshold of true threats, with circuit courts reading this same line to require different types of intent.⁸⁶

The *Black* Court limited the definition of intent by stating that a speaker need not intend to carry out a threat in order for the threat to be proscribed, as the Court did in *Watts*, but did not clarify any further.⁸⁷ Ultimately, the Court ruled that intimidation is a subset of true threats and, as such, cross burning with the intent to intimidate can be prohibited without violating First Amendment freedoms.⁸⁸ At the time *Black*

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); see also *Virginia v. Black*, 538 U.S. 343, 348 (2003).

82. *Black*, 538 U.S. at 363 (“A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.”). However, the Court found that the prima facie evidence provision in the statute was unconstitutional, and remanded the judgment for further proceedings. *Id.* at 367.

83. *Id.* at 363 (“The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead 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. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm.”).

84. Crane, *supra* note 73, at 1254.

85. *Black*, 538 U.S. at 359 (citing *Watts v. United States*, 394 U.S. 705, 708 (1969)) (internal quotations omitted). The Court’s definition of “true threats” uses *165 characters*, just slightly more than allowable in a tweet, yet it has created a huge difference of opinion in what constitutes a true threat in the circuits.

86. See *infra* Part III.

87. *Black*, 538 U.S. at 360 (“The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders’”) (alteration in original) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

88. *Id.* at 361 (“Intimidation in the constitutionally proscribable sense of the word is a type of

was decided, legal scholars believed it would bolster free speech protection in true threat cases; however, this was misguided, and time has shown that instead *Black* failed to restore a stricter standard for true threats to the lower courts.⁸⁹

D. *The Need for Clarity: Current Federal Threat Statutes*

While the constitutional confusion lingers, the standard for true threats remains a significant problem.⁹⁰ The definition of true threats and the requisite level of intent effects a myriad of federal threat statutes; as a result, the confusion surrounding intent jurisprudence following *Black* has only served to further compound the inconsistencies and chaos of federal threat statute enforcement.⁹¹ Without guidance as to the requisite level of intent for a true threat under federal law, there can be no expectation of consistent application of federal laws involving threats including violations of statutes proscribing blackmail, threats against the President, interference with commerce, and improper influence of a federal official.⁹² Each of the aforementioned statutes could be implicated in Internet speech. Combine the ubiquity of social media with the large number of cases filed implicating these statutes, and it becomes evident

true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”).

89. Compare Lauren Gilbert, *Mocking George: Political Satire as “True Threat” in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843, 844 (2004) (“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*, which appears to have restored the speech-protective aspects of that doctrine.”), with P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 52–53 (2015) (“As the confusion in the true threats doctrine continues to impact public Internet speech, the divergent interpretations of *Black* raise First Amendment concerns regarding the responsibility that a speaker bears for virulent expression communicated to an unknown, yet interconnected, audience.”).

90. In fact, this same topic has been presented to the Supreme Court on at least five occasions since 2008. See *Vaksman v. United States*, 472 F. App’x 447 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 777 (2012) (applying both the objective and subjective tests to determine if an email was threatening); *United States v. Mabie*, 663 F.3d 322 (8th Cir. 2011), *cert. denied*, 133 S. Ct. 107 (2012); *United States v. Parr*, 545 F.3d 491 (7th Cir. 2008), *cert. denied*, 556 U.S. 1181 (2009); see also *Jeffries* Petition for Certiorari, *supra* note 31.

91. *Jeffries* Petition for Certiorari, *supra* note 31.

92. See 18 § U.S.C. 875(c) (2006) (proscribing “any threat to injure the person of another” sent over the Internet); 18 U.S.C. § 873 (stating that in regards to blackmail, “whoever, under a threat of informing or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned”); 18 U.S.C. § 876(c) (“whoever knowingly so deposits or causes to be delivered as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another”); 18 U.S.C. § 1503(a) (“whoever corruptly or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate or impede any grand or petit juror”). See also *Jeffries* Petition for Certiorari, *supra* note 31.

that the true threats doctrine needs clarification.⁹³ Furthermore, the jurisprudence surrounding social media provides no more guidance than that for true threats. Even the American Bar Association (“A.B.A.”) has expressed its fears about the potential for unintentional misuse of social media by attorneys and judges—those groups who understand the law the best—warning both groups to be prudent in monitoring their accounts and to think before clicking.⁹⁴ This has left the boundaries of the First Amendment blurred when it comes to social media, even amongst those most familiar with the law.

III. THE CIRCUIT SPLIT: STANDARDS OF INTENT IN THE CIRCUITS AFTER *BLACK*

After *Black*, the majority of circuit courts adopted an objective intent standard to identify when speech constitutes a true threat.⁹⁵ The circuits that continue to apply purely objective standards read *Black* as simply requiring the speaker to convey a general intent to “transmit the communication,” as opposed to a specific intent to make the recipient feel threatened.⁹⁶ Yet, even those courts that apply the objective test are fragmented.⁹⁷

Courts have developed three different objective tests: a viewpoint-neutral objective test, a reasonable speaker-focused objective test, and a reasonable recipient-focused objective test.⁹⁸ While the courts that adopt objective tests generally acknowledge that the Court in *Black* considered

93. See *Federal Criminal Case Processing Statistics*, BUREAU JUST. STAT., <http://www.bjs.gov/fjsrc/tsec.cfm> (select “Number of defendants in cases filed” and all years between 1994 and 2012; then “select by title and section within the U.S.C.”; then select a title, “18—Crimes and Criminal Procedure,” and choose section “18 875 C,” with PDF output option) (last visited Apr. 4, 2015) (documenting that thousands of defendants between 1994 and 2012 have been charged for violations of statutes implicating true threats).

94. The A.B.A. expresses concerns about judges and attorneys associating on social media, because there are no guarantees of privacy and people have no control over the reactions or postings of their friends. See James Podgers, *ABA Opinion Cautions Judges to Avoid Ethics Pitfalls of Social Media*, A.B.A. J. (May 1, 2013), http://www.abajournal.com/magazine/article/aba_opinion_cautions_judges_to_avoid_ethics_pitfalls_of_social_media/.

95. See *United States v. Martinez*, 736 F.3d 981, 985 (11th Cir. 2013) (adopting an objective intent standard for true threats); *United States v. Elonis*, 730 F.3d 321, 323 (3d Cir. 2013) (same); *United States v. Ambien*, 663 F.3d 322, 330 (8th Cir. 2011) (same); *United States v. Stewart*, 411 F.3d 825, 828 (7th Cir. 2005) (same).

96. See, e.g., *Ambien*, 663 F.3d at 330. This is the same standard that *Watts* cast doubt on even before *Black*. *United States v. Watts*, 394 U.S. 705, 707–08 (1969) (when discussing the intent to communicate standard, the Court expressed, “Perhaps this interpretation is correct, although we have grave doubts about it”).

97. *United States v. White*, 670 F.3d 498, 509–10 (4th Cir. 2012).

98. See *Elonis*, 730 F.3d at 329–30 (applying a reasonable speaker standard); *Martinez*, 736 F.3d at 985 (applying a viewpoint-neutral objective standard); *White*, 670 F. 3d at 513 (applying a reasonable recipient standard).

a subjective element, the subjective element of the opinion is disregarded as a mere consequence of the specific statute at issue in *Black*—not a new requirement for a subjective gloss in the constitutional definition of true threats.⁹⁹ Most courts that choose to adopt an objective test express contempt for the subjective test under the belief it would be overly protective of threatening speech.¹⁰⁰ Nevertheless, after *Black*, many judges who adopt the objective test question the tenability of a purely objective test in dicta or separate opinions.¹⁰¹ Therefore, even circuits that comprise the majority are divided by inconsistency amongst not only the circuits, but also the individual judges, producing a large discrepancy as to the correct level of intent for true threats.¹⁰²

Adding to the conflicted interpretations of *Black*, the minority of circuits currently apply a hybrid test that considers both an objective test and a subjective intent test.¹⁰³ The circuits that read a subjective element into *Black* do so based on *Black*'s reasoning that true threats only arise when the "speaker means to communicate a serious expression of an intent."¹⁰⁴ As a result of the tension created by the circuit courts conflicting standards for assessing the requisite intent for true threats, it is nearly impossible for a speaker whose words could easily reach any circuit via the Internet to predict what speech is protected and what speech is not. Furthermore, even the current balance of power seems subject to change as the Second, Seventh, and Sixth Circuits appear disposed to abandon the purely objective test.¹⁰⁵

99. *White*, 670 F.3d at 508–10.

100. *See Elonis*, 730 F.3d at 329–30 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)) ("Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from 'the fear of violence' and the 'disruption that fear engenders,' because it would protect speech that a reasonable speaker would understand to be threatening."). Part IV assesses whether this is a legitimate worry or if it is an inflated worry.

101. *See United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008) (finding that after *Black* it is "likely . . . that an entirely objective definition is no longer tenable"); *Jeffries v. United States*, 692 F.3d 473, 479 (6th Cir. 2012) (the case for a subjective intent standard is "not frivolous"); *id.* at 484 (Sutton, J., dubitante) ("If words matter, I am hard pressed to understand why these definitions do not resolve today's case. The definitions, all of them, show that subjective intent is part and parcel of the meaning of a communicated 'threat' to injure another."); *see also United States v. Eagleby*, 420 F.3d 1136, 1139 (10th Cir. 2005) (rejecting the general intent to communicate standard in favor of an intent to threaten, but finding defendant's challenge procedurally barred).

102. *See Crane*, *supra* note 73.

103. *United States v. Cassel*, 408 F.3d 622, 631–32 (2005); *United States v. Jeffries*, 692 F.3d 473, 479 (6th Cir. 2013).

104. *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 1 (D.D.C. 2012); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 (9th Cir. 2011); *United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005).

105. *See Jeffries* Petition for Certiorari, *supra* note 31 (noting the deep disagreement in the circuits regarding the intent standard for true threats). For a discussion of the potential for change,

A. *The Viewpoint-Neutral Objective Test*

Both the Eleventh and Fifth Circuits adopted the viewpoint-neutral objective test for true threats, which analyzes speech through the lens of a reasonable person without denoting whose perspective the threat is interpreted through—the speaker or the listener.¹⁰⁶ Under this objective test, a statement is a true threat if it “would cause a reasonable person to construe it as a serious intention to inflict bodily harm.”¹⁰⁷ The practical effect of this test is that courts may look at both what the reasonable speaker would have foreseen and how the reasonable recipient would have received the critique; the court can then give more weight to factors on either side in making a decision. Under this approach, the court is not confined by the perspective of either the speaker or the recipient, either of which at any time may be inadequate to obtain a conviction. When a court is not tied to one viewpoint, it may be easier to obtain convictions because there is flexibility to interpret a statement as a threat. At the same time, the strength of this test may also be its downfall as it may be *too* easy to convict because the criteria is not fixed and is therefore subject to multiple interpretations. Moreover, this test is sound only if the reason that the *Black* Court incorporated subjective intent was simply because the cross burning statute at issue contained a subjective element. If, instead, the *Black* Court intended to incorporate a subjective test into all threat cases, regardless of the statute at issue, then a purely objective test is directly contradictory to binding precedent.

Nevertheless, it is not clear if either circuit gives *Black* the proper weight as the Eleventh Circuit relies heavily on *Watts*, finding that the Court reached its conclusions using the objective characteristics of the speech.¹⁰⁸ Similarly, the Fifth Circuit’s post-*Black* test is based on dicta from a pre-*Black* opinion, defining a true threat as “unprotected if an objectively reasonable person would interpret the speech as a ‘serious expression of an intent to cause a present or future harm.’”¹⁰⁹ As a

see *infra* Part III.C. Further, the controlling Eighth Circuit case fails to directly address the intent standard in relation to *Black*. See *United States v. Koski*, 424 F.3d 812 (8th Cir. 2005) (failing to even mention *Black*).

106. See *United States v. Martinez*, 736 F.3d 981, 985 (11th Cir. 2013) (“Importantly, the Court reached this conclusion based on the objective characteristics of the speech and the context in which it was delivered—the Court did not speculate as to the speaker’s subjective mental state.”); see also *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (interpreting speech from the perspective of an “an objectively reasonable person”); *United States v. Alaboud*, 347 F.3d 1293, 1297–98 & n.3 (11th Cir. 2003) (A statement is a true threat if “a reasonable person [would] construe it as a serious intention to inflict bodily harm.”).

107. See *Alaboud*, 347 F.3d at 1297–98 & n.3.

108. *Martinez*, 736 F.3d at 984–85.

109. See *Porter*, 393 F.3d at 616 (quoting *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002)); see also *United States v. O’Dwyer*, 443 F. App’x 18, 19 (5th Cir. 2011)

result, both courts avoid the possible subjective interpretation presented by *Black* by citing to pre-*Black* precedent.

1. CASE STUDY: INTERNET THREATS IN THE ELEVENTH CIRCUIT

In *United States v. Martinez*, the Eleventh Circuit was tasked with determining the requisite level of intent needed after *Black*.¹¹⁰ In *Martinez*, an anonymous email was sent to a radio talk-show host, stating,

I felt your plan to organize people with guns in the hills of Kentucky and else where was a great idea. I know that you know one election is not enough to take our country back from the illegal aliens, [J]ews, [M]uslims, and illuminati who are running the show. . . . [I am] planning something big around a government building here . . . I'm going to walk in and teach all the government hacks working there what the 2nd amendment is all about . . . we'll end this year of 2010 in a blaze of glory . . . what does sarah say, don't retreat, reload!¹¹¹

Within a few hours, the show received a phone call from an anonymous woman stating that the email was from her mentally-ill husband who she believed was going to a school to open fire; she pleaded for the station's assistance.¹¹² The police locked down the schools in the area and identified the communications as coming from defendant Martinez's home; thereafter, Martinez was arrested for her allegedly threatening call to the radio and was charged.¹¹³ At trial, Martinez contended that for her statements to constitute true threats post-*Black*, a subjective intent test was required.¹¹⁴ The court disagreed, finding instead that limiting the definition of intent to subjective intent would result in overprotection of

("[I]n its context [it] would have a reasonable tendency to create apprehension that its originator will act according to its tenor.").

110. 736 F.3d 981 (11th Cir. 2013).

111. *Id.* at 983.

112. *Id.*

113. *Id.* at 985. In *Martinez*, the mentally ill husband who allegedly threatened to shoot school children was not the one charged with making a threatening statement; instead, it was his wife who had called the threat into the radio station that was charged. *Id.* at 983. It is my opinion that this case should have been decided under the prohibition against incitement of imminent lawless action—not true threats—as she is in jail for reporting an event that could have incited the public to act. See *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (describing incitement as "[t]he line between what is permissible and not subject to control and what may be made impermissible The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theatre.").

114. *Martinez*, 736 F.3d at 984. While Martinez disputed the test used, she conceded that her email contained "language that an objectively reasonable jury could find beyond a reasonable doubt to be a serious expression of an intent to injure another person." *Id.* It may also sound counterintuitive that the wife here, the caller, is being charged for statements that she purported her husband made. However, she called the station, reporting her husband's threat, and in doing so she made a threatening statement. *Id.*

threatening speech.¹¹⁵

The court reasoned that *Black* could be distinguished from the present case because in *Black* the issue was intimidating threats, which require a specific inquiry into the speaker's intent, while the case at hand dealt with general threats.¹¹⁶ Accordingly, the court applied the viewpoint-neutral reasonable person test, derived from *Watts*, classifying speech as a true threat when "the communication would be construed by a reasonable person as a serious expression of an intent to inflict bodily harm or death."¹¹⁷ Therefore, the court found that the defendant had no remedy on appeal as she conceded that, objectively, her statements were such that a reasonable person would have perceived her threats as real, and therefore her statements constituted true threats.¹¹⁸ In so holding, the court also brushed aside any subjective intent implications contained in *Black*.¹¹⁹

B. *The Objective Reasonable Speaker Test*

The First, Third, and Seventh Circuits use a reasonable speaker standard, grounding their interpretations of a true threat in how the "reasonable speaker" would "foresee that the statement would be interpreted."¹²⁰ All three circuits have revisited the question of intent since the decision in *Black*; yet, like the Fifth and Eleventh Circuits, these three circuits continue to fashion their tests around pre-*Black* precedent.¹²¹ The objective speaker test classifies speech as a true threat if "the sender should have reasonably foreseen that the recipient would interpret it as such."¹²² In a pre-*Black* decision, *United States v. Fulmer*, the First Circuit validated jury instructions, which indicated that a reasonable speaker test was preferable to a reasonable recipient test.¹²³ In

115. *Id.* at 987–88.

116. *Id.* at 987.

117. *Id.* at 988 (also considering if a "reasonable person would perceive the threat as real").

118. *Id.*

119. *Id.* at 987.

120. *United States v. Fuller*, 387 F.3d 643, 648 (7th Cir. 2004) (analyzing a threat to the President and finding that "[i]n light of the objective standard laid out above, Fuller's subjective intent to carry out the threat is not relevant to the question of whether the letter constituted a 'true threat'"); see also *United States v. Zavrel*, 384 F.3d 130, 135–36 (3d Cir. 2004) (determining if speech is a true threat by looking at the perspective of "a reasonable person hearing . . . or receiving the communication"); *United States v. Nishnianidze*, 342 F.3d 6, 15 (1st Cir. 2003) ("A true threat is one that a reasonable recipient familiar with the context of the communication would find threatening.").

121. *Fuller*, 387 F.3d at 647 (supporting the objective standard using *Watts* and other cases from the 1970s); *Zavrel*, 384 F.3d at 136 (citing to *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994), a pre-*Black* case, for support); *Nishnianidze*, 342 F.3d at 16 (relying on pre-*Black* precedent by citing *United States v. Fulmer*, 108 F.3d 1486, 1492–93 (1st Cir. 1997)).

122. *United States v. Clemens*, 738 F.3d 1, 11 (1st Cir. 2013).

123. 108 F.3d 1486, 1494 (1st Cir. 1997) (quoting Trial Transcript 4 at 84–87) ("When we talk

choosing to apply a reasonable speaker test, the courts rely on the supposition that “the perils that inhere in the ‘reasonable-recipient standard,’ namely that the jury will consider the unique sensitivity of the recipient,” are allayed when a reasonable speaker test is employed.¹²⁴

The First Circuit recently revisited the question of intent required for speech to be considered a true threat in *United States v. Clemens*, and failed to depart from the Circuit’s earlier decision to utilize an objective test.¹²⁵ Similarly, the Seventh Circuit in *United States v. Fuller*, also applying a reasonable speaker standard, relied on historical standards to rationalize not interpreting *Black* as proffering a subjective standard.¹²⁶ While the court did not clarify the reasoning behind the use of a reasonable speaker standard instead of a reasonable recipient standard, it did illuminate that the use of a subjective test would “hinder the government’s ability to prosecute threats.”¹²⁷ The Seventh Circuit only rejected the subjective intent standard by defining it as requiring a subjective intent to carry out the threat or an actual present ability to carry it out—the only intent standard specifically renounced by the Supreme Court.¹²⁸ In a more recent case, *United States v. Parr*, the Seventh Circuit assessed the effect that *Black* had on a purely objective test, finding that it was highly possible that a purely objective test *may no longer be tenable*.¹²⁹ Further, in the dicta of *Parr*, the Seventh Circuit indicated that post-*Black* the correct standard may need to consider that the “statement at issue must objectively be a threat *and subjectively be intended* as such.”¹³⁰ As a result, speculatively, the Seventh Circuit may be prone to change its test in the future.

Like the Fifth Circuit,¹³¹ even before *Black*, the Third Circuit has consistently held that speech was considered an unprotected true threat when “a reasonable person would foresee that the statement would be

about a defendant’s—about the defendant’s intent, we are talking about what he meant to do and what was in his mind. This is difficult to prove directly, because there is no way directly to scrutinize the works of someone else’s mind or his state of mind. But you may infer . . . the defendant’s intent from the surrounding circumstances, that is to say, you may rely on circumstantial evidence in determining the defendant’s intent.”).

124. *Fulmer*, 108 F.3d at 1491.

125. *Clemens*, 738 F.3d at 14 (citing *United States v. Whiffen*, 121 F.3d 18, 21 (1st Cir. 1997)).

126. *Fuller*, 387 F.3d at 646.

127. *Id.* at 647.

128. *Id.* at 648; *see supra* Part II (discussing how, in both *Watts* and *Black*, the Supreme Court explicitly rejected the intent standard that looked at the speaker’s ability to carry out the threat).

129. *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008).

130. *Id.* However, this was merely dicta, and the court still claimed to stand by the objective test based in circuit precedent. *See id.*

131. *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616 (5th Cir. 2004) (quoting *Doe v. Pulaski Cnty. Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002)).

interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm.”¹³² This standard is still used today, even after *Black*.¹³³ In a recent Third Circuit decision, *United States v. Elonis*, the court explicitly found that *Black* did not create a subjective intent component for assessing true threats, but instead reaffirmed the objective reasonable-speaker test.¹³⁴ However, this may change soon, as *Elonis* is being reviewed by the Supreme Court in the 2014–2015 term.¹³⁵

1. CASE STUDY: INTERNET THREATS IN THE THIRD CIRCUIT

The reasonable speaker test from the Third Circuit considers whether a “reasonable speaker would foresee the statement would be interpreted as a threat.”¹³⁶ In this case, *Elonis*, the defendant, was a depressed man whose wife had left him and taken their children.¹³⁷ His depression was apparent to other employees at the amusement park where he worked.¹³⁸ After the Halloween season ended at the park, *Elonis* posted on his Facebook page a picture of him from the Halloween festivities in costume holding a knife to his coworker’s neck.¹³⁹ Below the photo, he captioned it: “I wish.”¹⁴⁰ *Elonis* was fired after his manager saw the photo.¹⁴¹ After losing his job, *Elonis* began to post Facebook statuses about how he wished his ex-wife were dead so that he could commit vile acts to her corpse.¹⁴² While the words were offensive, the defendant perceived them to be in a lyrical “rap” format styled after his favorite artists.¹⁴³ Further, he indicated on his Facebook page that posting the song lyrics was therapeutic to him.¹⁴⁴ As a result, a protective order was issued for *Elonis*’ ex-wife.¹⁴⁵ *Elonis* then went on to post another rap on his Facebook, also styled after one of his favorite artists,

132. *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991).

133. *United States v. Elonis*, 730 F.3d 321, 323 (3d Cir. 2013) (applying the reasonable recipient test), *cert. granted*, 134 S. Ct. 2819 (2014).

134. *Id.*

135. *Elonis v. United States*, 134 S. Ct. 2819 (2014) (granting certiorari).

136. *Elonis*, 730 F.3d at 323.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 324.

141. *Id.*

142. *Id.* The text of two of the more strongly worded statuses are as follows: “If I only knew then what I know now, I would have smothered [you] with a pillow, dumped your body in the back seat, dropped you off in Toad Creek, and made it look like a rape and murder,” and “There’s one way to love you but a thousand ways to kill you. I’m not going to rest until your body is a mess, soaked in blood and dying from all the little cuts.” *Id.*

143. Brief for Appellant at 8–9, *United States v. Elonis*, 730 F.3d 321 (No. 12-3798).

144. *Id.*

145. *Id.*

about how it was illegal for him to state he wanted to kill his ex-wife and then went into detail about how it would be “incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you’d have a clear line of sight through the sun room.”¹⁴⁶ The defendant continued to post statements about the acts he would commit because he felt he was not being justly treated in the judicial system.¹⁴⁷

After the lower court found Elonis guilty of threatening both his wife and his coworker, he appealed.¹⁴⁸ Relying on *Black*, he claimed that the Supreme Court had created a requirement that courts look at both a subjective and objective intent when determining what constitutes a true threat.¹⁴⁹ The Third Circuit, however, disagreed, asserting that the decision in *Black* did not find the objective test unconstitutional.¹⁵⁰ The court reasoned that *Black*’s subjective component was merely a result of the cross burning statute at issue, and therefore the analysis performed of subjective intent was a direct result of the challenged statute’s legislative construction, not new constitutional implications.¹⁵¹

Thus, the objective reasonable speaker test remains intact in the Third Circuit.¹⁵² Under the objective reasonable speaker test, the court found that Elonis did in fact issue true threats through his Facebook page.¹⁵³ This was the court’s holding despite the fact that the statements he issued were not specifically directed at his ex-wife and that she had, in fact, gone looking for his comments by finding his Facebook page even though they were not “friends.”¹⁵⁴ The Supreme Court will decide

146. *Elonis*, 730 F.3d at 325. The inspiration comes from a sketch from *The Whitest Kids U Know*, which talks about how it is illegal to say “I want to kill the President of the United States of America.” See *Whitest Kids U Know: It is Illegal to Say*, YOUTUBE (Apr. 24, 2007), available at <https://www.youtube.com/watch?v=QEQQOvyGbBY>.

147. *Elonis*, 730 F.3d at 325. Some of these “lyrics” are as follows: “Fold up your [Protection from Abuse Order (“PFA”)] and put it in your pocket[.] is it thick enough to stop a bullet? Try to enforce an Order [t]hat was improperly granted in the first place[.] Me thinks the judge needs an education on *true threat* jurisprudence[.] And prison time will add zeroes to my settlement[. . . .] And if worse comes to worse[.] I’ve got enough explosives to take care of the state police and the sheriff’s department.” *Id.* at 325–26 (emphasis added).

148. *Id.* at 329–32.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* However, this may change as this case is currently before the Supreme Court. *Elonis v. United States*, 134 S. Ct. 2819 (2014) (granting certiorari).

153. *Elonis*, 730 F.3d at 325.

154. Brief for Appellant, *supra* note 143, at 8–9 (“There was no evidence that any of the charged victims in this case (Mr. Elonis’s wife, law enforcement agencies or agents, or schools) were his Facebook ‘friends.’ Facebook users who affirmatively chose to be designated a

Elonis in the 2014–2015 term.¹⁵⁵

C. *The Objective Reasonable Recipient Test*

The Second, Fourth, Sixth, Eighth, and Tenth Circuits all apply an objective “reasonable recipient” test, which looks at whether a reasonable recipient who is familiar with the context of the statement would see the speech as a “serious expression of an intent to do harm.”¹⁵⁶ This test, in theory, has the benefit of allowing the fact-finder to interpret the threat as a reasonable recipient should have, without struggling to determine what the speaker’s state of mind was and avoiding the issue of a particularly sensitive recipient.¹⁵⁷ However, critics often point out that in reality this test is flawed; it fails to weed out overly sensitive recipients or jurors, because the jury still receives the information from the actual recipient on the stand and then processes it in accordance with their own reaction or the victim’s reaction.¹⁵⁸

In *Rogers v. United States*, which was decided before *Black*, Justice Marshall attempted to untangle the issue of intent in his discussion of the boundaries between unprotected threatening speech and protected speech.¹⁵⁹ In that discussion, he acknowledged that because the objective test exclusively measures the impact of speech on the recipient, it has the prospect of creating a chilling effect because it is overly inclusive of both pure speech and “true threats.”¹⁶⁰ Nevertheless, the Fourth Circuit and cohorts continue to apply an objective test,¹⁶¹ even after *Black*.¹⁶² The underlying reasoning is that the objective test is not overly

‘Facebook friend’ of *Elonis*’s would see his postings, alongside those of their other ‘friends,’ on a page within the Facebook website called the ‘newsfeed.’”)

155. *Elonis v. United States*, 134 S. Ct. 2819 (2014).

156. *Jeffries v. United States*, 692 F.3d 473, 480 (6th Cir. 2013); *United States v. White*, 670 F.3d 498, 509–10 (4th Cir. 2012); *United States v. Koski*, 424 F.3d 812, 818–20 (8th Cir. 2005); see also *United States v. Jongewaard*, 567 F.3d 336, 339 n.2 (8th Cir. 2009) (“In this circuit, the test for distinguishing a true threat from constitutionally protected speech is whether an objectively reasonable recipient would interpret the purported threat ‘as a serious expression of an intent to harm or cause injury to another.’”), *cert. denied*, 130 S. Ct. 1502 (2010); *United States v. Wolff*, 370 F. App’x 888, 892 (10th Cir. 2010); *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006) (affirming the objective reasonable recipient test post-*Black* without proffering reasoning as to why); *United States v. Turner*, 720 F.3d 411, 413 (2d Cir. 2013).

157. See Comment, *First Circuit Defines Threat in the Context of Federal Threat Statutes: United States v. Fulmer*, 111 HARV. L. REV. 1110, 1114 (1998).

158. Rothman, *supra* note 50, at 319–21.

159. 42 U.S. 35, 45 (1975).

160. *Id.* at 46–47.

161. See *supra* note 156. But see *United States v. Dinwiddle*, 76 F.3d 913, 925 (8th Cir. 1996) (finding that determining how a reasonable recipient would interpret speech may require consideration of potentially subjective material, including (1) “reaction of the recipient and other listeners”; (2) “whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence”; and (3) whether the threat was made directly to the victim).

162. *United States v. White*, 670 F.3d 498, 509–10 (4th Cir. 2012); see also *United States v.*

inclusive because the fact-finder must still consider the context in which the speech occurred.¹⁶³ Further, while some scholars posited that the Tenth Circuit had adopted a subjective intent standard after *Black*,¹⁶⁴ in an unpublished opinion the Tenth Circuit continued to apply the objective reasonable recipient standard.¹⁶⁵ Presumably these courts are following the axiom of better safe than sorry.¹⁶⁶

The Second Circuit's standard for true threats also relies on pre-*Black* precedent, defining the standard as "an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury."¹⁶⁷ However, the Second Circuit's entire analysis of the *Black* Court's intent standard occurred in a footnote, exposing potential vulnerability for change, like in the Seventh Circuit.¹⁶⁸

In *United States v. Turner*, the defendant was accused of threatening federal judges on his blog when he expressed that the Seventh Circuit judges, who had recently made a ruling regarding the Second Amendment's application to the states, should die for not following the Constitution.¹⁶⁹ Turner subsequently posted on his blog the work

Koski, 424 F.3d 812, 818–20 (8th Cir. 2005); *United States v. Zavrel*, 384 F.3d 130, 135–36 (3d Cir. 2004) (determining if speech is a true threat by looking at the perspective of "a reasonable person hearing . . . or receiving the communication"); *United States v. Nishnianidze*, 342 F.3d 6, 15 (1st Cir. 2003) (applying an objective test in the context of presidential threats).

163. *Jeffries v. United States*, 692 F.3d 473, 480 (6th Cir. 2013).

164. *See, e.g., Crane, supra* note 73.

165. *United States v. Wolff*, 370 F. App'x 888, 892 (10th Cir. 2010) (quoting *United States v. Magleby*, 241 F.3d 1306, 1311 (10th Cir. 2001)) ("The trier of fact, therefore, must decide whether a 'reasonable person would find that a threat existed.'"). However, *Magleby* was decided prior to *Black*.

166. The Fourth Circuit's test for true threats asks whether "'an ordinary reasonable recipient who is familiar with the context . . . would interpret [the statement] as a threat of injury.'" *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) (quoting *United States v. Roberts*, 915 F.2d 889, 891 (4th Cir. 1990)).

167. *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006) (quoting *United States v. Malik*, 16 F.3d 45, 49 (2d Cir. 1994)) (internal quotation marks omitted). While this case proffered the standard for threats post-*Black*, it failed to address any potential change as a result of *Black*.

168. While the Second Circuit's first post-*Black* precedent can be found in *Davila*, 461 F.3d at 305, in a 2013 decision, the Second Circuit revisited the issue, noting that "[t]his Court's decision in *Davila* post-dates, but did not address, *Virginia v. Black*" and went on to further dismiss the need for analysis because the defendant satisfied both a subjective and an objective test. *United States v. Turner*, 720 F.3d 411, 420 n.4 (2d Cir. 2013) ("Even assuming, *arguendo*, that *Black* did alter the definition of 'true threats' to require subjective intent to intimidate, the outcome in this case would be the same: the statute under which Turner was convicted includes a subjective intent element.").

169. The exact statement Turner wrote on his blog was: "If they are allowed to get away with this by surviving, other Judges will act the same way. These Judges deserve to be made such an example of as to send a message to the entire judiciary: Obey the Constitution or die." *Id.* at 413. He went on to state, "let me be the first to say this plainly: These Judges deserve to be killed. Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions." *Id.* at 415. Additionally, he insinuated that they had been warned by a hit man and ignored the

addresses of the judges, including detailed maps of the buildings that indicated the locations of anti-truck bomb barriers.¹⁷⁰ He vowed that home addresses would follow.¹⁷¹ He was eventually convicted for making “true threats.”¹⁷²

While the defendant did not attempt to use the *Black* decision’s possible subjective intent requirement as a defense, the court addressed the controversy surrounding *Black*, *sua sponte*, in a footnote that completely dismissed the possibility of a subjective standard for the Second Circuit.¹⁷³ Acknowledging the disagreement between the other circuits, the court noted that it had no occasion to address the potential subjective standard proffered in *Black*.¹⁷⁴ However, the court was willing to posit, assuming *arguendo* a subjective intent standard was required, that that would not have changed the outcome in the case because the defendant’s blog was so egregiously threatening that it constituted a true threat pursuant to both objective and subjective tests.¹⁷⁵ While the court went on to rely on *Watts* and *United States v. Davila* (the Second Circuit decision that adopted the objective speaker test), the court’s footnote discussing *Black* seemed to indicate a future potential for change, as no court in the Second Circuit has addressed whether a purely objective test is tenable after *Black*.¹⁷⁶

1. CASE STUDY: INTERNET THREATS IN THE SIXTH CIRCUIT

In *United States v. Jeffries*, the defendant made a YouTube video in which he performed a self-written song expressing his grievances with the judicial system, specifically the courts handling of a custody dispute over his daughter.¹⁷⁷ In the self-written lyrics, the defendant alluded to his time in the military and threatened the judge’s life if the case was not resolved favorably.¹⁷⁸ After creating the YouTube video, the defendant posted a link to his Facebook and sent the link to twenty-nine users, including news stations and politicians.¹⁷⁹ Within twenty-five hours, the video was removed, but not before the defendant’s former-sister-in-law

warning. *Id.* at 413. The judges he threatened to kill were Judge Easterbrook and Judge Posner, both highly respected judges of the Seventh Circuit Court of Appeals. *Id.* at 416.

170. *Id.* at 415.

171. *Id.* However, it is not clear that these addresses were ever posted.

172. *Id.* at 422.

173. *Id.* at 420 n.4.

174. *Id.* at 420.

175. *Id.*

176. *Id.* at 420–21; *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006).

177. *United States v. Jeffries*, 692 F.3d 473, 475–78 (6th Cir. 2012).

178. *Id.*

179. *Id.*

had brought the video to the judge's attention.¹⁸⁰ This woman, who alerted the authorities to the YouTube video, was not an intended recipient, as this individual was not a Facebook friend of the defendant.¹⁸¹

The defendant was prosecuted, and at his trial the jury was instructed to apply an objective test, "in light of the context" from a reasonable recipient's perspective, and determine if the video constituted a true threat or "a serious expression of intent to inflict bodily injury . . . done to effect some change or achieve some goal through intimidation."¹⁸² Under this instruction, the defendant was convicted.¹⁸³

The defendant appealed, contending that the jury instructions directing the jurors to apply a purely objective test were no longer appropriate after *Black*.¹⁸⁴ The Sixth Circuit disagreed, finding that *Black* did not create a subjective intent requirement but, instead, that the *Black* Court merely interpreted a statute that required a subjective intent inquiry and was not presented with the question of whether an objective intent standard is constitutional. As such, according to the Sixth Circuit, *Black* never reached the issue of intent.¹⁸⁵ The *Jeffries* court, like in other circuits, found much support for the objective test in *Watts* and pre-*Black* precedent.¹⁸⁶ Accordingly, the court applied a purely objective test based on the perspective of the reasonable recipient, finding the defendant's statements to be "true threats."¹⁸⁷

While the *Jeffries* court was a unanimous decision with the majority opinion written by Judge Sutton, paradoxically, two opinions were issued.¹⁸⁸ The second opinion was a dubitante opinion also authored by Judge Sutton, casting doubt on his own opinion.¹⁸⁹ In his dubitante opinion, Sutton concluded that both the plain language definition of the word "threat" and the legislative history for the statute in question indicated that in order to communicate a threat, subjective intent is required.¹⁹⁰

180. *Id.* at 477.

181. *Jeffries* Petition for Certiorari, *supra* note 31, at 17–20.

182. *Jeffries*, 692 F.3d at 477.

183. *Id.* at 482.

184. *Id.* at 478–79.

185. *Id.* at 479. Judge Sutton stated, in his majority opinion, that the defendant's interpretation "reads too much into *Black*," and then went on in his dubitante opinion to posit the same idea. *Id.* at 483 (Sutton, J., dubitante).

186. *Id.* at 478–79.

187. *Id.* at 479–80.

188. *Id.* at 473.

189. *Id.* at 483 (Sutton, J., dubitante). A dubitante opinion is one that is rarely used, so I will define it here. A dubitante opinion is one where "the judge doubted a legal point but was unwilling to state that it was wrong." BLACK'S LAW DICTIONARY 515 (7th ed. 1999).

190. *Jeffries*, 692 F.3d at 484 (Sutton, J., dubitante) ("Conspicuously missing from *any* of these dictionaries is an objective definition of a communicated 'threat,' one that asks *only* how a reasonable observer would perceive the words. If words matter, I am hard pressed to understand

Tracing the origins of the objective test, Sutton indicated that some courts rooted their findings in criminal law of general intent as opposed to specific intent crimes, and he reprimanded these courts for attempting to change the fundamental meaning of the word threat.¹⁹¹

Rooting his opinion in *Watts*—not *Black*—Judge Sutton proceeded to cast doubt on his own majority opinion, finding that the true and correct way to identify whether a statement can be proscribed as a criminal threat is to apply *both* a subjective and objective test.¹⁹² In addition to accepting the hybrid test, Sutton concluded his dubitante opinion by explaining that despite the majority of circuits agreeing that the objective test is the correct test, the objective test was neither correct nor consistent with any definition of the word “threat.”¹⁹³ With this opinion, the Sixth Circuit joined both the Second and Seventh in casting doubt on the purely objective test.¹⁹⁴

D. *The Hybrid Test: Requiring Both Objective and Subjective Intent*

Both the D.C. Circuit and the Ninth Circuit’s post-*Black* tests require the precise standard that Judge Sutton advocated for in his dubitante opinion.¹⁹⁵ The hybrid test requires courts to assess both objective and subjective elements.¹⁹⁶ Under this test, the court must determine whether the “defendant intended that the statement be understood as a threat.”¹⁹⁷ The Ninth Circuit periodically is aided by the addition of an objective test, while the D.C. Circuit always requires the objective test alongside the subjective test.¹⁹⁸ In other words, in addition to determining the speaker’s intent, the court must also determine if “the statement would be understood by people hearing or reading it in context as a serious expression of an intent to kill or injure.”¹⁹⁹ In *United States v.*

why these definitions do not resolve today’s case.”). As to Congress’ intent, Judge Sutton noted that at no point did Congress believe that a person could be punished for communicating a threat without subjectively intending to do so. *Id.*

191. *Id.* at 485. While this opinion is labeled a dubitante opinion, the language at times indicates it may have been better classified as a dissent.

192. *Id.* at 485–86.

193. *Id.*

194. See *supra* notes 130, 173, and 189.

195. *Jeffries*, 692 F.3d at 483 (Sutton, J., dubitante); *United States v. Bagdasarian*, 652 F.3d 1113, 1117 & n.14 (9th Cir. 2011); *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 1 (D.D.C. 2012).

196. *Bagdasarian*, 652 F.3d at 1117 & n.14; *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d at 1.

197. *Bagdasarian*, 652 F.3d at 1118.

198. See *id.* at 1117 & n.14; *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d at 1.

199. *Bagdasarian*, 652 F.3d at 1118. This objective test is likely still a component because, before *Black*, the Ninth Circuit debated adopting an objective test, but the subjective test prevailed. *United States v. Romo*, 413 F.3d 1044, 1051 (9th Cir. 2005) (applying an objective test). *But see Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008) (questioning the inconsistency

Twine, the Ninth Circuit hinted toward a subjective standard in dicta when it expressed that in order for a statement to be considered a true threat, “the level of culpability must exceed a mere transgression of an objective standard of acceptable behavior.”²⁰⁰ After *Black*, the Ninth Circuit solidified this subjective standard in *United States v. Bagdasarian*, finding that the First Amendment requires a subjective intent test to “be read into all threat statutes that criminalize pure speech.”²⁰¹ While the Ninth Circuit adjusted its intent standard, it preserved the objective test’s elements and merely incorporated a further subjective component.²⁰² The court found the true threats definition in *Black* to require the speaker to both intend to communicate and “intend for his language to *threaten* the victim.”²⁰³

More recently, the D.C. Circuit addressed this issue as one of first impression after *Black*.²⁰⁴ In dealing with none other than a social media threat, the D.C. Circuit chose to follow the test proffered in the Ninth Circuit’s *United States v. Bagdasarian* decision that incorporated both a subjective and objective intent into one standard.²⁰⁵ The D.C. Circuit was influenced by the unique characteristics of online communication in combination with *Black* in departing from the majority of Circuits who utilize purely objective tests.²⁰⁶

1. CASE STUDY: INTERNET THREATS IN THE NINTH CIRCUIT

After *Black*, the Ninth Circuit decided *United States v. Bagdasarian*, in which it found that threats against the President, made on an online message board, did not rise to the level of a true threat when the hybrid objective and subjective test was applied. During the 2008 presidential election, the defendant joined a Yahoo message board

between *Romo* and *Cassel*). *But cf. Bagdasarian*, 652 F.3d at 1117 (reaffirming support for the subjective test). However, an earlier case, *Roy v. United States*, decided within months of *Watts*, continued to govern the requisite intent standard for the Ninth Circuit. *Roy v. United States*, 416 F.2d 874 (9th Cir. 1969). *Roy* applied a reasonable speaker test, assessing whether the reasonable speaker would foresee that the recipient would interpret the statement as a threat. *Id.* at 877. This held true through the much-cited decision, *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002). In that case, the court emphasized the foreseeability element of the objective speaker test, finding that it was very important to ensure that the threat was foreseeable given the context. *Id.* at 1075–76.

200. *United States v. Twine*, 853 F.2d 676, 680 (9th Cir. 1988).

201. *Bagdasarian*, 652 F.3d at 1117.

202. *Id.* at 1116–17.

203. *United States v. Cassel*, 408 F.3d 622, 631 (9th Cir. 2005).

204. 652 F.3d at 1117; *see In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 1 (D.D.C. 2012).

205. *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d at 2. This opinion noted that like in *Bagdasarian*, there may be situations that call for only the subjective test, but it failed to elaborate what those situations would be.

206. *See supra* note 95.

and posted disparaging comments about then-presidential candidate, Barack Obama, indicating he would have a fifty-caliber bullet in his head in the near future.²⁰⁷ The speaker also posted messages at the same time about how drunk he was.²⁰⁸ The Secret Service was alerted and interpreted the postings as threats.²⁰⁹ The Secret Service then found the defendant at his home where he kept various weapons, including a fifty-caliber rifle.²¹⁰

The court explained that in assessing threats, both a subjective and objective standard must be applied, not merely one of the two.²¹¹ The court reasoned that because true threats are governed by the Constitution, “the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech . . . [However,] with respect to some threat statutes, we require that the purported threat meet an objective standard in addition, and for some we do not.”²¹² Therefore, the court directed that the subjective test is mandatory in all instances after *Black* where the question is a constitutional free speech issue involving true threats, even if the test is inconsistent with prior tests.²¹³

In this case, the court concluded that under the objective element of the test, the statements could not be considered a threat by the reasonable recipient because the recipient would have very little context with which to interpret the statements posted on the message board.²¹⁴ The messages were anonymously posted on a financial board that was unrelated to the subject of the messages, and there was no evidence to suggest the statements were not conditional.²¹⁵ Moreover, the recipients had no information regarding the fact that the defendant actually possessed weapons.²¹⁶ As support, the court relied on the fact that while many people read the defendant’s postings, only one notified the authorities.²¹⁷

In looking at the subjective element, the court held that the defendant did not have the requisite subjective intent.²¹⁸ The court reasoned that the requisite intent was lacking particularly because the statements were made in a predictive manner, with an exhortatory tone, and the statements did not indicate that the defendant intended to carry out his

207. *Bagdasarian*, 652 F.3d at 1115.

208. *Id.*

209. *Id.* at 1116.

210. *Id.*

211. *Id.* at 1117.

212. *Id.*

213. *Id.* at 1118.

214. *Id.* at 1119.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

threats or have anyone else carry out the threats.²¹⁹ As such, no subjective intent could be read into the defendant's statements, and they did not rise to the level of true threats.²²⁰

2. CASE STUDY: INTERNET THREATS IN THE D.C. CIRCUIT

The D.C. Circuit's most recent true threats case was one of first impression—it was the Circuit's first opportunity to interpret the standard of intent for true threats following the *Black* decision.²²¹ In this case, the defendant utilized Twitter to express his desire to participate in inappropriate sexual activities with Michelle Bachmann, United States Congresswoman.²²² The defendant challenged the court's procurement of his personal information from Twitter, contending that there was no basis for the court to obtain his personal information under *Black*.²²³ Unlike the defendants in previous cases, here, the defendant contended that *Black* advocated for an objective standard.²²⁴ He reasoned that because the recipients on Twitter would not know his personal information, it was not necessary for the jury to know it either to determine whether his tweet could be considered a true threat under a reasonable person standard.²²⁵ The court, however, was not persuaded and instead concluded that a "close reading of *Black* raises doubts" about a purely objective test.²²⁶

The court reasoned that because the *Black* Court found that the act of burning a cross alone did not constitute a "true threat," consequently it was *the subjective intent of the speaker to threaten* that enabled burning a cross to become a "true threat."²²⁷ The court reasoned that merely assessing the threat's objective effect was insufficient, instead opting to consider if the tweet represented a "manifestation of a speaker's 'intent of placing the victim in fear of bodily harm or death,'" or, more simply,

219. *Id.*

220. *Id.* at 1120–23.

221. *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 1 (D.D.C. 2012). There was indication from his page that he frequently made sexually explicit jokes and meant this statement in jest. *Id.* at 3.

222. *Id.*

223. *Id.* at 9.

224. *Id.*

225. *Id.* It is likely that this defendant was relying on the interpretation of the majority of circuits, as explained above. See *supra* notes 156–59 and accompanying text.

226. *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d at 5.

227. *Id.* While it may be counterintuitive to imagine cross burning as not constituting a threat, cross burning has sometimes been used without any threatening implications, indicating that the *context* in which a cross is burned is key. One popular use of cross burning that was clearly not meant to be a threat was that in Madonna's *Like a Prayer* music video, where Madonna sang while crosses burned in the background. See Madonna, *Like a Prayer* at 3:09 (Warner Brothers Records 1989), available at <https://www.youtube.com/watch?v=79fzeNUqQbQ>.

the “speaker’s state of mind.”²²⁸

Unlike other circuits, the D.C. Circuit determined that assessing the “objective effectiveness” of the threat would be adding an additional objective requirement to the subjective test, one that was not proffered by *Black*.²²⁹ The court did not believe that *Black* wholly abrogated the objective test, but instead that it added an additional element.²³⁰ Therefore, the court adopted a subjective intent test, requiring “a serious expression of an intent to commit an act of unlawful violence,” while noting some situations may require an objective standard in addition to the subjective standard.²³¹

The court then went on to consider if this particular tweet constituted a true threat.²³² In reviewing the defendant’s entire Twitter account, the court concluded that in light of the defendant’s entire account, the tweet in question was not unusual because defendant’s past tweets were “extremely crude” and in “incomprehensibly poor taste.”²³³ Furthermore, the court found that despite the crude nature of the tweets, they were merely an “infantile attempt at humor” and not an actual threat.²³⁴ The court correctly reasoned that while the tweets were offensive, the tweets were merely vapid attempts at gaining attention from the Internet that he “surely lack[ed] in real life” and were not true threats.²³⁵

The mere fact that the defendant’s tweets were not of any social value did not authorize the court to limit them *carte blanche*.²³⁶ Instead, the defendant’s tweet about his desire to sodomize Michelle Bachmann was pure speech, and therefore not a “true threat.”²³⁷ The court supported its opinion noting that there was “nothing serious whatsoever” about the defendant’s Twitter page “except . . . the severity of mental depravity that would lead a person to produce such posts.”²³⁸ Further-

228. *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d at 10 (quoting *Virginia v. Black*, 538 U.S. 343, 360 (2003)).

229. *Id.*

230. *Id.*

231. *Id.* at 6–7 (quoting *Black*, 538 U.S. at 360) (noting that the case at hand was not a situation that required the objective test, but failing to clarify what situations would require it).

232. *Id.*

233. *Id.* at 2.

234. *Id.* at 3.

235. *Id.* It is noted that at the time of the decision, the defendant had 736 followers subscribed to see his tweets, and the court expected this number to grow after the decision was published. *Id.* Two other tweets found on the defendant’s Twitter page that the court found to be vapid follow: “My dick testified in court today in the case against my left hand ‘he beat me, your honor everyday for 25 years[.]’” *Id.* Another example was, “Marcus Bachmann is sponsoring a scavenger hunt in his home-town in the hopes someone finds his heterosexuality.” *Id.* at 4. To say the least, the court was not amused with the defendant’s humor. *See id.* at 3–4.

236. *See id.* at 7–10.

237. *See id.* at 5–10.

238. *Id.* at 7.

more, it was likely that a jury might find that the tweet was “political hyperbole,” like in *Watts*.²³⁹ Therefore, the court concluded that the threats did not rise to the level of true threats but instead were protected speech under the First Amendment.²⁴⁰

IV. THE NEED FOR CHANGE: A CALL TO ABANDON THE OBJECTIVE STANDARD

*“When some law-making bodies ‘get into grooves,’ Judge Learned Hand used to say, ‘God save’ the poor soul tasked with ‘getting them out.’”*²⁴¹

While it is clear that the circuits agree that the Supreme Court precedent set forth in *Watts* and *Black* indicates that context is very important for the fact-finder when deciding whether a statement constitutes a “true threat,” the courts disagree on the perspective from which this context should be interpreted.²⁴² Although the majority of circuit courts apply a variation of the objective test, as noted in Part III, in a post-*Black* world this may no longer be tenable—particularly with the increased use of social media as a forum. As detailed throughout this note, Internet speech is often anonymous, short, and lacking in context, while the intent standard for true threats is ambiguous and inconsistent. This section underscores why it is necessary for the Supreme Court to provide a clear directive to the courts below to abandon the objective standard altogether. Without a clear and uniform test, there is a high risk that pure speech will be punished under criminal statutes inconsistent with First Amendment principles.²⁴³ The combination of an increasing number of true threat cases arising from Internet speech and the fact that many circuits appear ready to abandon the objective test demonstrates that the courts need to find a clear consensus on how to assess intent. Therefore, it is imperative that the Supreme Court clarify *Black*, and that it do so in more than 165 characters.²⁴⁴

A. *Caught in the Grooves: The Objective Test in the Face of Ubiquitous Online Communication*

While all of the objective tests focus on different perspectives, the underlying principle is the same: avoiding an inquiry into the subjective

239. *Id.* at 8 (quoting *Watts v. United States*, 394 U.S. 705, 708 (1969)).

240. *Id.* at 7.

241. *Jeffries v. United States*, 692 F.3d 473, 486 (6th Cir. 2012) (Sutton, J., dubitante) (quoting *JUDGE LEARNED HAND, THE SPIRIT OF LIBERTY* 241–42 (2d ed. 1954)).

242. See *supra* Part III.

243. See Rothman, *supra* note 50, at 366.

244. See *supra* Part III. The mention of 165 characters refers to the number of characters used in *Black* to define true threats, a mere twenty-five more than are allowed in one tweet.

state of mind of the speaker.²⁴⁵ The reality is that circuits utilizing a purely objective test likely fear that by adding a subjective element, convictions for true threats will be harder to obtain and speech will be over-protected.²⁴⁶ However, I would counter this supposition and suggest that, in the face of the Internet, the opposite is true. Particularly when assessing online speech, anonymous or not, difficulties arise in applying the reasonable person test.²⁴⁷ Imagine the *Bagdasarian* case from the Ninth Circuit, detailed above, where the anonymous speaker posted threats to kill President Barack Obama on a financial message board. The objective reasonable speaker could not possibly have expected people to take his threats seriously. Why is this? The dominant reaction of those who encounter anonymous threats is to treat the threats as innocuous, just as the professional athletes and journalist from the introduction of this note did.²⁴⁸

In fact, of all the people who got on this public message board, only one reported the threats to the Secret Service.²⁴⁹ As the reasonable speaker relies on the reasonable recipient to construe his speech, the fact that the majority of recipients of the threat ignored it shows that, under a reasonable recipient test, most threats sent over the Internet to public forums would be construed as baseless and benign.²⁵⁰ Therefore, a speaker would expect that even in the face of a tasteless or threatening comment, that the recipients would either ignore it, or see it as an attempt at humor, like in *In re Grand Jury Subpoena No. 11116275*.

Even assuming *arguendo* that the speaker subjectively intended his posts to be a “true threat,” and that there were therapists and family members ready to testify to the fact that he truly desired to threaten the President, this information may not matter under an objective standard. There is overwhelming evidence that the average reasonable recipient in the context of anonymity would not report the threat or take it seriously, and the subjective intent is not considered in purely objective jurisdictions. The outcome of applying this test is, therefore, a general under-protection of speech.

Applying the reasonable recipient test, the result would not be much different. As noted above, most recipients would easily disregard an anonymous, threatening message as inconsequential. In all but the most serious of contexts, most users would presume that the speaker was

245. See *supra* Part III.

246. Segall, *supra* note 27, at 195–96.

247. Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats*, 41 Sw. L. REV. 43, 73 (2011).

248. See *supra* Part I.

249. *United States v. Bagdasarian*, 652 F.3d 1113, 1121 (9th Cir. 2011).

250. See *supra* notes 8–9 and accompanying text.

one with a similar sense of humor like that in *In re Grand Jury Subpoena No. 11116275*; inappropriate, distasteful, and crude—but not dangerous.²⁵¹ As such, a reasonable juror, correctly applying the reasonable recipient standard, would be hard pressed to convict someone who sent a threat of this nature without some kind of overriding context. However, this context could not be about the subjective intent of the speaker. For example, in the *In re Grand Jury Subpoena No. 11116275* case, had the Twitter user attached a picture of himself, with a Vietnam era machete, at a rally for the congresswoman, the reasonable recipient may see this as a true threat. It is likely most recipients would only have this reaction if the recipient could fathom the speaker actually getting close enough to the threatened recipient to make his tweet a reality, which is unlikely given the security that surrounds politicians.²⁵² This may then require a showing that the speaker actually had the ability to carry out the threat, a standard clearly rejected by the Supreme Court.²⁵³ As such, it does not appear that the reasonable recipient test would fare any better than the reasonable speaker test in the context of Internet speech that often provides little clarifying context. Moreover, it is unlikely that a test that could look at both, like in the Eleventh Circuit, would fare any better as neither test provides an adequate basis for finding that a recipient would feel threatened in anything other than the most extreme cases, leading to a broad overprotection of speech.

Yet, it is not just anonymous speech where context is the key to interpretation. Imagine, for example, that a couple fights and breaks up. In the process of breaking up, they “un-friend” each other on Facebook, presuming that this means they will no longer see each other’s Facebook updates. Then, for this example, imagine the ex-girlfriend decides to start dating again, has an unpleasant experience, and posts on her Facebook a status about how much she hates men and could “kill a man.” What she forgets is that while she “un-friended” her ex-boyfriend, she did not “un-friend” all of his friends. So what happens next?

Just like in the *Jeffries* and *Elonis* cases, where a third party revealed speech on a Facebook page to the threat’s recipient, here a friend shares the status with the ex-boyfriend. The ex-boyfriend, who is still mad about the breakup, gets angry, and decides to report the status, which was not written about him, to the authorities. What happens when the authorities not only charge the ex-girlfriend with making a threatening communication, under 18 U.S.C. § 875(c), but also charge everyone

251. 846 F. Supp. 2d. 1, 8–12 (D.D.C. 2012).

252. *Id.*

253. *Virginia v. Black*, 538 U.S. 343, 360 (2003) (“The speaker need not actually intend to carry out a threat.”).

who “liked” the status as well? Without the subjective intent inquiry, a jury will never learn that when this statement was originally made, it was not about the person who felt threatened, nor did the speaker ever believe it would be received by him. Is this really a true threat? How can the objective tests thoroughly investigate this speech without consideration of the subjective intent of the speaker not to direct this speech at the recipient? This is particularly troubling where “private” and “direct” communications are written and then shared later with third parties.

Moreover, many people use their social media pages as a way to build support for their art, visual or otherwise.²⁵⁴ But, what happens if one’s art could be construed as a threat—like in *Elonis* or *Jeffries*—despite the person placing a disclaimer on their site that the page represents art? Would this grant the person more protection because there is a warning to a “reasonable recipient” that the statuses are meant to be therapeutic art and not actual threats?

For example, the rapper Eminem wrote a song titled “Kim,” where he rapped about killing his ex-wife.²⁵⁵ How can the courts distinguish Eminem’s rap lyrics about his wife from those in *Elonis* or *Jeffries*? It would be reasonable to imagine that under purely objective standards, the recipients, all ex-wives, would construe the lyrics similarly. However, it would be hard to imagine that a jury familiar with Eminem’s songs would construe his lyrics as a threat. But, once fame is taken out of the equation, and a jury is not familiar with the person’s artistic style, the same jury may come to the exact opposite conclusion. So is all art that includes what may be construed as a true threat potentially criminal? Possibly. Jurisdictions that apply a hybrid of the subjective intent test and the objective test may provide more consistent results, because juries will be given more context as to the speakers’ intentions, including disclaimers on their pages and their past history, like in *Bagdasarian* and *In re Grand Jury Subpoena No. 11116275*.²⁵⁶

B. *The Hybrid Test: A Way Out of the Grooves*

The objective test is ill-equipped to determine the intent of online communications that often involve very little context. This is particularly true where speech is largely ignored by the intended audience.

254. Robert Maynard, *Artists and the New Normal*, HUFFINGTON POST (June 20, 2012), http://www.huffingtonpost.com/robert-maynard/artists-social-networking_b_1610290.html.

255. Andrew Dansby, *Eminem’s Wife Sues for \$10 Million*, ROLLING STONE (Aug. 22, 2000), <http://www.rollingstone.com/music/news/eminems-wife-sues-for-10-million-20000822>.

256. See, e.g., *United States v. Bagdasarian*, 652 F.3d 1113, 1116 (9th Cir. 2011) (introducing evidence that the speaker owned guns); *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d 1, 3 (D.D.C. 2012) (presenting evidence that the speaker’s Twitter account frequently featured crass jokes).

Accordingly, in the age of social media, the standard best equipped to address threats is the standard proffered in the Seventh Circuit's dicta in *United States v. Parr* and in Justice Sutton's dubitante opinion and adopted by both the Ninth and D.C. Circuits.²⁵⁷ This standard would ask "the fact finder . . . first to determine whether a reasonable person, under the circumstances, would interpret the speaker's statement as a threat, and second, whether the speaker intended it as a threat."²⁵⁸ Not only would this provide an avenue for consideration of evidence regarding the speaker's subjective intent and surrounding circumstances, like the gun that the defendant in *Bagdasarian* owned, it would also ensure that there was adequate breathing room for an artist who strives to become the next Eminem, like in *Elonis*. Consequently, those who truly do not intend to threaten another, yet do so unintentionally, would have an opportunity to explain their intentions to the fact-finder.²⁵⁹

This approach is consistent with the longstanding First Amendment precedent that strives to protect speech from being chilled.²⁶⁰ Whereas the objective test for true threats presents a potential for underprotection of speech, resulting in a potential chilling effect, the subjective test is naturally congruent with the First Amendment's goal to broadly protect speech.²⁶¹ Under the hybrid test, speakers are free to make jokes or post rap lyrics on social media, even if tasteless, without worrying about being prosecuted for speaking outside of acceptable social norms. As such, I would posit that the hybrid test is not only the most consistent with constitutional traditions of protecting pure speech from censorship, but that it is also best equipped to deal with threats under the changing landscape.

V. CONCLUSION

As Judge Sutton pointed out in his dubitante opinion, our jurisprudence has departed drastically from the plain meaning of a threat, so much so that an objective reasonable person definition cannot be squared with the word 'threat' itself.²⁶² As a result, our courts are stuck

257. See *United States v. Jeffries*, 692 F.3d 473, 486 (6th Cir. 2012); *In re Grand Jury Subpoena No. 11116275*, 846 F. Supp. 2d at 7; *Bagdasarian*, 652 F.3d at 1119; *United States v. Parr*, 545 F.3d 491, 500 (7th Cir. 2008).

258. *Parr*, 545 F.3d at 500.

259. 652 F.3d at 1113. Without this standard, it would appear that the intent standard for a threat would be based in negligence.

260. *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967–68 (1984) (holding that statutes that create "an unnecessary risk of chilling free speech [are] properly subject to facial attack").

261. Segall, *supra* note 27, at 195–96.

262. *United States v. Jeffries*, 692 F.3d 473, 484 (6th Cir. 2012) ("Conspicuously missing from any of these dictionaries is an objective definition of a communicated 'threat,' one that asks *only*

in the grooves and need help to get out. As detailed above, the subjective intent test is the rope dangling down, waiting for the other courts to grab on and escape the grooves. Particularly, with the advances in the Internet and social media, the purely objective test is no longer tenable, and there is a need for a test that is better equipped to deal with the present landscape. The hybrid test fits the bill. However, even if the courts do not choose to adopt the hybrid test, with the limited agreement amongst the circuit courts after *Black*, there is a need for clarity—the many iterations of intent required for a true threat after *Black* prevent justice from being served equally across the nation. At issue is one of our founding fathers' deeply cherished rights, the freedom of speech, and thus a need for clarity is clear as, currently, Internet speech that falls outside generally acceptable norms, even if posted in jest, is susceptible to criminal punishment. As a result, without clear guidance, it is likely that pure speech will be stifled under the current objective test. This would result in an outcome that is contradictory to this nation's history and tradition of expansive protection of free speech.

how a reasonable observer would perceive the words. If words matter, I am hard pressed to understand why these definitions do not resolve today's case.”).

