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Domestic violence intersects with constitutional, criminal, and civil law in ways that often present challenges for jurists seeking to reconcile conflicting interests in promoting victim safety and protecting the legal rights of those accused of abuse. One current issue presenting such tensions relates to "true threats" of violence which the U.S. Supreme Court considers to be among the categories of speech receiving only limited First Amendment protection. The Supreme Court has yet to indicate what level of intent would be constitutionally sufficient for conviction of a speaker of a true threat and the circuit courts have split on this issue. While a decision on the constitutionally requisite mens rea *for a true threat will impact a broad range of individuals and groups, it will have a substantial effect on domestic violence victims. Domestic violence victim advocates have generally argued that offering minimal free speech protections for true threats will best serve victims' interests and, in the context of civil protection order cases, this approach is indeed optimal. However, victims hold varying perspectives on the desirability of criminal*

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prosecution as a response to domestic violence. Moreover, rhetorical threats of violence can add value to political protest speech, as seen in rap music and other art forms, and thereby aid efforts to combat broader societal problems which contribute to domestic violence. As a result, a low mens rea *standard for true threats in all cases would undermine the goals of many domestic violence victims and could chill public dissent on issues impacting them.*

Supreme Court precedents addressing other categories of unprotected speech, particularly defamation, offer useful guidance on the resolution of this question. Specifically, the Court's caselaw suggests that applying a heightened mens rea *requirement for public protest context threats—threats against public officials or figures communicated in a public forum as part of a discussion on matters of public concern—versus lower intent standards for threats in other contexts represents the optimal balance between protecting threat victims and respecting free speech rights.*

INTRODUCTION

Domestic violence advocacy in the United States over the last several decades has produced sweeping legal changes in numerous areas including family law, immigration, and civil protection orders, bringing substantial relief to many victims.[1] As Congress and state legislatures have acted to combat domestic violence, courts have been presented with difficult questions related to balancing the promotion of safety for domestic violence victims with the protection of constitutional rights for those accused of abuse.[2] First Amendment speech protections currently exemplify one such area of tension. In recent years, defendants in a number of criminal prosecutions and civil protection order cases have raised free speech

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[1] *See, e.g.*, *Green Card for VAWA Self-Petitioner*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/green-card/green-card-vawa-self-petitioner (last updated July 26, 2018) (explaining path to citizenship for victims of domestic violence under the Violence Against Women Act); Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993) (providing a survey of civil protection order statutes in all fifty states); Nancy K.D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody to Batterers: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 606–13 (2001) (describing developments and implementation of rebuttable presumptions against award of custody to batterers in many states).

[2] *See, e.g.*, Davis v. Washington, 547 U.S. 813, 832–33 (2006); Crawford v. Washington, 541 U.S. 36, 57, 60 (2004); United States v. Arnold, 486 F.3d 177, 188–89 (6th Cir. 2007); *see also* Brief of Amicus Curiae of the American Civil Liberties Union et al. in Support of Petitioners at 17, Davis v. Washington, 547 U.S. 813 (2006) (No. 05-5224) ("*Davis* and *Hammon* illustrate the similar pressure on courts to expand the definition of 'nontestimonial.'"); Brief of Amici Curiae the National Network to End Domestic Violence et al. in Support of Respondents at 16, Davis v. Washington, 547 U.S. 813 (2006) (No. 05-524) ("Adopting an overly expansive view of 'testimonial' statements . . . will convert this 'shield' into a sword to be wielded by batterers to silence their victims . . . ").

arguments when accused of threatening, stalking, or harassing their current or former intimate partners.[3] Domestic violence victims are increasingly facing threats via the Internet and social media platforms, further clouding the lines between constitutionally protected speech and acts of abuse subject to legal regulation.[4]

For example, consider the case of Melissa, a high school senior who just went through a bad breakup with her boyfriend, Anthony.[5] One morning, Melissa gets texts from several friends stating that Anthony has just posted a new rap song on his public SoundCloud page that does not mention Melissa's name but uses language suggesting that he's threatening her. Melissa then visits Anthony's SoundCloud page and sees that Anthony has changed his profile picture—it now shows him holding a gun pointed at the camera. She plays the new song and hears Anthony rapping the following lyrics:

> *You fucked up my life*
>
> *Put a knife in my lungs*
>
> *I don't give about a fuck about a bitch*
>
> *Pull my gun*

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[3] *See, e.g.*, State v. B.A., 205 A.3d 1130, 1134 (N.J. Super. Ct. App. Div. 2019) (rejecting a defendant's challenge to stalking statute as vague and overbroad in violation of the First Amendment in a domestic violence case); People v. McPheeters, 159 Cal. Rptr. 3d 607, 619 (Cal. Ct. App. 2013) (concerning a defendant who argued that the trial court erred when it failed to instruct the jury to consider free speech arguments in a prosecution based on the defendant's threat to kill his ex-girlfriend in front of a police officer); State v. Oliveros, No. 28935, 2010 WL 3433557, at *9 (Haw. Ct. App. Oct. 12, 2010) (concerning a defendant who argued that the trial court failed to comply with First Amendment requirement to instruct the jury of an objective standard for true threats in the prosecution of the defendant for threatening to kill his girlfriend).

[4] *See* Megan L. Bumb, *Domestic Violence Law, Abusers' Intent, and Social Media: How Transaction-Bound Statutes are the True Threats to Prosecuting Perpetrators of Gender-Based Violence*, 82 BROOK. L. REV. 917, 929 (2017) ("A survey conducted by the National Network to End Domestic Violence in 2012 revealed that . . . almost 90% of [domestic violence] agencies had had victims report being threatened through technology; one third of those threats occurred on social media and Facebook.").

[5] Melissa is a fictional name, but her experiences are based on the lives of women I have represented in practice.

Put it to your fucking head

Now you're dead

My shit is too hot though

Guns to your head

El Chapo

Melissa agrees with her friends that the song is about her, and she is frightened. Melissa seeks a civil protection order against Anthony. Anthony argues that he is an aspiring rapper with a First Amendment right to post the new song—which he claims is about no one in particular—and that the Constitution prevents the court from using his lyrics as the basis for an order against him. In deciding whether to enter a civil protection order against Anthony, the court must somehow reconcile the goal of domestic violence prevention and the protection of free speech rights.[6]

The U.S. Supreme Court announced that "true threats" were among the categories of speech left unprotected by the First Amendment in a 1969 *per curiam* opinion, *Watts v. United States*.[7] However, the Court in *Watts* did not define "true threats."[8] The Supreme Court next addressed the issue of true threats in 2003, in *Virginia v. Black*, commenting that "true threats encompass those statements where the speaker means to communicate a serious

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[6] *Abuse Defined: What is Domestic Violence?*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/is-this-abuse/abuse-defined/ (last visited Jan. 2, 2020) ("Domestic violence (also called intimate partner violence (IPV), domestic abuse or relationship abuse) is a pattern of behaviors used by one partner to maintain power and control over another partner in an intimate relationship."). Use throughout this Article of the female pronoun to refer to plaintiffs or domestic violence victims and the male pronoun to refer to defendants or perpetrators of domestic violence reflects recent statistics indicating that approximately 85% of victims are women and the vast majority of perpetrators of domestic violence against women are male. *See* Alissa Scheller, *At Least A Third of All Women Murdered in the U.S. Are Killed By Male Partners*, HUFFPOST, https://www.huffpost.com/entry/men-killing-women-domesti_n_5927140 (last updated Dec. 6, 2017). This usage is not intended in any way to deny or minimize the plight of male or non-binary victims or the problems of female or non-binary perpetrators.

[7] Watts v. United States, 394 U.S. 705 (1969) (per curiam).

[8] *See generally id.*

expression of an intent to commit an unlawful act of violence to a particular individual or group of individuals."[9] Beyond that sentence, however, the Court gave little attention to the definition of true threats, ultimately deciding the case on unrelated grounds.[10] Following *Watts*, many circuit courts adopted an "objective test" to determine whether a statement constituted a true threat,[11] and the circuits have continued to utilize this test following *Black*.[12] Under the objective test, the fact finder asks if a reasonable listener, or, in some jurisdictions, a reasonable speaker or a reasonable person, would find the communication at issue to be threatening.[13] The objective test does not address the *mens rea* of an individual speaker accused of uttering a true threat.[14] In contrast to the general consensus on applying an objective test to true threats,[15] the circuit courts split sharply on how to treat the element of the requisite, subjective *mens rea* of the speaker.[16] State courts have split on this issue as well.[17]

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[9] Virginia v. Black, 538 U.S. 343, 359 (2003) (explaining that the speaker need not intend to carry out a threat; rather, it is enough that disruption and fear were caused by the true threat).

[10] *Id*. at 347–48 (resolving the case by holding that the statutory provision was unconstitutional because it treated "any cross burning as prima facie evidence of intent to intimidate").

[11] *See, e.g.*, United States v. Alabound, 347 F.3d 1293, 1297 (11th Cir. 2003) ("Thus, the offending remarks must be measured by an objective standard.").

[12] *See, e.g.*, United States v. Martinez, 736 F.3d 981, 987 (11th Cir. 2013) (finding that *Black* did not introduce a subjective test for true threat analyses); United States v. White, 670 F.3d 498, 508–09 (4th Cir. 2012) (finding that *Black* did not implement a subjective test, thus applying an objective true threat analysis); United States v. Fuller, 387 F.3d 643, 647 (7th Cir. 2004) (describing the inadequacy of a subjective test).

[13] *See infra* Section I.A; *see also* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1235 (2006) ("The test typically comes in one of three forms. The variations are based on whether the perspective of the test is that of a reasonable speaker, a reasonable listener, or a 'neutral' reasonable person.").

[14] *See* Crane, *supra* note 13, at 1235.

[15] *See, e.g.*, United States v. Bagdasarian, 652 F.3d 1113, 1118 (9th Cir. 2011); United States v. White, 670 F.3d 498, 507–08 (4th Cir. 2012).

[16] *Compare, e.g.*, *Bagdasarian*, 652 F.3d at 1118 (interpreting *Black* as requiring that the "speaker subjectively intend the speech as a threat"), *with White*, 670 F.3d at 507–08 (requiring only that the speaker intend to communicate a statement that meets the objective test for true threats).

[17] *See infra* Section II.B.

Many lawyers and commentators[18] expected the Supreme Court to resolve the circuit court split as to this *mens rea* issue in the 2015 case of *Elonis v. United States*, but the Court ultimately decided the case on statutory grounds.[19] The eventual resolution of this question will have a significant effect on domestic violence victims because of the frequency with which they endure perpetrators' threats and the devastating emotional and financial toll that such threats exact.[20] The Supreme Court specifically noted the importance of true threat jurisprudence for domestic violence victims during oral argument in *Elonis*.[21] For example, Justice Alito asked Elonis's attorney, "What do you say to the amici who say that if [a subjective knowledge or purpose to threaten standard] is adopted, this is going to have a very grave effect in cases of domestic violence?"[22] Commentators agree that the Supreme Court will likely feel compelled to revisit the constitutional question left unaddressed in *Elonis* as the Internet

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[18] *See, e.g.*, Emily Bazelon, *Do Online Death Threats Count as Free Speech?*, N.Y. TIMES (Nov. 25, 2014), https://www.nytimes.com/2014/11/30/magazine/do-online-death-threats-count-as-free-speech.html; Clay Calvert et al., Opinion, *Rap Lyrics or True Threats? It's Time for the High Court to Decide*, FORBES (May 24, 2014, 12:32 AM), https://www.forbes.com/sites/realspin/2014/05/24/rap-lyrics-or-true-threats-its-time-for-the-high-court-to-decide/#1e2a42525601; *Justices Weigh Limits of Free Speech Over Internet*, FOX NEWS, https://www.foxnews.com/politics/justices-weigh-limits-of-free-speech-over-internet (last updated Dec. 20, 2015); Vauhini Vara, *The Nuances of Threats on Facebook*, NEW YORKER (Dec. 3, 2014), https://www.newyorker.com/news/news-desk/nuances-threat-facebook.

[19] Elonis v. United States, 135 S. Ct. 2001, 2012 (2015).

[20] *See infra* Parts II, IV.

[21] Transcript of Oral Argument at 44, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983) [hereinafter *Elonis* Oral Argument] (statement of Justice Breyer expressing his concern that "a lot of [true threat] cases would come up in the context of domestic relations disputes"). The Court also accepted two amicus briefs from attorneys and service providers on behalf of domestic violence victims. *See* Brief Amici Curiae the National Network to End Domestic Violence, et al. in Support of Respondent, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983) [hereinafter Brief Amici Curiae the National Network to End Domestic Violence, et al.]; Brief of the Domestic Violence Legal Empowerment and Appeals Project and Professor Margaret Drew as Amici Curiae in Support of Respondent, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983) [hereinafter Brief of the Domestic Violence Legal Empowerment and Appeals Project and Professor Margaret Drew as Amici Curiae].

[22] *Elonis* Oral Argument, *supra* note 21, at 60.

renders criminal charges for threats more common.[23] The Court will not lack opportunities to decide the proper test for a true threat—cases raising this question continue to be litigated, with unsuccessful defendants regularly seeking certiorari.[24]

Legal scholarship has rarely examined the resolution of the circuit court split on true threats from the perspective of a domestic violence victim.[25] Of those domestic violence victims advocates that have addressed this issue, some have argued that victims' interests are best served if minimal First Amendment protection, namely requiring only the intent to communicate objectively threatening words, applies to all true threats cases, whether civil or criminal.[26] Victim advocates correctly note that adoption of a subjective intent to threaten requirement for true threats could limit access of many victims to civil protection orders, as civil protective order standards in some states rely upon criminal statutes or caselaw.[27] A heightened *mens rea* requirement would also hinder the ability of some victims to seek criminal prosecution of their former intimate partners for abuse.[28]

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[23] *See e.g.*, Cameron L. Fields, Note, *Unraveling a Ball of Confusion: Layers of Criminal Intent, Facebook, Rap, and Uncertainty in* Elonis v. United States, *135 S. CT. 2001 (2015)*, 36 MISS. COLLEGE L. REV. 133, 169 (2017) (discussing how *Elonis* failed to answer many questions about true threat analysis); Fernando L. Diaz, Note, *Trolling & the First Amendment: Protecting Internet Speech in the Era of Cyberbullies & Internet Defamation*, 2016 U. ILL. J.L. TECH. & POL'Y 135, 138 (2016) ("[T]he Supreme Court will be petitioned to hear more cases like *U.S. v. Elonis*, where Internet speech challenges traditional First Amendment jurisprudence.").

[24] *See, e.g.*, Petition for Writ of Certiorari, Knox v. Pennsylvania, 190 A.3d 1146 (Pa. 2018) (No. 18-949), *denying cert.* 139 S. Ct. 1547 (2019) [hereinafter *Knox* Writ of Cert.]; Petition for Writ of Certiorari, State v. Sibley, No. 1 CA-CR 17-0768, 2018 WL 2440236 (Ariz. Ct. App. May 31, 2018) (No. 18-1001), *denying cert.* 139 S. Ct. 1348 (2019).

[25] *But see* Bumb, *supra* note 4, at 950 ("[T]he issue domestic violence victim advocates need to address is *how* to establish that [abusers] knew the threatening nature of [their] posts . . .").

[26] *See, e.g.*, Brief of the Domestic Violence Legal Empowerment and Appeals Project and Professor Margaret Drew as Amici Curiae, *supra* note 21, at 30–31 ("[A] ruling that the First Amendment requires proof of subjective intent in prosecutions for domestic abuse threats would jeopardize the protections afforded victims . . ."); Brief Amici Curiae the National Network to End Domestic Violence, et al., *supra* note 21, at 21–22.

[27] *See infra* Section II.B.

[28] *See infra* Section II.C.

This Article, however, argues that while an interpretation of the First Amendment requiring a minimal subjective test for true threats in civil protection order cases is constitutionally sufficient and comports with the goals of domestic violence victims, the same low *mens rea* standard in criminal cases conflicts with the preferences of many victims. First, many victims disfavor reliance on criminal law as a means of preventing and remedying harm from domestic violence.[29] Second, a legal rule which enhances the likelihood of criminal convictions in all true threat cases, including those not involving domestic violence, contributes to the problem of mass incarceration, which has had a profoundly negative impact on the communities in which many domestic violence victims live.[30] Third, vigorous First Amendment protections for political protest speech, including rhetorical threats of violence, help to safeguard public expression of social justice outrage on issues of importance to domestic violence victims.[31] In this regard, rap music offers some helpful insight into free speech concerns with a subjective test requiring minimal intent.[32]

This Article provides a legal framework, attuned to the interests and perspectives of domestic violence victims, aimed at limiting the frequency of true threats of violence while also respecting freedom of speech principles and the intersectional identities of domestic violence victims.[33] This Article argues that, rather than imposing a

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[29] *See infra* Section II.C.

[30] *See infra* Section II.C.

[31] *See infra* Part III.

[32] *See, e.g.*, N.W.A., *Fuck tha Police*, *on* STRAIGHT OUTTA COMPTON (Ruthless Records & Priority Records 1988); *see also infra* Section IV.A.3. Other scholars have addressed issues of misogyny in rap which, while beyond the scope of this Article, are nonetheless important to note. *See, e.g.*, Sarah Rogerson, *Using Hip-Hop's Lyrical Narrative to Inform and Critique the Family Justice System in* HIP HOP AND THE LAW 219, 227 n.2 (Pamela Bridgewater et al., eds. 2015) ("[G]angsta rap . . . tends to be less articulate regarding contemporary social issues and more focused on 'thug' or 'gang' culture of violence, materialism, and misogyny.").

[33] "Intersectionality is defined as "the interconnected nature of social categorizations such as race, class, and gender as they apply to a given individual or group, regarded as creating overlapping and independent systems of discrimination or disadvantage." *Intersectionality*, OXFORD ENGLISH DICTIONARY (3d ed. 2011); *see* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination*, 1989 U. CHI. LEGAL FORUM 139 (1989).

single, overarching standard to achieve the proper balance between deterring violent threats and protecting free speech, the Court should instead draw upon the framework of defamation law to apply varying *mens rea* standards to true threats depending upon the communication target, context of delivery, and type of potential liability.[34] Part I provides an overview of the Supreme Court's jurisprudence on true threats and the circumstances in which threats of violence may receive some level of constitutional protection. Part II describes the prevalence of threats in the context of domestic violence, as well as the emotional and financial costs of such threats for victims. It also highlights the potential for a constitutionally required, heightened *mens rea* standard to limit legal relief for domestic violence victims seeking civil protection orders and details victims' diverse viewpoints regarding criminal prosecution of their current and former intimate partners. Part III explains how an examination of the Supreme Court's standards for other unprotected speech categories, specifically defamation, and, to a lesser extent, incitement, provides helpful insight into the rules that optimally balance interests in free speech and protection of victims from the harm caused by true threats. Part IV suggests that the Supreme Court adopt a three-tiered approach to the subjective *mens rea* for true threats in addition to requiring communication of words qualifying as true threats pursuant to the objective test. Specifically, the Article first proposes heightened free speech protection (purpose to threaten or knowledge to a substantial certainty that a statement will threaten) for *public protest context* threats that encompass threats against public officials or figures on matters of public concern when

[34] While this Article focuses on the intersection of true threat jurisprudence and domestic violence, it should not be read as suggesting support for a domestic violence exceptionalism approach to true threats. "The anti-violence movement has long engaged in what has come to be known as 'domestic violence exceptionalism'—the idea that policymakers should care more about people subjected to abuse than other victims or trauma or marginalized groups." LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 129 (2018). Rather, I assert that the perspective of domestic violence victims should be given significant consideration particularly in the context of civil liability for true threats which will involve almost exclusively domestic violence civil protection order cases as discussed in Section IV.B.2, *infra*.

someone utters those threats in public.[35] Second, it suggests an intermediate level of protection (recklessness as to whether a statement will threaten) in criminal cases for *private context* threats which include any threats against private individuals regardless of whether they are uttered in public or in private, as well as threats against public officials or figures that are uttered in private.[36] Finally, in civil cases, this Article recommends a lesser standard for private context threats of violence against any individual or group, requiring only that the speaker intends to communicate the objectively threatening words without any need for the speaker to also intend to threaten the target of the statement.[37] This approach best balances domestic violence victim concerns, providing significant continued protection to threat victims while also allowing for impassioned political protest speech.[38]

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[35] The terms "public protest context threats" and "private context threats" are used throughout this Article as a shorthand for the definitions utilized here. Although she did not utilize the term "public protest context threats" in this specific manner, Judge Marsha S. Berzon provided the inspiration for the term in her employment of similar language in her dissent. *See* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1105–08 (9th Cir. 2002) (en banc) (Berzon, J., dissenting).

[36] To clarify, I argue that a recklessness standard should apply to any criminal case involving threats of violence *which the speaker communicates privately*, (i.e., personal cellular telephone voicemail or text message), to a public official or figure, regardless of whether the speech also addresses a matter of public concern, for reasons discussed *infra* Section IV.B. Private individual is used here to refer to anyone not qualifying as a public official or figure.

[37] Civil cases involving true threats will almost all involve domestic violence civil protection orders but will also include, in some jurisdictions, other civil stay away orders, for victims of non-intimate partner abuse, as well as negligent infliction of emotional distress.

[38] Two other jurists have suggested that true threat standards should draw upon Supreme Court precedent on defamation, albeit in different ways than proposed in this Article. *See Planned Parenthood of the Columbia/Willamette, Inc.*, 244 F.3d at 1107 (Berzon, J., dissenting) (suggesting that for true threats against public officials or public figures and on matters of public concern, the court should require subjective intent on the part of the speaker along with an objective test that specific victims understand communication as an unequivocal threat that the speaker would physically harm them but not addressing other types of true threats); Michael Pierce, *Prosecuting Online Threats After Elonis*, 110 NW. U. L. REV. ONLINE 51, 59 (2015) (arguing for a recklessness standard for online threats against public figures or on public issues versus a negligence standard for threats involving private individuals).

I. DEVELOPMENT OF TRUE THREAT JURISPRUDENCE

A. *Unprotected Speech*

The First Amendment dictates that "Congress shall make no law . . . abridging the freedom of speech."[39] Jurists have discussed and debated the importance of various rationales underlying the Constitution's protection of speech, including the promotion of self-government, support for autonomy, facilitation of the search for truth, and provision of a safety-value for unlawful impulses.[40] The Supreme Court has consistently emphasized the key role of respect for political speech in First Amendment interpretation, describing the First Amendment's focus as protection of "the free discussion of governmental affairs."[41] Moreover, the government cannot prohibit speech or expressive conduct merely because society finds it "offensive or disagreeable,"[42] or because people find it to be "hurtful."[43]

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[39] U.S. CONST. amend. I.

[40] *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (noting the marketplace of ideas rationale for First Amendment protection and stating "the ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . ."); Anne Klinefelter, *First Amendment Limits on Library Collection Management*, 102 L. LIBR. J. 343, 347 (2010) (noting goals underlying the First Amendment include "citizen oversight of government"); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1001 (1978) (observing that the rationale for protecting speech draws from "ethical requirement that the integrity and autonomy of the individual moral agent must be respected"); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 UNIV. CHI. L. REV. 20, 23 n.18 (1975) ("[T]he first amendment serves chiefly as a safety valve, permitting peaceful reform within a stable system-or, . . . preventing revolution through 'repressive tolerance.'").

[41] Mills v. Alabama, 384 U.S. 214, 218 (1966); *see also infra* Section IV.A.I.

[42] Texas v. Johnson, 491 U.S. 397, 414 (1989) ("if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[43] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. 515 U.S. 557, 574 (1995) ("Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.").

However, free speech rights are not "absolute at all times and under all circumstances."[44] The Supreme Court first announced that some categories of speech did not warrant constitutional protection in the 1942 case of *Chaplinsky v. New Hampshire*.[45] In that case, Walter Chaplinsky appealed his conviction for violation of a state criminal law banning the use of "offensive, derisive or annoying" words addressed towards another in public on First Amendment grounds.[46] The Supreme Court upheld Chaplinsky's conviction and, in explaining its ruling, acknowledged the existence of "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[47] Unprotected speech categories include libel and obscenity as well as "fighting words," which the Court in *Chaplinsky* defined as "words likely to cause an average addressee to fight."[48] Libel, obscenity, and fighting words do not merit constitutional protection because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them may be outweighed by the social interest in order and morality."[49]

The Supreme Court first declared that true threats were among the categories of unprotected speech in the 1969 case of *Watts v. United States*.[50] In 1966, Robert Watts, an African-American teenager,[51] attended a public rally on the Washington Monument

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[44] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.").

[45] *Id.* at 572.

[46] *Id.* at 569.

[47] *Id.* at 571–72.

[48] *Id.* at 572–73 ("These [categories of unprotected speech] include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . .").

[49] *Id.* at 572; *see also* Ohralick v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (Commercial speech also receives less constitutional protection given its "subordinate position in the scale of First Amendment values.").

[50] Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

[51] David L. Hudson Jr., *50 Years Ago, the Court Enters the True Threats Thicket in Watts v. United States*, FREEDOM FORUM INST. (May 7, 2019), https://www.freedomforuminstitute.org/2019/05/07/50-years-ago-the-court-enters-the-true-threats-thicket-in-watts-v-united-states/.

grounds.[52] Watts spoke out during a post-rally discussion stating "I have already received my draft classification as 1-A" then declared he would not go to Vietnam explaining that the government was "not going to make [him] kill [his] black brothers."[53] Watts closed out his comments with the rhetorical flourish that resulted in his criminal charges: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[54] The group in attendance laughed and the discussion ended uneventfully.[55] However, the next day, Secret Service agents arrested Watts, and prosecutors charged him with a felony violation of a federal law banning any "knowing and willful" threat to injure or kill the President.[56]

A jury convicted Watts and the Court of Appeals affirmed; the Supreme Court, however, reversed.[57] The Supreme Court found Watts' remark to be "political hyperbole" and reiterated America's "profound national commitment" to vigorous debate on public issues.[58] Watts's statement consisted of merely a "crude offensive method of stating a political opposition to the President."[59] In the *per curiam* opinion, the Court further noted that language in the political arena is "often vituperative, abusive and inexact."[60] In reaching the conclusion that Watts's rhetoric did not constitute a true threat, the Court considered the context of Watts's statement as well as the statement's conditional nature and the reaction of the listeners.[61] The Supreme Court did not, however, offer any detailed analysis or define the term "true threat."[62]

The Supreme Court did not return to the issue of true threats until 2003 in *Virginia v. Black*.[63] In *Black*, Justice O'Connor focused on

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[52] Watts v. United States, 402 F.2d 676, 686 (D.C. Cir. 1967) (Skelly Wright, J., dissenting) ("Appellant attended a rally of the W.E.B. DuBois Club at the Sylvan Theater on the Washington Monument grounds.").

[53] *Id*.

[54] *Id.*

[55] *Watts*, 394 U.S. at 707.

[56] *Watts*, 402 F.2d at 677; *see also* 18 U.S.C. § 871(a) (1964).

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

[58] *Id.* at 708.

[59] *Id.*

[60] *Id.*

[61] *Id*.

[62] *See id.* (mentioning "true threat" once, but not defining or analyzing the term).

[63] Virginia v. Black, 538 U.S. 343 (2003) (plurality opinion).

the concept of true threats in just two paragraphs of a lengthy plurality opinion.[64] The Court ultimately resolved the case on other grounds.[65] Specifically, the *Black* Court found a Virginia statute criminalizing cross burning with intent to intimidate was unconstitutional due to a provision which, as interpreted in a jury instruction, improperly treated an act of cross burning alone as prima facie evidence of the requisite criminal intent.[66] The Court noted, however, that the state of Virginia did possess the power to ban cross burning "with intent to intimidate" because that type of symbolic speech constituted a true threat.[67] The plurality then offered that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an unlawful act of violence to a particular individual or group of individuals."[68]

In contrast to the Supreme Court's limited attention to the issue, the circuit courts have decided numerous cases involving true threats in the years before and after *Black*.[69] Lower courts have found that analyzing whether a statement qualifies as a true threat requires two distinct inquiries. First, the fact finder must consider whether the words in question are objectively threatening such that the speech may fail to warrant constitutional protection.[70] With respect to this first question, the circuit courts have defined the concept of a true threat in similar ways, largely corresponding to the language in *Black*.[71] The circuit courts frequently refer to this

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64 *Id*. at 359–60.

65 *Id*. at 347–48.

66 *Id*. at 347–48, 354, 364–65 (holding that the prima facie evidence provision of the statute was improper because cross burning might indicate an intent to intimidate or it might suggest a "person is engaged in core political speech" in an effort to "communicate . . . shared ideology").

67 *Id.* at 362.

68 *Id.* at 359.

69 *See infra* notes 72–74.

70 *See, e.g.*, United States v. Turner, 720, F.3d 411, 426–27 (2d Cir. 2013) (affirming lower court jury instructions that instructed that "[w]hether a particular statement is a threat is governed by an objective standard.").

71 *See e.g.*, United States v. Doggart, 906 F.3d 506, 510 (6th Cir. 2018) ("an expression of an intent to inflict loss or harm"); United States v. White, 810 F.3d 212, 220 (4th Cir. 2016) ("serious expression of an intent to do harm"); United States v. Heineman, 767 F.3d 970, 972 (10th Cir. 2014) ("declaration of intention, purpose, design, goal, or determination to inflict [bodily injury] on another"

inquiry as the "objective test" for a true threat because they have adopted the viewpoint of either a reasonable speaker, reasonable recipient/listener, or just a generic reasonable person to assess whether the words at issue may constitute a true threat.[72] The "objective test" generally looks to the words spoken, as well as to a

(internal quotation marks omitted)); *Turner*, 720 F.3d at 427 ("serious expression of an intent to inflict injury"); United States v. Stock, 728 F.3d 287, 293 (3d Cir. 2013) ("communications expressing an intent to inflict injury in the present or future"); United States v. Stefanik, 674 F.3d 71, 77 (1st Cir. 2012) ("serious expression of intent to inflict bodily injury" (internal quotation marks omitted)); United States v. Jongewaard, 567 F.3d 336, 340 (8th Cir. 2009) ("express[ion of] an intention to inflict harm, loss, evil, injury, or damage on another"); United States v. Stewart, 411 F.3d 825, 828 (7th Cir. 2005) ("serious expression of an intention to inflict bodily harm" (internal quotation marks omitted)); United States v. Alaboud, 347 F.3d 1293, 1296–97 (11th Cir. 2003) ("serious expression of an intention to inflict bodily harm" (internal quotation marks omitted)); Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1075 (9th Cir. 2002) (en banc) ("expression of an intention to inflict evil, injury, or damage on another" (internal quotation marks omitted)); United States v. Morales, 272 F.3d 284, 287 (5th Cir. 2001) (communication that "create[s] apprehension that its originator will act according to its tenor" (internal quotation marks omitted)).

[72] *Compare, e.g.*, United States v. Clemens, 738 F.3d 1, 12 (1st Cir. 2013) ("this court has applied an objective defendant vantage point standard"); United States v. Elonis, 730 F.3d 321, 331 n.7 (3d Cir. 2013) ("The Fourth Circuit test focuses on the reasonable recipient, but our test asks whether a reasonable speaker would foresee that statement would be understood as a threat."), *with Turner*, 720 F.3d at 420 ("This Circuit's test for whether conduct amounts to a true threat is 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 inquiry.") (internal quotation marks omitted); United States v. White, 670 F.3d 498, 509 (4th Cir. 2012) ("whether the statement amounts to a true threat is determined by the understanding of a reasonable recipient familiar with the context"); Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (en banc) ("Our court is in the camp that views the nature of the alleged threat from the viewpoint of a reasonable recipient."), *and* Porter v. Ascension Par. Sch. Bd., 393 F.3d 608, 616 (5th Cir. 2004) ("Speech is a 'true threat' and therefore unprotected if an objectively reasonable person would interpret the speech as a 'serious expression of an intent to cause a present or future harm.'"); United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012) ("a reasonable observer would construe as a true threat to another."); United States v. Martinez, 736 F.3d 981, 988 (11th Cir. 2013) ("A true threat is determined from the position of an objective, reasonable person"), *vacated by* 135 S. Ct. 2798 (2015).

variety of contextual factors to determine if a statement qualifies as a true threat.[73]

With respect to the second, subjective inquiry, the fact finder must assess whether the speaker of the words at issue had the necessary intent to utter or publish a true threat pursuant to the relevant statute, or pursuant to the First Amendment if the Amendment requires a higher *mens rea* than the statute.[74] On this *mens rea* question, the majority of circuit courts have held that the Constitution requires only that a speaker intend *to communicate* particular words—words that the fact finder later determines qualify objectively as a true threat; under this standard, the speaker need not intend *to threaten* or intimidate the victim(s) by speaking the words.[75] Thus, most circuit courts utilize a *mens rea* standard which, in essence, protects only a very small subset of defendants who communicate an objective true threat;[76] for example, those who

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[73] *See, e.g.*, United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (stating that courts must evaluate alleged threat in light of "entire factual context" considering factors including the reaction of the recipient and other listeners to the threat and whether the recipient had reason to believe that the speaker had the propensity to engage in violence). The objective test does not require a speaker have the purpose of acting upon the threat. *See* United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005) (citing Virginia v. Black, 538 U.S. 343, 360 (2003)) (emphasizing that a finding of the speaker's actual intent to carry out the threat is unnecessary because the intent to threaten alone qualifies the speech as a true threat if the statement also met the standard of the objective test).

[74] The existence of a constitutional question regarding the level of intent on the part of the speaker of a true threat required by the First Amendment depends in each case upon the *mens rea* indicated in the applicable federal or state law. For example, if the relevant law requires only recklessness on the part of the speaker, defendants may argue that the First Amendment necessitates a higher *mens rea* for liability on the basis of speech. *See, e.g.*, *Doggart*, 906 F.3d at 512; *White*, 810 F.3d at 220–21; United States v. Heineman, 767 F.3d 970, 973 (10th Cir. 2014); *Turner*, 720 F.3d at 426–27; *Stock*, 728 F.3d at 293–94; *Jongewaard*, 567 F.3d at 341; *Stewart*, 411 F.3d at 828.

[75] *See, e.g.*, *White*, 670 F.3d at 511 (requiring only intent to communicate the purported true threat, regardless of subjective intent to intimidate). *See also Clemens*, 738 F.3d at 11–12 (summarizing which circuits have considered a adopting a subjective intent to threaten requirement after *Black* and finding that the majority of circuits have rejected such a test and instead continued to require only a subjective intent to communicate a true threat).

[76] *See, e.g.*, Thomas DeBauche, Note, *Bursting Bottles: Doubting the Objective-Only Approach to 18 U.S.C. § 875(C) in Light of* United States v. Jeffries *and the Norms of Online Social Networking*, 51 HOUS. L. REV. 981, 987,

deliver a sealed envelope with a true threat from a third party to the victim while unaware of its contents or those who have Tourette's Syndrome. Some commentators and litigants have argued that the objective test without a corresponding subjective intent to threaten requirement imposes a standard akin to negligence for true threats.[77] However, the *mens rea* approach followed by the majority of circuit courts is more fairly characterized as a general intent standard for true threats.[78]

Two circuits, however, have cited *Black* in support of finding that the First Amendment requires proof of a subjective intent *to threaten*, meaning this *mens rea* standard is far more demanding than the requirement of a subjective intent *to communicate* words that are objectively true threats of violence.[79] The Ninth and Tenth Circuits have held that the First Amendment requires a speaker to have a subjective intent (purpose or knowledge to a substantial certainty) to threaten the target of a communication, with words that the fact finder later determines meet the objective test for a true

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1011 n.246 (2014); Brian Walsh, Comment, *Circuits Split as to Statutory Interpretation of the Mens Rea Requirement in 21 U.S.C. § 841(c)(2): The Tenth Circuit Provides the Correct Answer*, 48 DUQ. L. REV. 123, 126–32 (2010).

[77] *See, e.g.*, Brief for the Petitioner at 3–4, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983). Some courts and commentators discussing the *mens rea* inquiry refer to any requirement of an intent to threaten, as opposed to an intent merely to communicate words determined to be threatening, as the "subjective test." *See, e.g.*, *Clemens*, 738 F.3d at 10–12 (describing the circuit split as one over objective and subjective intent); *Turner*, 720 F.3d at 420 n.4 (framing the circuit split in the same terms); United States v. Williams, 641 F.3d 758, 769 (6th Cir. 2011) (framing the circuit split in the same terms); *see also* Crane, *supra* note 13, at 1261–69 (describing different courts' intent tests for true threats). However, this narrow use of the term "subjective test" may be misleading as it fails to acknowledge that, even in the absence of a requirement to prove a subjective intent to threaten, prosecutors must prove a subjective intent to communicate a true threat for conviction and cannot simply ignore the question of a defendant's subjective intent after proving the defendant uttered a true threat meeting the objective test.

[78] General intent here is used in this Article to refer to an awareness of the factors that constitute the offense which thus encompasses purpose, knowledge, or recklessness.

[79] *See Heineman*, 767 F.3d at 978 (holding that true threats require both objectively threatening speech and a subjective intent to intimidate); United States v. Bagdasarian, 652 F.3d 1113, 1118 (9th Cir. 2011) (holding that a true threat must have objectively threatening language and include a subjective intent to intimidate).

threat, in order for the speech to be constitutionally unprotected and for liability to attach.[80] While not arising in every true threat case, *mens rea* arguments have been articulated in recent years in part as a result of the advent of the Internet and other technologies (i.e., text messaging), which lead speakers to argue a lack of subjective intent to threaten or even to communicate a true threat based on ambiguities inherent in communication through these media.[81] Despite these recent First Amendment arguments in true threat cases and the continued circuit court split on the requisite intent for a true threat post-*Black*, the Supreme Court did not revisit the issue of true threats for twelve years following *Black*, until the *Elonis* case in 2015.[82]

B. *Elonis v. United States*

In June 2015, the U.S. Supreme Court issued its much-anticipated opinion in the case of *Elonis v. United States*.[83] The case arose when Anthony Douglas Elonis, a man upset following his separation from his wife, started posting seemingly threatening rap lyrics on his Facebook page.[84] Elonis claimed to be an aspiring rap artist and his lyrics appeared to threaten to kill his estranged wife as well as his former co-workers.[85] In response to a posting in which Elonis discussed the best place from which to fire a mortar at his wife's house, Elonis's wife petitioned for relief pursuant to Pennsylvania's civil protection order statute and obtained a

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[80] *Bagdasarian*, 652 F.3d at 1122; *see also* United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005) (stating that "the threat must be made 'with the intent of placing the victim in fear of bodily harm or death.'"). In addition, the Seventh Circuit indicated in dicta post-*Black* that it might also adopt a subjective test in an appropriate case. *See* United States v. Parr, 545 F.3d 491, 499–500 (7th Cir. 2008).

[81] *See, e.g.*, Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 386 (5th Cir. 2015) (en banc) (student who purportedly threatened coaches argued he put "the recording on Facebook and YouTube . . . to 'increase awareness of the situation'; and . . . did not think the coaches would hear the recording and did not intend it to be a threat . . . ").

[82] *See* Virginia v. Black, 538 U.S. 343, 359 (2003); Elonis v. United States, 135 S. Ct. 2001, 2004 (2015).

[83] *See generally Elonis*, 135 S. Ct. 2001 (2015).

[84] *Id.* at 2004–05.

[85] *Id.* at 2007.

Protection From Abuse Order ("PFA") against him.[86] After the entry of the PFA, Elonis posted a rap referencing use of explosives to "take care" of the state police, along with the following lyrics, which his wife viewed as a threat:

> *Fold up your PFA and put it in your pocket*
>
> *Is it thick enough to stop a bullet?*[87]

Elonis then moved on to rapping about a school shooting with the following post on his Facebook page:

> *That's it, I've had about enough*
>
> *I'm checking out and making a name for myself*
>
> *Enough elementary schools in a ten mile radius*
>
> *to initiate the most heinous school shooting ever imagined*
>
> *And hell hath no fury like a crazy man in a Kindergarten class*
>
> *The only question is . . . which one?*[88]

The Federal Bureau of Investigations ("FBI" or "Bureau") had been monitoring Elonis's Facebook page following contact from his former employer.[89] After the school shooting post, the FBI sent two agents to speak with Elonis; his next Facebook post ostensibly threatened to kill the lead FBI agent.[90] Federal prosecutors thereafter charged Elonis with five counts of violating a federal law prohibiting the transmission in interstate commerce of a threat to

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[86] *Id.* at 2006.

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* Elonis's post stated, in relevant part:

> *Little Agent lady stood so close*
> *Took all the strength I had not to turn the b**** ghost . . .*
> *So the next time you knock, you best be serving a warrant*
> *And bring yo' SWAT and an explosives expert while you're at it . . . .*

Id.

injure the person of another.[91] At the conclusion of the trial, the district court instructed the jury that speech qualifies as a true threat under the following circumstances:

> a defendant intentionally makes a statement in a context . . . wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.[92]

Elonis's conviction was affirmed by the Third Circuit.[93] Elonis's Petition for Writ of Certiorari argued that the jury instruction failed to reflect the *mens rea* required by the First Amendment for a true threat.[94]

Jurists and media commentators had speculated extensively on the direction the Court would take in true threat jurisprudence in *Elonis*.[95] The Court's ultimate decision in *Elonis* did not resolve the circuit court split with respect to the *mens rea* constitutionally required for speech to be a true threat.[96] Instead, the Supreme Court reversed Elonis's conviction and remanded the case based solely on a statutory issue involving congressional intent with respect to the requisite *mens rea* in the applicable federal law.[97] The Court stated

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[91] *Id.* Specifically, the government charged Elonis for his threats against his estranged wife, the patrons and employees of his former employer, police officers, a kindergarten class, and the FBI agent who interviewed him. *Id.*

[92] United States v. Elonis, 730 F.3d 321, 327 (3d Cir. 2013).

[93] *Id.* at 335.

[94] Petition for a Writ of Certiorari at 28–32, Elonis v. United States, 135 S. Ct. 2001 (2015), No. 13-983.

[95] *See, e.g.*, Nina Totenberg, *Supreme Court To Weigh Facebook Threats, Religious Freedom, Discrimination*, NPR (October 6, 2014, 4:58 AM), https://www.npr.org/2014/10/06/353515078/supreme-court-to-weigh-facebook-threats-religious-freedom-discrimination (discussing *Elonis v. United States* from 3:12 to 5:12); Vauhini Vara, *The Nuances of Threats on Facebook*, NEW YORKER (December 3, 2014), https://www.newyorker.com/news/news-desk/nuances-threat-facebook.

[96] Elonis v. United States, 135 S. Ct. 2001, 2013 (2015).

[97] *Id.* at 2008–09, 2012 ("The most we can conclude from the language of Section 875(e) and its neighboring provisions is that Congress meant to proscribe a broad class of threats in Section 875(e), but did not identify what mental state, if any, a defendant must have to be convicted.").

"[g]iven our disposition, it is not necessary to consider any First Amendment issues."[98]

Justice Alito wrote a separate opinion concurring in the judgment but dissenting in part on grounds related to true threat jurisprudence.[99] In his partial dissent, Justice Alito argued that the majority should have also resolved the question of the requisite *mens rea* for finding a true threat to be constitutionally unprotected speech.[100] Justice Alito offered his view that the First Amendment did not protect true threats uttered recklessly by a speaker because those threats "inflict great harm and have little if any social value."[101] He also expressed concern regarding the impact of requiring knowledge or purpose for a true threat in domestic violence cases, noting that domestic violence perpetrators consider threats a weapon of choice.[102] In regard to Elonis's claim that the First Amendment protected his rap lyrics, including any threats, Alito stated that a "fig leaf of artistic expression cannot convert such hurtful, valueless threats into protected speech."[103]

Since the Court decided *Elonis*, many circuit courts have cited the case but most of these decisions have involved interpretation of the *mens rea* required by the same federal criminal statute at issue in *Elonis* and have not considered broader constitutional issues.[104]

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[98] *Id.* at 2012.

[99] *Id.* at 2013–14, 2017 (Alito, J., concurring in part and dissenting in part) (concurring that Elonis' conviction must be vacated and the case remanded in light of the lower court's interpretation of the federal criminal statute as requiring only negligence on the part of a defendant).

[100] *Id.* at 2013, 2016.

[101] *Id.* at 2016. Justice Alito did not address whether the Constitution would permit the finding of a true threat based on the lower standard of an intent to communicate a true threat currently employed by the majority of circuit courts. *See id.* at 2013–18.

[102] *Id.* at 2017 (citing Brief Amici Curiae the National Network to End Domestic Violence, et al., *supra* note 21, at 4–16).

[103] *Id.* at 2016–17. Alito also rejected Elonis's "support for autonomy" style argument that his speech should be protected because he made the threats to help himself deal with the pain in his life. *Id.* "[T]he fact that making a threat may have a therapeutic or cathartic effect for the speaker is not sufficient to justify constitutional protection." *Id.* at 2016.

[104] *See, e.g.*, United States v. Hoff, 767 F. App'x 614, 621–22 (6th Cir. 2019) (reviewing only for clear error of true threat jurisprudence); Voneida v. Att'y Gen. Pa., 738 F. App'x 735, 738–39 (3d Cir. 2018) (per curiam) (remanding on jurisdictional grounds without deciding requisite *mens rea*); United States v.

Likewise, in state courts, decisions citing *Elonis* tend to find the case not applicable or reference it when rejecting arguments made by defendants seeking First Amendment protection for their statements that qualified as threats pursuant to state criminal statutes.[105] In sum, federal and state courts have not substantially shifted their pre-*Elonis* positions on the question of whether the First Amendment requires merely an intent *to communicate* a statement objectively qualifying as a true threat for the speech to lose constitutional protection or whether it demands some level of intent *to threaten* to be considered a true threat. Resolution of the circuit court split seems likely to bring the issue to the Supreme Court's attention again.

II. TRUE THREATS IN THE CONTEXT OF DOMESTIC VIOLENCE

A significant number of true threat cases involve domestic violence and thus consideration of the concerns of domestic violence victims will be important in the Supreme Court's future resolution of the question of the constitutionally required *mens rea* for true threats.[106] In the United States, "more than one in three women . . . have experienced rape, physical violence, and/or

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Jordan, 639 F. App'x 768, 769 (2d Cir. 2016) (reviewing only for plain error); United States v. White, 810 F.3d 212, 228 (4th Cir. 2016) (affirming conviction because evidence sufficient to prove any requisite *mens rea*); United States v. Dutcher, 851 F.3d 757, 761, 763 (7th Cir. 2017) (affirming conviction because jury instructions properly instructed on the requisite *mens reas* pursuant to the relevant federal statute).

[105] *See, e.g.*, State v. Taupier, 193 A.3d 1, 12 (Conn. 2018) (referencing concurrence of Justice Alito in *Elonis*, as well as *Black*, in rejecting defendant's assertion that First Amendment requires proof of specific intent to terrorize a threat target for criminal conviction); Major v. State, 800 S.E.2d 348, 352 (Ga. 2017) (citing *Elonis* and *Black* in rejecting argument by defendant that "communicating a threat of violence in a reckless manner does not meet the definition of a true threat."); People v. Lewis, No. 4-15-0449, 2017 WL 5443163, at *9 (Ill. App. Ct. Nov. 3, 2017) (*Elonis* not applicable because lower court "did not instruct jury it could find defendant guilty based on his negligence").

[106] *See, e.g.*, Commonwealth v. Walters, 37 N.E.3d 980 (Mass. 2015) (concerning defendant who stalked and harassed his ex-fiancé); Perez v. State, No. 08-00253-CR, 2017 WL 1955338 (Tex. Ct. App. May 11, 2017) (concerning defendant who stalked and threatened his ex-girlfriend); *see also supra* note 21.

stalking by an intimate partner in their lifetimes."[107] Threats represent a key component of the control tactics by which a perpetrator of domestic violence attempts to coerce an intimate partner into acceding to his demands, including staying or reconciling with him despite abuse.[108] According to the Centers for Disease Control and Prevention, almost twenty percent of women in the United States report having been threatened with physical harm by an intimate partner at some point during their lifetime.[109]

A. *Particularized Vulnerabilities*

Domestic violence victims are particularly vulnerable to threats of physical harm or death from their current or former intimate partners in comparison to other threat victims for a number of reasons. First, domestic violence victims find threats especially frightening because, for them, threats of violence "are reliable predictors of physical violence."[110] Statistics and research on stalking offer a useful proxy for measuring the impact of threats because stalking generally involves threats, whether implicit,

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[107] MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER & SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (2010), https://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf.

[108] NAT'L CTR. ON DOMESTIC & SEXUAL VIOLENCE, POWER AND CONTROL WHEEL 1 (2019), http://www.ncdsv.org/images/PowerControlwheelNOSHADING.pdf [hereinafter POWER AND CONTROL WHEEL]; *see also* Mary P. Brewster, *Stalking by Former Intimates: Verbal Threats and Other Predictors of Physical Violence*, 15 VIOLENCE & VICTIMS 41, 43 (2000) (noting that most former intimate partners who stalk seek reunification with, or revenge against, their former partners).

[109] SHARON G. SMITH ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 21 (2018), https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf.

[110] Brief Amici Curiae the National Network to End Domestic Violence, et al., *supra* note 21, at 9. In addition, the correlation between stalking and violence persists in studies of homicide cases with at least seventy-five percent of women killed by intimate partners having experienced prior stalking by her killer. Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 TEX. J. WOMEN & L. 131, 133 (2011).

explicit, or both.[111] Research on stalking demonstrates that a strong correlation exists between intimate partner stalking and physical violence, as eighty-one percent of women who were stalked by a current or former intimate partner were also physically assaulted by that partner.[112] Stalking by former intimate partners also involves significantly more threats and intrusive behaviors than stalking by strangers or acquaintances.[113] In addition to an increased risk of physical violence, intimate partner stalking victims suffer from high rates of anxiety and depression.[114] Research suggests that stalking by a violent current or former intimate partner causes "greater psychological distress" than stalking by a non-violent partner or non-partner.[115] A threat in the domestic violence context can be especially harmful partially because the threat often exacerbates the effects of prior abuse, which itself tends to have serious chronic mental health consequences.[116] Additionally, the emotional harm caused by intimate partner threats can extend beyond the distress the target feels because threats of violence "may cause serious emotional stress for . . . those who care about [the targeted] person,"

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[111] Lorraine Sheridan & Karl Roberts, *Key Questions to Consider in Stalking Cases*, 29 BEHAV. SCI. & L. 255, 263 (2011) ("Stalkers frequently threaten their victims, either directly or indirectly.").

[112] Judith M. McFarlane et al., *Stalking and Intimate Partner Femicide*, 3 HOMICIDE STUDIES 300, 301 (1999) (citing a National Violence Against Women survey).

[113] Lorraine Sheridan & Graham M. Davies, *Violence and the Prior Victim-Stalker Relationship*; 11 CRIM. BEHAV. & MENTAL HEALTH 102, 109–11 (2001).

[114] TK Logan & Robert Walker, *Toward a Deeper Understanding of the Harms Caused by Partner Stalking*, 25 VIOLENCE & VICTIMS 440, 447 (2010) ("Women who were stalked had higher global stress scores . . . compared to the other two groups."); *see also* Mindy B. Mechanic et al., *Mental Health Consequences of Intimate Partner Abuse: A Multidimensional Assessment of Four Different Forms of Abuse*, 14 VIOLENCE AGAINST WOMEN 634, 645 (2008) (describing how the study, controlled for effects of other forms of partner abuse, demonstrated stalking by current or former intimate partner predicts PTSD symptoms).

[115] TK Logan & Robert Walker, *Partner Stalking: Psychological Dominance or "Business as Usual"?*, 10 TRAUMA, VIOLENCE & ABUSE 247, 265 (2009).

[116] Society for Women's Health Research, *Linking Domestic Violence and Chronic Disease: An Issue Not in the Headlines*, HUFFPOST, https://www.huffpost.com/entry/linking-domestic-violence_b_5884050 (last updated Nov. 29, 2014).

such as the target's children.[117] Moreover, a threat's emotional toll will often be amplified for a domestic violence victim's children when the person making the threat is their other parent.[118]

Second, because domestic violence victims experience higher rates of poverty than the general population, they often have fewer options to enhance personal safety in response to a threat.[119] For example, moving to a new home or changing jobs or schools to avoid threatened violence are less likely to be options for domestic violence victims than for other threat victims.[120] Research demonstrates that stalking exacts significant financial costs from victims who change their residence or lose time at work.[121] The

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[117] Elonis v. United States, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring in part and dissenting in part); Laurie S. Kohn, *Why Doesn't She Leave? The Collision of First Amendment Rights and Effective Court Remedies for Victims of Domestic Violence*, 29 HASTINGS CONST. L.Q. 1, 45, 56 (2001) [hereinafter Kohn, *Why Doesn't She Leave?*] (highlighting state's interest in protecting domestic violence victims and their children from negative consequences of speech by victim's current or former intimate partner, including partners disclosure of immigration status or sexual orientation of the victim).

[118] For example, children in domestic violence cases suffer a heightened emotional toll exacted by the awareness that their father threatened to kill or physically harm their mother. *See* Jayne O'Donnell & Mabinty Quarshie, *The Startling Toll on Children Who Witness Domestic Violence Is Just Now Being Understood*, NORTHJERSEY.COM, https://www.northjersey.com/story/news/health/2019/01/29/domestic-violence-research-children-abuse-mental-health-learning-aces/2227218002/ (last updated Jan. 31, 2019, 7:03 PM). In addition, because most children in domestic violence households witness abuse, they will be able to imagine their father physically harming their mother with a level of detail that the children of other threat victims cannot. *See id.* Given the prevalence of post-traumatic stress disorder among children of domestic violence victims, a threat may also trigger symptoms including nightmares and panic attacks. *See id.*

[119] GOODMARK, *supra* note 34, at 36 ("[L]ow income women are disproportionately represented among people subjected to abuse. As many as two-thirds of low-income woman are subject to intimate partner violence. The lower a woman's income, the more likely she is to experience intimate partner violence.").

[120] *Id.* Even more minor changes, such as leaving work early to evade stalking, are less likely to be feasible for a domestic violence victim with a low wage position since such jobs frequently offer little flexibility in work hours. *See id.* at 37.

[121] KATRINA BAUM ET AL., U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY: STALKING VICTIMIZATION IN THE UNITED STATES 6–7 (2009), https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf (noting that stalking leads one in seven victims to move in an

relationship between poverty and the increased likelihood of violence is further supported by research that shows that domestic violence victims with the fewest resources experience the highest rates of repeat abuse.[122]

Third, domestic violence victims may feel less comfortable contacting the police than other threat victims because there is a history of inadequate law enforcement responses to intimate partner abuse,[123] which is an issue that persists today.[124] Moreover, in immigrant communities, some victims fear deportation for themselves or their partners.[125] These concerns have only increased

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attempt to escape further stalking.); Brief Amici Curiae the National Network to End Domestic Violence, et al., *supra* note 21, at 10–11 ("More than half of victims reported losing at least one week of work" as a result of stalking); Bumb, *supra* note 4, at 940 (explaining that victims oftentimes have to take off from work to seek court ordered protection, which also leads to taxpayer dollars being spent to investigate abuse); Melanie M. Hughes & Lisa D. Brush, *The Price of Protection: A Trajectory Analysis of Civil Remedies for Abuse and Women's Earnings*, 80 AM. SOC. R. 140, 158 (2015) (estimating "that women [seeking civil protection orders] lose between $312 and $1,018 . . . through the year after petitioning alone, and additional analyses suggest women are not recouping these losses later.").

[122] Mechanic et al., *supra* note 114, at 648.

[123] *See, e.g.*, Thurman v. City of Torrington, 595 F. Supp. 1521, 1528 (D. Conn. 1984) ("[T]he City has failed to put forward any justification for its disparate treatment of women."); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 47 (1992) ("The evidence suggests, however, that police are largely indifferent to domestic violence, and that they attach to it a very low priority.").

[124] *See* Natalie Schreyer, *Too Terrified to Speak Up: Domestic Abuse Victims Afraid to Call Police*, USA TODAY, https://www.usatoday.com/story/news/nation/2018/04/09/too-terrified-speak-up-domestic-abuse-victims-afraid-call-police/479855002/ (last updated Apr. 9, 2018, 7:33 AM) ("A 2015 survey by the National Domestic Violence Hotline found that a quarter of women who had called police to report domestic violence or sexual assault would not call again in the future."); PETER C. HARVEY, INDEP. MONITOR, CONSENT DECREE: INDEPENDENT MONITOR – SECOND-YEAR REASSESSMENT 9–10 (2018), https://www.newarkpdmonitor.com/wp-content/uploads/2018/10/Second-Year-Reassessment_10.12.18.pdf (issuing report from independent monitor as part of Consent Decree from *United States v. Newark* (Civil Action No. 16-1731), finding that police department still needed to improve response of law enforcement officers, 911 operators, and police dispatchers to domestic violence complaints).

[125] *See* Sarah M. Buel, *Fifty Obstacles to Leaving,* a.k.a., *Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 26; *see also* Natalie Nanasi, *A Fraught Pairing: Immigrant Survivors of Intimate Partner Violence and Law Enforcement*, *in* THE

in recent years as immigration policy has changed, causing a plummet in the number of domestic violence reports to police.[126] Calls to law enforcement because of domestic violence may also lead to other undesirable, and potentially devastating, collateral consequences in certain cases, including intervention by local child protective services agencies for alleged child neglect.[127] In fact, police calls to a residence by a victim to stop abuse may also result in a landlord seeking to evict the victim via local nuisance ordinances.[128]

Finally, in the context of criminal or civil domestic violence cases alleging threats, First Amendment arguments by a defendant will frequently signal that the threat victim is a *former*, and not a current, intimate partner.[129] If the victim and defendant remain romantically involved, the defendant can threaten his partner with violence directly without creating an online evidentiary trail that may later be used against him.[130] As a result, domestic violence perpetrators will not often threaten their current intimate partners in a public Internet space.

POLITICIZATION OF SAFETY: CRITICAL PERSPECTIVES ON DOMESTIC VIOLENCE RESPONSES 202, 207–08 (Jane K. Stoever ed., 2019) (explaining how many non-citizen individuals do not trust the police out of fear of being treated differently because of their immigration status).

[126] *See* ASIAN-PACIFIC INST. ON GENDER BASED VIOLENCE ET AL., IMMIGRANT SURVIVORS FEAR REPORTING VIOLENCE 1–2 (2019), https://www.tahirih.org/wp-content/uploads/2019/06/2019-Advocate-Survey-Final.pdf; Cora Engelbrecht, *Fewer Immigrants Are Reporting Domestic Abuse. Police Blame Fear of Deportation*, N.Y. TIMES (June 3, 2018), https://www.nytimes.com/2018/06/03/us/immigrants-houston-domestic-violence.html.

[127] GOODMARK, supra note 34, at 20.

[128] Sarah Swan, *Home Rules*, 64 DUKE L.J. 823, 849–50 (2015) ("[T]enants, who have either themselves contacted police or whose neighbors, family members, or friends did so, have been evicted for violating nuisance ordinances in connection with their attempts to seek assistance during home violence."); *see also* GOODMARK, *supra* note 34, at 42 ("One particularly problematic practice is the use of nuisance property laws against people subjected to abuse. Nuisance property laws allow police to penalize landlords for their tenants' behavior . . . . Landlords often include evictions or the threat of eviction . . . and use those threats to prevent tenants from continuing to seek assistance from the police.").

[129] *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2004–07 (2015).

[130] Kohn, *Why Doesn't She Leave?*, *supra* note 117, at 4–7 (recounting stories of individuals abused and threatened).

However, when a domestic violence victim has left her intimate partner, the partner often will no longer be able to communicate directly with her due to actions she has taken to prevent further abuse, such as blocking his cellphone number, moving to a confidential address, etc.[131] The most effective way for a domestic violence perpetrator to convey a threat against his former intimate partner will often be via the Internet.[132] Then, to avoid liability based on that threat, a defendant may try to claim that he made the online threat for another audience and/or an innocent purpose (i.e., venting, artwork, etc.) and not to intimidate the victim.[133] In contrast, a direct threat through a private channel is less likely to leave space for a constitutional defense.[134] In light of research establishing that the time post-separation is the most dangerous for a victim in terms of her risk of physical assault and homicide,[135] a defendant's free speech argument in a domestic violence case (and its general implication that the parties have separated) has increased significance. In sum, true threat litigation in the domestic violence context involves a subset of threat victims who are at a high risk of danger of actual violence but who also have generally fewer options

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131 *Path to Safety: What is a Safety Plan?*, NAT'L DOMESTIC VIOLENCE HOTLINE, https://www.thehotline.org/help/path-to-safety/ (last visited Jan. 10, 2020).

132 *See* Laura Silverstein, *The Double Edged Sword: An Examination of the Global Positioning System, Enhanced 911, and the Internet and Their Relationships to the Lives of Domestic Violence Victims and Their Abusers*, 13 BUFF. WOMEN'S L.J. 97, 120–21 (2004) (discussing the ease and non-existent expense for perpetrators to continue their abuse over the Internet).

133 *See, e.g.*, *Elonis*, 135 S. Ct. at 2007 (noting defendant argued he was merely emulating rap music).

134 *See* Hon. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1310 (1993) ("Whether a particular act or message is . . . entitled to First Amendment protection turns on context as well as content.").

135 Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. PUB. HEALTH 1089, 1092 (2003) (noting that risk of experiencing violence increases significantly after separation of intimate partners); PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, NCJ 181867, EXTENT, NATURE, AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE 37 (2000), https://www.ncjrs.gov/pdffiles1/nij/181867.pdf (finding that "married women who lived apart from their husbands were nearly four times more likely to report that their husbands had raped, physically assaulted, and/or stalked them than were women who lived with their husbands").

and resources available to protect their safety than other threat victims.

B. *Civil Protection Order Impact of True Threat Jurisprudence*

For domestic violence victims, any changes in true threat jurisprudence will have the most significant impact on civil protection orders because victims seek these orders more frequently than they pursue criminal charges against their former intimate partners.[136] In civil protection order cases, domestic violence victims overwhelmingly support maximizing access to relief because victims retain autonomy in setting the litigation goals; in contrast, victims lack such authority in criminal prosecutions.[137] Moreover, because civil cases involving First Amendment arguments related to true threats will likely be civil protection order matters, the perspective of domestic violence victims should be particularly important here.[138]

Generally, protection orders for domestic violence victims are civil orders, although violation of a civil protection order constitutes a crime.[139] The essence of a civil protection order is a requirement that the defendant stay physically away from the victim and have limited or no other contact with her.[140] Civil protection orders may also provide for ancillary relief, such as child custody and visitation, child support, and use and possession of a home.[141] The civil

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[136] Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1503–04 (2008) ("[C]ivil protection orders have emerged as the most frequently used . . . legal remedy against domestic violence.").

[137] *Id.* at 1508.

[138] *See generally* Kohn, *Why Doesn't She Leave?*, *supra* note 117 (discussing first amendment issues that abound when judges enjoin speech in civil protection order, divorce, or child custody proceedings); *see infra* Section IV.B.2.

[139] *See* Kohn, *Why Doesn't She Leave?*, *supra* note 117, at 10; *see also* VA. CODE ANN. § 16.1-253.2(A) (West 2016); N.Y. FAM. LAW § 812(1) (McKinney 2019).

[140] *See* Goldfarb, *supra* note 136, at 1506 (defining civil protection order as "a court order that imposes legally binding restrictions on an offender's future conduct.").

[141] Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1109

protection order process involves an initial *ex parte* filing seeking a temporary order.[142] Within a relatively short time frame, a victim will need to appear at an adversarial hearing before a judge in order to obtain a full civil protection order, which may last for a year or more, depending on the state's law.[143] The general public often views civil protection orders with an unfair level of skepticism regarding their efficacy.[144] However, research indicates that in many cases, civil protection orders stop abuse entirely or reduce frequency and severity of abuse.[145] In addition, domestic violence victims generally view the value of civil protection orders positively.[146]

(2001); *see also* N.J. STAT. ANN. § 2C:25-29 (West 2018) (authorizing the court to enter a restraining order to grant ancillary relief and other relief including restitution, an order requiring the defendant to receive domestic violence counseling, and possession of personal property including a pet).

[142] Goldfarb, *supra* note 136, at 1506; *see also* N.J. STAT. ANN. § 2C:25-28(b) (West 2017) (providing means to file a petition for a domestic violence restraining order in New Jersey court).

[143] *See generally* A.B.A. COMM'N ON DOMESTIC VIOLENCE, DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOS) (2016), https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/migrated_charts/2016%20CPO%20Availability%20Chart.pdf (listing domestic violence laws in all U.S. states and territories).

[144] *See, e.g.*, Robin L. Barton, *Do Orders of Protection Actually Shield Domestic Violence Victims?*, CRIME REPORT (Jan. 23, 2018), https://thecrimereport.org/2018/01/23/do-orders-of-protection-actually-shield-victims/ (providing examples of domestic violence victims who had protective orders against their abuser, who were ultimately killed); Stefanie Knowlton, *Are Restraining Orders False Security?*, USA TODAY, https://www.usatoday.com/story/news/nation/2014/09/07/domestic-violence-deaths-raise-questions-about-gaps/15260841/ (last updated Sept. 7, 2014, 8:18 PM).

[145] Victoria L. Holt et al., *Civil Protection Orders and Risk of Subsequent Police-Reported Violence*, 288 JAMA 589, 589 (2002) (concluding "[p]ermanent, but not temporary, protection orders are associated with a significant decrease in risk of police-reported violence against women by their male intimate partners"). *But see* Andrew R. Klein, *Re-Abuse in a Population of Court-Restrained Male Batterers After Two Years: Development of a Predictive Model*, *in* DO ARRESTS AND RESTRAINING ORDERS WORK? 192, 207 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (noting "research does not reveal whether the use of [restraining orders] lessens the severity of continued abuse or the number of abuse incidents").

[146] Goldfarb, *supra* note 136, at 1510–12 (citing several studies in which seventy-two to eighty-four percent of women who had obtained civil protective orders reported improvements in their safety and well-being).

Any future Supreme Court decision on a constitutionally requisite *mens rea* for true threats will likely be in the context of a criminal case and, thus, will not automatically apply in civil protection order matters.[147] However, even if the Supreme Court chose to explicitly limit a holding on the subjective test for true threats to criminal cases, the pronouncement would likely impact civil protection order matters because "criminal law casts a long shadow over civil protection order practice."[148] In order for a victim to receive a *civil* protection order based on threats, approximately eighteen states require her to prove the *crime* of threats.[149] Victims in civil protection order cases alleging threats of violence that do not qualify as "terroristic threats" or "assault" under state law may, in some cases, argue that these threats constitute "stalking."[150]

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[147] *See infra* Section IV.B.2; *see also* Brief of the Domestic Violence Legal Empowerment and Appeals Project and Professor Margaret Drew as Amici Curiae, *supra* note 21, at 31 ("Should the Court require proof of subjective intent in true threat prosecutions, *Amici* respectfully urge the Court to distinguish and carefully safeguard civil protection orders from its holding.").

[148] Brief of the Domestic Violence Legal Empowerment and Appeals Project and Professor Margaret Drew as Amici Curiae, *supra* note 21, at 18, 27 (noting even in states not utilizing criminal statutes as controlling authority in civil protection order hearings, judges will be "inevitably influenced by" criminal law standards when evaluating abuse allegations); *see also* Ashley Hahn, Comment, *Toward a Uniform Domestic Violence Civil Protection Order Law*, 48 SETON HALL L. REV. 897, 904 (2018) (noting that eleven states require a victim of domestic violence to prove all elements of one or more criminal offenses committed against her by the defendant to obtain a civil protection order, and twenty-one states require proof of a criminal act with respect to some types of abuse before a court will grant a civil protection order).

[149] *See* Brief of the Domestic Violence Legal Empowerment and Appeals Project and Professor Margaret Drew as Amici Curiae, *supra* note 21, at 27 ("In fact, approximately 18 states require litigants to *prove the crime of threats* in order to receive a *civil* protection order based on threats.").

[150] *See* James Thomas Tucker, Note, *Stalking the Problems with Stalking Laws: The Effectiveness of Florida Statutes Section 784.048*, 45 FLA. L. REV. 609, 615 (1993) (noting that anti-stalking statutes "filled the gap" left by state law definitions of terroristic threats and assault). A domestic violence victim unable to prove all elements of terroristic threats, assault, or stalking following an incident of abuse may also seek a civil protection order on the grounds of harassment. *See generally, e.g.*, A.B.A. COMM'N ON DOMESTIC VIOLENCE, STALKING/HARASSMENT CIVIL PROTECTION ORDERS (CPOS) BY STATE (2009) http://www.ncdsv.org/images/ABA_Stalking-HarassmentCivilProtectionOrdersByState_6-2009.pdf (listing the relevant statutes for each state and explaining what is needed to prove stalking versus

However, as with threats, some states require a victim to establish that the defendant committed the *crime* of stalking to receive a *civil* protection order on the ground of stalking.[151]

A comprehensive examination of the potential impact of a Supreme Court decision on the constitutional *mens rea* requirement for true threats on state civil protection order relief would be challenging in light of the interplay between the civil protection order statutes and criminal law in many states, as well as the varied ways in which a threatening statement may qualify as an act of domestic violence.[152]

However, a partial analysis of state civil protection order statutes suggests concerns on behalf of domestic violence victims with respect to their ability to obtain relief if the Court finds that the First Amendment requires a heightened *mens rea* for a true threat are warranted. While civil protection order statutes in some states currently rely on definitions of threats that require proof of a purpose to threaten, other jurisdictions provide relief for a domestic violence victims able to prove reckless disregard on the part of a former intimate partner who threatens violence against her.[153] Many states have enacted civil protection order laws that define threats in a manner that focus on the objectively threatening nature of the statement to a reasonable person, rather than a speaker's subjective

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harassment in each state, in order to obtain a civil protection order). However, harassment claims raise additional First Amendment issues beyond the scope of this Article. *See, e.g.*, Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 HASTINGS L. J. 781 (2013).

151 *See, e.g.*, Hahn, *supra* note 148, at 902, 904–05.

152 In addition, given the limited number of appeals in civil protection order cases, caselaw interpreting legislative intent on *mens rea* when the plain language of statute does not provide clear guidance on that element may not be available.

153 *Compare* FLA. STAT. § 741.28 (2019) (indicating that to obtain an injunction for protection on basis of a threat, a victim may attempt to prove the crime of stalking, as defined by FLA. STAT. § 784.048 (2019), which requires willful and malicious conduct, or the crime of assault, defined in FLA. STAT. § 784.011 (2019), which requires an intentional threat), *with* N.J. STAT. ANN. § 2C:25-19 (West 2018) (offering a list of crimes that a petitioner may prove, such as terroristic threats under N.J. STAT. ANN. § 2C:12-3 (West 2018), which requires either purpose to terrorize another or reckless disregard of the risk of terrorizing another). *See also* Klein & Orloff, *supra* note 1, at 876 (noting "most statutes require threatening behavior and criminal intent on the part of the defendant," while other statutes require "evidencing a continuity of purpose.").

intent to threaten.[154] Thus, if the Supreme Court requires a heightened *mens rea*—purpose or knowledge to threaten—in order to prove a true threat in the criminal context, it could "potentially [ ] undo[ ] years of legislative progress . . . to increase protections for victims of domestic violence" via civil protection orders.[155]

Caselaw shows that First Amendment defenses have been raised frequently in domestic violence proceedings in recent years.[156] A review of reported state court civil and criminal cases involving true threats and domestic violence indicates a surge in the number of litigants raising First Amendment arguments in these types of cases in the last twenty years.[157]

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[154] *See, e.g.*, CAL. FAM. CODE § 6203(a)(3) (West 2016) (defining abuse which may enable a plaintiff to obtain a protective order to include acts which "place a person in reasonable apprehension of imminent serious bodily injury to that person or to another."); TEX. FAM. CODE ANN. § 71.004(1) (West 2017) (to obtain a protective order, a plaintiff must prove "family violence" such as "a threat that reasonably places the member in fear of imminent physical harm"); *see also* Brief for Amicus Curiae National Center for Victims of Crime in Support of Respondent United States at 8–9, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983) (noting most state stalking laws utilize an objective reasonable person standard and do not require defendant to have specific intent).

[155] Soraya Chemaly & Mary Anne Franks, *Supreme Court May Have Made Online Abuse Easier,* TIME (June 3, 2015), https://time.com/3903908/supreme-court-elonis-free-speech/.

[156] *See e.g.*, Williams v. Williams, 905 N.W.2d 900, 902, 904 (N.D. 2018) (reversing entry of restraining order obtained by wife against estranged husband and remanding for consideration of husband's claim that entry of order based on his statements violated his First Amendment rights); Kreuzer v. Kreuzer, 761 N.E.2d 77, 80 (Ohio Ct. App. 2001) ("Although Mr. Kreuzer's picketing activities might qualify as protected speech in another place at another time, we do not think they qualify as protected speech on the facts of this case."); Feinberg v. Butler, No. 25255, 2004 Haw. App. LEXIS 274, at *1, *18 (Haw. Ct. App. 2004) (holding that an order prohibiting a defendant from "publish[ing] or mak[ing] public of [sic] any disparaging allegations against [the purported victim] that serve no legitimate purpose" violated the defendant's First Amendment rights); Childs v. Ballou, 148 A.3d 291, 293, 298 (Me. 2016) (determining no error in a case prohibiting defendant from having any contact with his wife and using the First Amendment as "a sword to disrupt [the wife's] life through behavior that . . . met the definitions of abuse").

[157] A Shepherd's search for citations to *Watts v. United States* in state court cases referencing domestic violence (or related terms) indicates that in the first 40 years following the decision (1970–1999), state courts cited *Watts* 91times, whereas in the last 20 years (2000–2019), state courts have cited *Watts* 209 times.

Media sources have paid recent attention to free speech issues in domestic violence proceedings, too.[158] In addition, the Internet provides opportunities for domestic violence perpetrators to share litigation strategies and find legal information they may utilize in formulating a free speech defense in civil protection order proceedings.[159] The Court should therefore anticipate that defendants in civil protection order cases will likely attempt to invoke any decision favoring increased protection of free speech in the context of true threats to oppose the issuance of orders against them.

Finally, the Court should consider that the ability of domestic violence victims to obtain civil protection orders has implications for both victim safety and public safety because a civil protection order will generally prohibit the individual subject to the order from purchasing or possessing firearms.[160] Numerous studies have established a strong connection between firearm access and domestic violence homicide.[161] However, recognition of the link between domestic violence and mass shootings has come only in recent years, with research demonstrating that domestic violence

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Presumably, broader access to electronic legal research tools has played a part in this trend.

158 *See, e.g.*, John S. Eory, *Domestic Violence and Free Speech*, NAT'L L. REV. (Feb. 14, 2018), https://www.natlawreview.com/article/domestic-violence-and-free-speech; David Coursey, *Judge: Apologize on Facebook or Go to Jail*, FORBES (Feb. 26, 2012, 10:50 PM), https://www.forbes.com/sites/davidcoursey/2012/02/26/judge-apologize-on-facebook-or-go-to-jail/#517482c335d9.

159 *See, e.g.*, RESTRAINING ORDER BLOG, https://www.restrainingorderblog.com (last visited Jan. 12, 2019) (blogging about retaliatory claims to civil protection order proceedings, use of subpoenas, and related litigation terminology); *Should Restraining Orders Be Abolished as Incompatible with Free Speech Rights*, QUORA, (last visited Jan. 12, 2019), https://www.quora.com/Should-restraining-orders-be-abolished-as-incompatible-with-free-speech-rights.

160 GOODMARK, *supra* note 34, at 72–73. However, laws denying domestic violence perpetrators access to firearms not always enforced. *Id.*

161 Campbell et al., *supra* note 135, at 1092 (stating that the risk of homicide is five times greater for women whose current or former intimate partners have access to a gun); *see also* April Zeoli et al., *Risks and Targeted Interventions: Firearms in Intimate Partner Violence*, 38 EPIDEMIOLOGY REV. 125, 125 (2016) (noting that fifty percent of intimate partner homicide victims die as result of gun violence).

and family violence underlie more than half of the mass shootings perpetrated in the United States during the last decade.[162]

In sum, any heightened *mens rea* requirement for true threats in civil cases has the potential to limit domestic violence victims' access to protection orders, with negative consequences for both victim and public safety.

C. *Criminal Prosecution and Victim Interests and Perspectives*

Resolution of the First Amendment question left unanswered in *Elonis* will impact a broad range of criminal cases, including those involving domestic violence. Some commentators have expressed concern that true threat prosecutions pursuant to a low *mens rea* requirement may result in the conviction of individuals showing merely poor judgment, a result which criminal law disfavors.[163] Recent arrests and criminal charges, particularly those involving teenagers for statements on social media posts, suggest fears that the current approach is overly punitive may be warranted.[164] The

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[162] *Mass Shootings in the United States: 2009-2020*, EVERYTOWN FOR GUN SAFETY https://everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019/ (last updated Feb. 28, 2020). An analysis of mass shootings in the United States from 2009 to 2018 found 54% of mass shootings to be domestic violence or family violence related, defined by FBI as the murder of four or more people, not including the gunman, with one murder victim being a current or former intimate partner or family member of the shooter. *Id.*

[163] *See, e.g.*, G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. Rev. 829, 875–76 (2002) ("[A] purely negligence standard . . . is a potentially devastating legal sword to draw and wield"); Stephanie Charlin, Comment, *Clicking the "Like" Button for Recklessness: How* Elonis v. United States *Changed True Threats Analysis*, 49 LOY. L.A. L. REV. 705, 720 (2016) ("[N]egligence [is] insufficient because it [is] 'inconsistent with 'the conventional requirement for criminal conduct—awareness of some wrongdoing . . . .'") (quoting *Elonis*, 135 S. Ct. at 2011).

[164] Justin Jouvenal, *A 12-Year-Old Girl Is Facing Criminal Charges for Using Certain Emoji. She's Not Alone.*, WASH. POST (Feb. 27, 2016, 3:47 PM), https://www.washingtonpost.com/news/local/wp/2016/02/27/a-12-year-old-girl-is-facing-criminal-charges-for-using-emoji-shes-not-alone/?utm_term=.a063bb86c329; Austin Sanders, *Felony Charges Dropped in "Facebook Threat" Case*, AUSTIN CHRONICLES (Apr. 6, 2018, 11:00 AM), https://www.austinchronicle.com/daily/news/2018-04-06/felony-charges-dropped-in-facebook-threat-case/; *Student Accused of Making Online Threats*

significant consequences for uttering a true threat make it desirable to avoid wrongful convictions in this area of the law.[165] In theory, problems with true threat statutes being overly punitive could be addressed, in part, through adjustments in criminal penalties.[166] However, significant changes in statutory and common law standards for threats seem unlikely, and thus, the Court should establish the constitutional requirements for true threats in light of current law.

When specifically considering domestic violence cases, victims have a wide variety of opinions regarding prosecution of their current or former intimate partners for alleged threats against them, ranging from enthusiastic to ambivalent to opposed.[167] Even after separating, domestic violence victims may have many reasons for

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Directed at Emmerich Manual High School Arrested, CBS 4, https://cbs4indy.com/2017/01/13/juvenile-accused-of-making-online-threats-directed-at-emerich-manual-high-school-arrested/ (last updated Jan. 13, 2017, 4:40 PM); Thomas Tracy, *Winking Smiley Face: Brooklyn Teen Boy's Emoji Cop Threat Charges Tossed by Grand Jury*, N.Y. DAILY NEWS (Feb. 03, 2015, 12:52 PM), https://www.nydailynews.com/new-york/nyc-crime/grand-jury-tosses-brooklyn-teen-emoji-threat-charges-article-1.2101735 (arguing that concern for excessive criminalization of online speech should be addressed by reconsidering the minimum age for criminal responsibility in some jurisdictions and prosecutorial discretion); *see also* Perez v. Florida, 137 S. Ct. 853, 853 (2017) (Sotomayor, J., concurring), *denying cert.* (expressing concern that a defendant convicted and sentenced to fifteen years in prison may have merely made a drunken joke).

[165] For example, in *Elonis* all five charged counts of threats were felonies. Elonis v. United States, 135 S. Ct. 2001, 2007–08 (2015); *see also Knox* Writ of Cert., *supra* note 24, at 21 (noting that defendants incarcerated following convictions for violation of 18 U.S.C. § 875(c) "faced an average prison term of more than two years.").

[166] *See* Randall Eliason, *The Rush to Criminal Remedies*, SIDEBARS (Sept. 24, 2019) https://sidebarsblog.com/when-criminal-remedies-prosecution-appropriate/ (discussing alternatives to criminal sanctions and arguing that criminal remedies are being used too often).

[167] *See, e.g.*, Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1888 (2002) (commenting favorably on pro-arrest and pro-prosecution policies which build in greater flexibility for a victim's ambivalence "recognizing the complexity of her situation"); Sara C. Hare, *What Do Battered Women Want? Victims' Opinions on Prosecution*, 21 VIOLENCE & VICTIMS 611, 612 (2006) (noting that many victims who *do* initially contact law enforcement and request filing of criminal charges later change their minds and seek to "drop charges").

not wishing to see their partners prosecuted, including the need for child support or the desire to ensure children have visitation with their fathers.[168] Despite this range of viewpoints among victims, the victims' advocacy movement in the United States has historically focused on criminal law responses to combating domestic violence.[169] Meanwhile, some scholars have proposed alternative approaches, including restorative justice, to address domestic violence.[170] In recent years, more advocates have joined in the longstanding calls for policy makers to rethink the centrality of criminalization in the response to domestic violence.[171] Thus, it is undisputed that true threat rules which facilitate high rates of prosecution for domestic violence would conflict with the goals, and undermine the autonomy of, at least some victims.[172]

Domestic violence victims' interests can also include robust protections for public dissent. Rhetorical threats of violence can serve to express outrage on topics of public concern and draw attention to dissenting political viewpoints but can only do so if the First Amendment offers strong protection for such speech from government suppression.[173] The battered women's movement began

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[168] Niwako Yamawaki et al., *Perceptions of Domestic Violence: The Effects of Domestic Violence Myths, Victim's Relationship With Her Abuser, and the Decision to Return to Her Abuser*, 27 J. INTERPERSONAL VIOLENCE 3195, 3196–97 (2012).

[169] Mimi E. Kim, *The Coupling and Decoupling of Safety and Crime Control*, *in* THE POLITICIZATION OF SAFETY 15, 15 (Jane K. Stoever ed., 2019); *see also* Erika Sussman, *Reflections on Police Violence and the Implications for Survivors*, CTR. FOR SURVIVOR AGENCY & JUSTICE (July 13, 2016), https://csaj.org/news/view/we-are-reeling-after-last-week (explaining that in the 1970s, advocates for battered women sought to address the harm of domestic violence through "criminal justice remedies, in part to ensure public recognition of these crimes against women.").

[170] *See, e.g.*, Linda G. Mills, *The Justice of Recovery: How the State Can Heal the Violence of Crime*, 57 HASTINGS L.J. 457, 473 (2006); *see also* Laurie S. Kohn, *What's So Funny about Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 522–23 (2010).

[171] Kim, *supra* note 169, at 31–32.

[172] *See* Yamawaki et al., *supra* note 168, at 3198.

[173] *See, e.g.*, Sam Sanders, *Kathy Griffin: Life After the Trump Severed Head Controversy*, NPR (April 23, 2019, 5:09 AM), https://www.npr.org/2019/04/23/716258113/kathy-griffin-life-after-the-trump-severed-head-controversy. In 2017, comedian Kathy Griffin lost work

as a protest movement against societal norms which tolerated domestic violence.[174] Today, victim advocates and scholars continue to seek changes in domestic violence policy, some of which are controversial.[175] Moreover, the intersectional identities of many domestic violence victims suggests that those advocating on their behalf should seek change on a broad range of societal issues beyond intimate partner abuse.[176] Domestic violence victims are disproportionately women from marginalized groups, such as women of color, immigrants, and LGBTQ individuals.[177] A correlation exists between domestic violence and poverty, as well.[178] As a result, effective domestic violence victim advocacy requires

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immediately after she posed with a mock-severed head of President Trump and was placed on the "no-fly" list for two months. *Id.* "Federal officials also threatened to charge [Griffin] with conspiracy to assassinate the president." *Id.*

174 *See* Kim, *supra* note 169, at 17–18.

175 *See, e.g.*, GOODMARK, *supra* note 34, at 8.

176 *See id.* at 8–9 (discussing the intersectionality between domestic violence issues, over-criminalization, and mass incarceration).

177 DOMESTIC VIOLENCE COMMUNITIES OF COLOR: FACTS AND STATES COLLECTION, WOMEN OF COLOR NETWORK 2–4, 6 (2006) https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf (highlighting specific domestic violence issues that affect different women of color); MIKEL L. WALTERS ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 1, 18–23 (2013) https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf (studying prevalence of domestic violence behaviors among LGBT individuals in the United States); SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 198 (2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf (showing that of the transgender and non-binary individuals surveyed, "[m]ore than half (54%) experienced some form of intimate partner violence, including acts involving coercive control and physical harm."); *The Facts on Immigrant Women and Domestic Violence*, FUTURES WITHOUT VIOLENCE https://www.futureswithoutviolence.org/userfiles/file/Children_and_Families/Immigrant.pdf (last visited Jan. 13, 2020) (finding that immigrant women often experience higher rates of domestic violence than U.S. citizens due to more limited access to legal and social services as well as cultural influences for some victims).

178 *See generally* JILL DAVIES, POLICY BLUEPRINT ON DOMESTIC VIOLENCE AND POVERTY 4 (2002), https://vawnet.org/sites/default/files/materials/files/2016-09/BCS15_BP.pdf.

work on an array of social justice issues which can impact victims both directly and indirectly by effecting victims' families, friends, and communities (e.g., minimum wage rates, immigration policy, and police misconduct).[179] Mass incarceration represents one such issue and has had a devastating impact on many of the communities in which domestic violence victims live and work.[180] A low *mens rea* for true threats in criminal prosecutions would not only chill public protest speech, but could also contribute to mass incarceration, thereby harming the interests of many domestic violence victims.[181]

Consideration of the foregoing issues highlights the complexities of formulating an approach to true threat jurisprudence that reflects to the greatest possible degree the preferences and interests of all domestic violence victims in both criminal and civil cases. In turning to other categories of unprotected speech, defamation jurisprudence provides support for a nuanced, multi-tiered approach to the subjective test for true threats which attempts to optimally promote the goals and needs of domestic violence victims while also respecting free speech principles.

III. DEFAMATION OFFERS GUIDANCE ON TRUE THREATS

While the Supreme Court has noted that unprotected speech categories "can, consistently with the First Amendment, be regulated," it has also remarked that these classes of speech are not

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[179] *See generally, e.g.*, LAURA HUIZAR & TSEDEYE GEBRESELASSIE, NAT'L EMP'T L. PROJECT, WHAT A $15 MINIMUM WAGE MEANS FOR WOMEN AND WORKERS OF COLOR (2016), https://www.nelp.org/wp-content/uploads/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf; Michelle S. Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39 (2017); Edna Erez et al., *Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 FEMINIST CRIMINOLOGY 32 (2009).

[180] Campbell Robertson, *Crime is Down, Yet U.S. Incarceration Rates are Still Among the Highest in the World*, N.Y. TIMES (April 25, 2019), https://www.nytimes.com/2019/04/25/us/us-mass-incarceration-rate.html (stating that African American men are serving prison sentences at almost six times the rate of white men and African American women are incarcerated at a rate double that of White women).

[181] *See, e.g.*, Blakey & Murray, *supra* note 163, at 875–76; Charlin, *supra* note 163, at 720.

"entirely invisible to the Constitution . . . ."[182] The Court has established definitive legal standards to delineate when speech falls outside the realm of constitutional protection with respect to some categories of unprotected speech, but not in regard to others.[183] To the extent that the Supreme Court has announced them, the constitutional requirements for other categories of unprotected speech vary, but all reflect the need to balance the potential value of speech with the injuries speech may cause.[184] Since the Supreme Court has only substantively analyzed the issue of true threats in *Watts* and *Black*, with neither case offering a comprehensive definition of the term or a rule setting the constitutional boundaries for threatening speech,[185] some scholars have argued that true threats need their own "fine-tuned test and definition."[186]

Other categories of unprotected speech with more robust definitions and rules, in particular defamation,[187] and, to a lesser extent, incitement,[188] may inform future analysis of true threats. Incitement provides guidance specifically on the optimal rules for true threats uttered in the public protest context.[189] The Court established the modern rule on incitement in *Brandenburg v. Ohio*, in which it determined that the government could not prohibit speech advocating unlawful violence or other illegal acts unless that speech was directed to inciting imminent lawless action and likely

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182 R.A.V. v. St. Paul, 505 U.S. 377, 383 (1992).

183 *See* Wayne Batchis, *On the Categorical Approach to Free Speech—And the Protracted Failure to Delimit the True Treats Exception to the First Amendment*, 37 PACE L. REV. 1, 2 (2016) ("contrasting the [Supreme] Court's protracted failure to define and delimit true threats with the comparatively robust guidance it has offered with other [unprotected speech] discrete categories.").

184 *See* Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL OF RTS. J. 647, 650–52 (2002) (describing tension between need to protect against serious injury from speech and need to avoid censorship); *see also* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687, 689 (2016) (defining idea of "free speech consequentialism," where the harms and benefits of speech are weighed to determine what kinds of speech are constitutionally protected).

185 *See generally* Watts v. United States, 394 U.S. 705 (1969) (per curiam); Virginia v. Black, 538 U.S. 343 (2003).

186 *See, e.g.*, Batchis, *supra* note 183, at 53.

187 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

188 *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

189 *See id.*

to produce that action.[190] Advocacy falling short of incitement deserves First Amendment protection because "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action."[191] To date, each of the Supreme Court's cases addressing incitement has involved public speech intended to achieve political and social policy goals.[192] Some lower courts have read *Brandenburg* to require a determination of a specific intent (purpose) on the part of the speaker to incite immediate unlawful action before finding speech to be unprotected by the Constitution,[193] but the Supreme Court has not yet confirmed this to be the correct standard. The *Brandenburg* Court's reasoning suggests that the First Amendment provides protection for some speech regarding the commission of violent acts for the sake of promoting discussion on issues of public concern through a heightened *mens rea* requirement. As a result, such reasoning could potentially provide support for utilizing a similar approach with respect to true threats in the public protest context.

However, with respect to true threats against a private individual or against any individual uttered in a private setting, even a public official or figure, incitement does not offer a useful analogy. Private context threats do not advance the goal of robust public debate that seems to serve as the primary rationale for requiring specific intent for regulation of incitement.[194] Moreover, an examination of

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190 *Id.* at 448–49.

191 *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).

192 *See, e.g.*, *id.* at 447 (addressing speech at Ku Klux Klan rally in support of white supremacy); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (discussing civil rights protest speech in support of boycott against racial discrimination by local businesses); Holder v. Humanitarian Law Project, 561 U.S. 1, 44 (2010) (finding that the giving of aid, including training in peaceful conflict resolution and political advocacy on behalf of foreign organizations, may be deemed unlawful assistance of terrorists by the U.S. government).

193 *See, e.g.*, American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1063 (9th Cir. 1995) ("Under the standard enunciated by the Supreme Court in *Brandenburg v. Ohio*, advocacy may be punished only if it is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.' The Government must establish a 'knowing affiliation' and a 'specific intent to further those illegal aims.'") (internal citations omitted).

194 *Cf.* Batchis, *supra* note 183, at 51 ("If the public figure is also a public official with political duties, it may be even more likely that punishing such

Supreme Court cases on incitement suggests incitement differs from true threats in several key respects. First, incitement covers a broader range of activity (i.e., non-violent law breaking) than true threats and thus this category of speech may merit greater constitutional protection.[195] Second, incitement involves a more diverse group of potential targets including government institutions and private companies, in addition to the possible targets of true threats, namely individuals and groups of individuals.[196] This distinction similarly supports the argument that the Supreme Court may find the First Amendment to be less concerned with government regulation of true threats which, by definition, involve potential physical injury or death to human beings versus incitement, which may only seek to cause property damage. Finally, incitement requires a third party hearing the speech to decide to act in violation of the law to cause injury, whereas the harm from true threats does not require action by a third party; it requires only that the target be aware of the threat.[197] As a result, true threats will generally be more likely to cause fear and disruption to individuals in comparison to incitement. In sum, the Supreme Court's incitement jurisprudence lends support to an approach to true threats that requires a specific intent (purpose or knowledge) in the public protest context to promote self-government, but these incitement cases do not offer similar insight into the appropriate standard for private context threats.

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threats will, in some sense, stifle public debate and discussion about important issues.").

[195] *See id.* at 36–37 (discussing how the Court defined incitement language broadly and narrowed the definition of true threats by saying that intimidation is not part of the definition of true threats).

[196] *See, e.g.*, Edward Helmore, *'How is This Not Inciting Violence?': Gun Shop Billboard Targets the Squad*, GUARDIAN (Aug. 1, 2019), https://www.theguardian.com/us-news/2019/aug/01/gun-shop-billboard-the-squad-aoc-omar-tlaib-pressley (discussing billboard created by a group of individuals targeting government officials, as possibility being considered incitement).

[197] *Compare* Brandenburg v. Ohio, 395 U.S. 444, 448 (1968) (holding that a speaker who *prepares a group for violent action* and steels the group to such action has committed unlawful incitement), *with* Virginia v. Black, 538 U.S. 343, 359 (2003) (holding that a true threat is a "statement where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence *to a particular individual*") (emphasis added).

The legal standards for defamation offer more extensive guidance in answering the *mens rea* question left open in *Elonis* for several reasons relating to similarities between defamation and true threats.[198] With both defamation and true threats, the Court seeks to balance protecting First Amendment rights, especially robust debate on political issues, with deterring and remedying harm to individuals caused by speech violating common law norms.[199] Threats of violence and defamatory lies both have the ability to "severely disrupt peoples' lives, both by affecting them emotionally . . . and by impairing their social ties, their professional activities, and their ability to earn a living."[200] In addition, defamation and true threats both cause injury as soon as the victim learns of the speech.[201] True threats generally cause the target to experience immediate

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[198] It has been suggested in at least one scholarly article that rules regarding obscenity may offer the Supreme Court a useful analogy for true threats because both true threats and obscenity cause individual and social harm immediately upon exposure to relevant speech. *See, e.g.*, *The Supreme Court, 2014 Term—Leading Case: Federal Statutes and Regulations: Federal Threats Statute – Mens Rea and the First Amendment* – Elonis v. United States, 129 HARV. L. REV. 331, 338 (2015). However, the comparison is a weak one, in part because the narrow definition for true threats contrasts sharply with the notoriously ambiguous definition of obscenity. *Compare* Elonis v. United States, 135 S. Ct. 2001, 2016 (2015) ("To qualify as a true threat, a communication must be a serious expression of an intention to commit unlawful physical violence, not merely 'political hyperbole'; 'vehement, caustic, and sometimes unpleasantly sharp attacks'; or 'vituperative, abusive, and inexact' statements."), *with* Miller v. California, 413 U.S. 15, 24 (1973) (finding that for something to be deemed obscene, "the trier of fact must [find]: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.") (internal citations omitted).

[199] *See e.g.*, Kohn, *Why Doesn't She Leave?*, *supra* note 117, at 21 n.78 (describing how different courts have balanced First Amendment rights against state interests in different contexts).

[200] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1103 (9th Cir. 2002) (en banc) (Berzon, J., dissenting).

[201] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266–67 (1964) (noting that common law presumed general damages for defamation). In contrast to true threats, defamation also causes damage immediately upon publication, assuming those hearing the defamatory speech find it credible and that their opinion(s) impact the target. *See id.*

"apprehension and disruption, whether the apparent resolve proves bluster or not," just as defamation often inflicts demonstrable reputational injury despite falsity.[202] Finally, allegations of both defamation and true threats may arise in the context of speech on matters of public concern. Matters of public concern have been variously defined by the Supreme Court as "subject[s] of legitimate news interest . . . of general interest and of value and concern to the public"[203] as well as speech "fairly considered as relating to any matter of political, social, or other concern to the community."[204]

Defamation jurisprudence specifically provides an analytical framework differentiating between public officials and public figures versus private individuals, an approach that may also be useful with true threats.[205] At common law, defamation required proof of negligent publication of a false statement of fact that was damaging to the plaintiff's reputation and received no constitutional protection.[206] However, since the 1960s, the Supreme Court's decisions have tended to modestly increase constitutional protection for defamation in particular settings.[207] In *New York Times v. Sullivan*, the Supreme Court held that a public official could not recover civil damages for defamation relating to official conduct unless he proved "actual malice" on the part of the speaker by clear

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[202] *Planned Parenthood of the Columbia/Willamette, Inc.*, 290 F.3d at 1004 n.3, 1107 (Berzon, J., dissenting).

[203] Snyder v. Phelps, 562 U.S. 443, 453 (2011) (quoting City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004) (per curiam)).

[204] *Id.* (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).

[205] In the First Amendment context, the term "public official" has been utilized to cover a broad range of government employees. *See, e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 85 (1966) ("[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."). The Supreme Court has likewise established parameters for qualification of a person as a "public figure." *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (defining "public figures" to include individuals who attain status by occupying roles of special prominence in the affairs of society or thrusting themselves to the forefront of particular public controversies).

[206] Susan B. Anthony List v. Driehaus, 779 F.3d 628, 632–33 (6th Cir. 2015); Beverly Hills Foodland, Inc., v. United Food & Commercial Workers Union, 39 F.3d 191, 195 (8th Cir. 1994).

[207] *See, e.g.*, Camp v. Yeager, 601 So. 2d 924, 931 (Ala. 1992) (Maddox, J., dissenting).

and convincing evidence.[208] The Court defined "actual malice" in this context as knowledge of the falsity of the defamatory statement or reckless disregard of its falsity.[209] Similarly, in *Garrison v. Louisiana*, the Court decided that the First Amendment prohibited the imposition of criminal libel sanctions for criticism of public officials in the conduct of their duties in the absence of actual malice.[210]

In reaching these decisions, the Court emphasized that "speech concerning public affairs is more than self-expression; it is the essence of self-government."[211] Continuation of the common law negligence rule in this context would have the negative consequence of self-censorship.[212] The Court acknowledged that an "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[213] In addition, the Court justified a heightened *mens rea* for speech defaming public officials because it concluded that government employees had, in essence, assumed the risk of defamation, stating that "public men, are, as it were, public property."[214]

In contrast, the Court refused to extend the *New York Times v. Sullivan* actual malice standard to defamatory statements regarding a private individual, even on a matter of public concern, in *Gertz v. Welch*.[215] As in *New York Times v. Sullivan*, the Court in *Gertz* again justified differential legal treatment of public officials versus private individuals based on the expectations of those assuming a public role.[216] Specifically, the Court explained the "assumption that public

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[208] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

[209] *Id.*

[210] Garrison v. Louisiana, 379 U.S. 64, 77–78 (1964). Three years later, the Supreme Court held in another case that the *New York Times* rule applied to public figures, as well as public officials. *See* Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967).

[211] *Garrison*, 379 U.S. at 74–75.

[212] *N.Y. Times Co.*, 376 U.S. at 279.

[213] *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

[214] *Id.* at 268 (quoting Beauharnais v. Illinois, 343 U.S. 250, 263–64 (1952)).

[215] Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974).

[216] *Id.* at 345. The Court also referenced the fact that government officials have greater access to public channels of communication and thus may more effectively use counter-speech to remedy reputational harm caused by defamation. *Id.* at 344–46.

officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual."[217]

At least one jurist has previously suggested the Supreme Court's approach to defamation provides useful guidance for true threat jurisprudence.[218] In her dissent in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, Judge Marsha S. Berzon recommended courts look to the Supreme Court's defamation jurisprudence with its varied levels of constitutional speech protection "depending upon the nature of the speech in question and the role of speech of that nature in the scheme of the First Amendment" as a model for true threats.[219] Thus, development of defamation jurisprudence from common law rules allowing negligence standards to a requirement of actual malice in the context of a public official or public figure for liability may preview a parallel development in regard to true threats.

IV. PROPOSED APPROACH

The Supreme Court's First Amendment jurisprudence and consideration of the concerns of domestic violence victims suggest that drawing upon the Court's approaches to defamation and incitement to create a three-tiered approach for the requisite *mens rea* of true threats will best deter threats of violence while also protecting free speech rights, particularly in the context of public protest. In determining that a statement qualifies as a true threat and thus lacks constitutional protection, the Supreme Court should require that lower courts always first utilize the objective test, which necessitates a finding that a reasonable person would consider the speech in question to be a serious threat to commit an act of violence

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217 *Id.* at 345.

218 Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1104 (9th Cir. 2002) (en banc) (Berzon, J., dissenting).

219 *Id*. at 1104–05 (acknowledging the targeted medical professionals were not public officials but found the "public nature of the presentation and content addressing a public issue . . . critical.").

against a specific individual or group of individuals.[220] Then, for threats meeting the objective test,[221] a further subjective test should apply: courts should assess the speaker's *mens rea* to determine if criminal or civil liability attaches according to a three-tiered approach. First, in cases of *public protest context* threats, the Constitution should be understood to require the purpose *to threaten*, or knowledge to a substantial certainty, that the statement would be understood by a reasonable person to be a true threat, for criminal or civil liability.[222] Second, in *criminal* prosecutions for *private context* threats, on the question of any intent *to threaten*, a *mens rea* of recklessness should be deemed sufficient for conviction pursuant to the First Amendment.[223] Third, in cases in which any individual seeks *civil* legal relief in response to a *private context* threat, a general intent *to communicate* a statement qualifying objectively as a true threat should be adequate, from a constitutional perspective, to permit entry of a judgment against the speaker.

A. *Specific Intent for Public Protest Context Threats*

In several ways, Supreme Court free speech precedent suggests that the Constitution should be interpreted as requiring purpose or knowledge on the part of a speaker who makes a true threat against a public official or figure as part of a public protest for liability. First, the Court has repeatedly and emphatically acknowledged the high value placed by the Constitution on core political speech.[224] A low *mens rea* for true threat liability will be more likely to chill public, politically motivated, rhetorical threats of violence than other types of true threats. Second, the Court's caselaw establishes that

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[220] As discussed in the Introduction, *supra*, in some jurisdictions, the objective test focuses on the perspective of a reasonable speaker or a reasonable listener/recipient rather than a reasonable person. This Article takes no position on which of these variations of the objective test reflects the proper constitutional approach and uses reasonable person here for convenience and because it arguably encompasses both perspectives.

[221] *See supra* Section I.A.

[222] As discussed in the Introduction, *supra*, public protest context threats is a term used by the author to define threats against public officials or figures in a public forum and on topics of public concern.

[223] As discussed in the Introduction, *supra*, private context threats are threats against private individuals or against public officials or figures outside of a public protest context.

[224] *See supra* Part III; *infra* Section IV.A.1.

government officials and public figures assume the risk of harsh public speech against themselves.[225] Finally, an examination of the respective harms caused by true threats against public officials and figures versus true threats against private individuals indicates that threats against the latter will generally cause greater injury.[226]

1. HIGH VALUE OF SPEECH IN THE PUBLIC PROTEST CONTEXT

As the Court has stated, "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern."[227] In the United States, we often discuss issues of public concern through the lens of the person responsible for executing policy on those issues.[228] Reflecting this tendency, a significant number of true threat prosecutions have involved public criticism of government officials in which defendants argued their threats served merely as a rhetorical device to protest the target official's policy positions.[229] In public debates over highly contentious issues, "speakers will often resort to the language of threats and intimidation to communicate the depth of [their] feelings about the topic under discussion."[230] The Supreme Court has acknowledged that the United States' commitment to uninhibited debate on public issues may result in "vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."[231] By going "beyond

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225 *See supra* Part III and *infra* Section IV.A.3.

226 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 337 (1974); *infra* Section IV.B.

227 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).

228 Batchis, *supra* note 183 at 51.

229 *See, e.g.*, Hillstrom v. United States, 760 F. App'x 836, 837 (11th Cir. 2019) (defendant argued he lacked *mens rea* for a threat conviction based on blog entry stating "by the end of this year a rouque [sic] [assistant state's attorney] will be executed for his abuse of prosecutorial power" and then naming the specific attorney who would be "first"); *see also* Batchis, *supra* note 183, at 51.

230 Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1348 (2005).

231 N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964) (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) ("Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases."); Baumgartner v. United States, 322 U.S. 665, 673–74 (1944) (noting

the bounds of good taste and conventional manners,"[232] speech may provoke an emotional impact that better enables the speaker to successfully convey a political message.

Historically, recognition of the special value of political speech lead the Court to pronounce a higher *mens rea* requirement for liability for defamation of a public official than the *mens rea* that is required to defame a private individual.[233] For similar reasons, public threats of violence against public officials may hold value on matters of public concern, and thus, may merit additional constitutional protection that is not warranted in the context of a privately communicated threat.[234] The Supreme Court's decision in *Virginia v. Black*, provides support for the proposed distinction between threats in a public protest context versus a private context.[235] Specifically, the *Black* plurality found that the state statute at issue was unconstitutional because it failed to differentiate between cross burning as a form of expression for purposes of conveying *political views*, which could be protected speech, versus cross burning for purposes of *intimidation*, which would qualify as a true threat and thus be unprotected speech.[236]

One potential objection to the proposed heightened *mens rea* for public protest context threats relates to the fact that the lines of demarcation between issues of public concern and those of merely private concern have not been firmly established in the Supreme Court's First Amendment jurisprudence.[237] Thus, the proposed use of a high *mens rea* (i.e., purpose or knowledge), for public protest context threats will likely, in practice, present similar challenges in determining whether a particular statement involves an issue of public concern. However, the Supreme Court has recently addressed

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that society has a right to criticize public officials even if one "speak[s] foolishly and without moderation").

232 *Hustler Magazine, Inc.*, 485 U.S. at 54.

233 *See supra* Section III.

234 *See* Batchis, *supra* note 183 at 51.

235 *See supra* Section I.A.

236 Virginia v. Black, 538 U.S. 343, 365–66 (2003) (plurality opinion); *see also supra* Section I.A.

237 *See, e.g.*, Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 725–26 (2009) (explaining that the Supreme Court's "line drawing efforts in [matters of public concern versus matters of private concern] have not been reassuring").

the distinction between public speech versus private speech and provided some additional guidance in this area.[238] Moreover, lower courts frequently adjudicate First Amendment cases involving these distinctions,[239] suggesting that the proposed approach to true threats will be workable.

2. GREATER SUSCEPTIBILITY OF PUBLIC PROTEST SPEECH TO CHILLING

A minimal *mens rea* for true threats will likely chill some political protests that utilize rhetorical threats, via art or otherwise, whereas it will not likely deter speakers acting with poor judgment. Defenses to true threat prosecutions based specifically on the requisite *mens rea* required by the First Amendment, as opposed to challenges based on the objective test, tend to manifest in one of several forms. Some defendants in such actions assert that they were merely upset and venting frustration, or that they were simply joking.[240] Others argue that the threat constitutes part of a work of art such as a story, picture, or lyric, and that the Constitution protects their freedom of expression because they intended to create art and not to actually threaten anyone.[241] Finally, some defend true threat

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[238] *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 451–52 (2016) (presenting the issue of the case as whether the speech at issue was of public or private concern and offering some guiding principles for the public concern test); United States v. Alvarez, 567 U.S. 709, 720 (2012) (plurality opinion) (differentiating between fraudulent speech to government employees on official matters, as well as false representations that one speaks on behalf of the government, and fraudulent communications in other contexts not implicating such concerns).

[239] *See, e.g.*, Phelps-Roper v. City of Manchester, 697 F.3d 678, 684–86 (8th Cir. 2012) (applying the *Snyder* public versus private speech distinction to speech at a funeral or burial site); Nwanguma v. Trump, 903 F.3d 604, 611–12 (6th Cir. 2018) (analyzing whether Trump's direction to have his supporters remove protestors violated public protest rights under *Snyder*).

[240] *See, e.g.*, Jones v. State, 64 S.W.3d 728, 731 (Ark. 2002) (noting defendant told purported victim "[d]on't take this serious" at the time of making the purported threat).

[241] *See, e.g.*, Commonwealth v. Knox, 190 A.3d 1146, 1168 (Pa. 2018) (concerning songs); Commonwealth v. Grenga, No. WOCR201401337, 33 Mass. L. Rep. 94, 95 (Mass. Supp. 2015) (concerning a chalkboard drawing); *In re* George T., 93 P.3d 1007, 1011 (Cal. 2004) (concerning poetry).

prosecutions on the grounds that their threats were rhetorical as part of a political protest.[242]

A low *mens rea* requirement for true threats will be less likely to chill the speech of those who threaten violence when upset or due to a miscalculation on what qualifies as funny than it will be to suppress the speech of political protestors, including artists. While many protestors extemporize in public speeches, they generally attempt to articulate their points in a strategic manner to better achieve their goals. Similarly, artists tend to labor thoughtfully over their work and, even when creating art quickly or spontaneously, generally give careful consideration to the distribution of their work.[243] In contrast, irate individuals and ill-advised jokesters do not generally consider legal consequences.[244]

Rhetorical threats in the political protest context may also be more likely to garner the attention of government speech suppression efforts than threats against private individuals.[245] Rap music provides a valuable lens through which to consider the chilling effect of a low *mens rea* standard for true threats on public protest, since rap musicians have frequently stood at the crossroads of political dissent in pop culture and true threat prosecutions in recent years.[246] With respect to threats of violence in rap lyrics, some

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[242] *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902, 928 (1982) (finding the statement "If we catch any of you going in any of them racist stores, we're gonna break your damn neck" as an "impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them"); Fogel v. Collins, 531 F.3d 824, 827, 832 (9th Cir. 2008) (painting messages such as "I AM A FUCKING SUICIDE BOMBER COMMUNIST TERRORIST!" and "ALLAH PRAISE THE PATRIOT ACT . . . FUCKING JIHAD ON THE FIRST AMENDMENT! P.S. W.O.M.D. ON BOARD!" as a "protest against government policy").

[243] *See In re George T.*, 93 P.3d at 1011 (explaining how the defendant carefully "labeled [his poems] 'dark poetry' to inform readers that they were exactly that").

[244] *See generally, e.g.*, People v. Eure, 488 N.E.2d 1267, 1271–72, (Ill. App. Ct. 1986) (explaining that a defendant who acts in the heat of passion, anger, or fear does not think when they act and cannot be deterred by legal consequences, such as an armed violence enhancement).

[245] *See* Hustler Magazine, Inc., et. al. v. Falwell, 485 U.S. 46, 51–52 (1988).

[246] *See, e.g.*, People v. Murillo, 190 Cal. Rptr. 3d 119, 120 (Cal. Ct. App. 2015) (reversing trial court's dismissal of felony threat complaint on grounds that rap lyrics were protected speech and could not be basis for a conviction where lyrics lamented a friend's incarceration and called the friend's accusers "snitches" and

threats serve in efforts to convey a broader message advocating for political or social change.[247] In other instances, threats of violence by rap artists seem to function primarily as a means of self-expression and/or to garner public attention for commercial purposes.[248] Finally, some rap lyrics threatening violence seem primarily designed to provoke fear in the target(s) with the artistic medium of rap perhaps selected, as in the *Elonis* case,[249] to provide a potential free speech defense in the event of litigation.[250]

Rap artists have faced arrest, prosecution, and other types of less formal governmental pressure in response to their use of threats in songs, including those critical of public officials.[251] Perhaps the

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threatened to kill them); Lynn Neary, *Op-Ed: Two-Year Sentence For Rapper 'Excessive,'* NPR (Aug. 10, 2009, 1:00 PM), https://www.npr.org/templates/story/story.php?storyId=111742102.

[247] *See, e.g.*, PUBLIC ENEMY, *By the Time I Get to Arizona*, *on* APOCALYPSE 91 . . . THE ENEMY STRIKES BLACK (Def Jam Records & Columbia Records 1991) (rap song ostensibly threatening to kill Arizona's then Governor Evan Mecham in response to his cancellation of the state's holiday honoring Dr. Martin Luther King, Jr., with lyrics including "I'm on the one mission to get a politician to honor / Or he's a goner by the time I get to Arizona" and a video depicting violence against fictional politicians); BODY COUNT, *Cop Killer*, *on* BODY COUNT (Sire Records 1992) ("I'm cop killer, it's better you than me / Cop killer, fuck police brutality!"); *see also* Amici Curiae Brief of the Thomas Jefferson Center for the Protection of Free Expression et al. in Support of the Petition for A Writ Of Certiorari at 8, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983) (explaining how rap evolved with political overtones, as a means through which people could comment on and challenge the social conditions).

[248] *See, e.g.*, EMINEM, *Kim*, *on* THE MARSHALL MATHERS LP (Aftermath Entertainment & Interscope Records 2000) ("Baby you're so precious, daddy's so proud of you / Sit down bitch! You move again I'll beat the shit out of you! (Okay)."). In light of the lack of criminal charges or public comment by Eminem's former wife Kimberly Ann Scott regarding his numerous songs threatening her with violence, it seems likely she viewed the songs not as true threats but perhaps as profit motivated revenge fantasies or, in some instances, descriptions of prior abuse.

[249] *See* Elonis v. United States, 135 S. Ct. 2001, 2004–07 (2015).

[250] *See, e.g.*, Rios v. Fergusan, 978 A.2d 592, 595 (Conn. Super. Ct. 2008) (using rap video on YouTube to threaten a former intimate partner with death).

[251] Adam Liptak, *Hip-Hop Artists Give the Supreme Court a Primer on Rap Music*, N.Y. TIMES (Mar. 6, 2019), https://www.nytimes.com/2019/03/06/us/politics/supreme-court-rap-music.html; Veronica Stracqualursi, *Killer Mike, Chance the Rapper, Meek Mill to Supreme Court: Pittsburgh Rapper's Lyrics Are Not 'A True Threat of Violence*,*'* CNN,

most famous example involves the rap group N.W.A., which released the song *Fuck tha Police* in 1988 with lyrics condemning police brutality against African-Americans and referencing violent retaliation in what one group member described as a "revenge fantasy."[252] The Assistant Director of the FBI wrote a letter on behalf of the Bureau to the president of N.W.A.'s record label objecting to the song, which he claimed encouraged violence against police officers.[253] In addition, "[a]n informal police network faxe[d] messages to police stations nationwide, urging officers to help cancel concerts."[254] These government and quasi-government actions aimed at suppressing dissent achieved partial success in that N.W.A.'s promoter insisted that the group not play *Fuck tha Police* on tour although, ultimately, *Fuck tha Police*, along with the album *Straight Outta Compton*, had a significant musical and cultural impact.[255]

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https://www.cnn.com/2019/03/07/politics/supreme-court-first-amendment-rappers/index.html (last updated Mar. 7, 2019, 5:53 PM).

[252] Kelley L. Carter, *The Painful, Long, and Lasting Legacy of "Fuck tha Police,"* BUZZFEED (Aug. 13, 2015, 6:06 PM), https://www.buzzfeednews.com/article/kelleylcarter/how-fuck-tha-police-started-a-revolution. N.W.A. is an abbreviation for "Niggaz Wit Attitudes." Danielle Harling, *Ice Cube Names "Things N.W.A. Does Not Stand For" With Jimmy Fallon*, HIPHOPDX (AUG. 6, 2015, 7:30 AM), https://hiphopdx.com/news/id.34972/title.ice-cube-names-things-n-w-a-does-not-stand-for-with-jimmy-fallon.

[253] *When Christian America and the Cops Went Insane Over N.W.A, Rap, and Metal*, VILLAGE VOICE (Aug. 20, 2015), https://www.villagevoice.com/2015/08/20/when-christian-america-and-the-cops-went-insane-over-n-w-a-rap-and-metal/.

[254] *Id.* These efforts to inspire cancellation of N.W.A. concerts would likely have succeeded in several cities but for interventions by prominent public figures. In addition, both on- and off-duty police in cities around the United States refused to act as security when the group went on tour. *See* Kory Grow, *N.W.A's 'Straight Outta Compton': 12 Things You Didn't Know*, ROLLING STONE (Aug. 8, 2018, 8:46 AM), https://www.rollingstone.com/music/music-news/n-w-as-straight-outta-compton-12-things-you-didnt-know-707207/.

[255] Amy Nicholson, *9 Truths Cut From Straight Outta Compton*, L.A. WEEKLY (Aug. 17, 2015), https://www.laweekly.com/9-truths-cut-from-straight-outta-compton/ (highlighting N.W.A. member, Ice Cube's, statement that the group's promoter conditioned its 1988 concert tour on their not performing *Fuck tha Police*). N.W.A. was inducted into the Rock and Roll Hall of Fame in 2016 and, later that year, their album *Straight Outta Compton* was inducted into the Grammy Hall of Fame after it went triple platinum. Peter A. Berry, *N.W.A.'s*

The government response to *Fuck tha Police*, while not typical, likely also chilled political protest speech by other rap musicians, as well as artists in other areas, particularly those who have not already achieved some degree of success and financial security. Government pressure on political protest in rap continues in the present day and extends to Caucasian rappers, as evidenced by the treatment of Marshall Mathers, known professionally as Eminem.[256] Mathers reported that Secret Service agents questioned him following his critique of President Donald Trump in a freestyle rap on the 2017 Black Entertainment Television ("BET") Hip Hop Awards show.[257] In short, government responses to rap music suggest that those interested in protecting political dissent, including domestic violence victim advocates, should consider the advisability of a heightened *mens rea* for public protest context true threats.[258]

'Straight Outta Compton' Album Enters Grammy Hall of Fame, XXL MAG. (Nov. 29, 2016), https://www.xxlmag.com/news/2016/11/n-w-a-straight-outta-compton-album-enters-grammy-hall-of-fame/. Additionally, the Library of Congress's National Recording Registry, inducted the entire album *Straight Outta Compton* into its Registry in 2016. Joshua Barone, *Judy Garland and 'Straight Outta Compton' Join National Recording Registry*, N.Y. TIMES (Mar. 31, 2017), www.nytimes.com/2017/03/31/arts/music/judy-garland-and-straight-outta-compton-join-national-recording-registry.html.

256 Jessica Schladebeck, *Eminem Claims Trump Diss Track Earned Him a Visit From Secret Service on New 'Kamikaze' Album*, DAILY NEWS (Aug. 31, 2018, 11:40 AM), https://www.nydailynews.com/news/politics/ny-news-eminem-trump-secret-service-kamikaze-album-20180831-story.html. The Secret Service would neither confirm nor deny questioning Eminem, but it did comment that it investigates all threats against the President. *Id.*

257 EMINEM, *Like Home*, *on* REVIVAL (Aftermath Entertainment, Shady Records & Interscope Records 2017) ("Someone get this Aryan a sheet / Time to bury him, so tell him to prepare to get impeached / Everybody on your feet / This is where terrorism and heroism meet, square off in the street"); Schladebeck, *supra* note 256 ("In the third verse of 'The Ringer,' Eminem claims his 2017 freestyle for the BET Hip Hop Awards earned him a visit from the Secret Service."); EMINEM, *The Ringer*, *on* KAMIKAZE (Aftermath Entertainment, Shady Records & Interscope Records 2018) ("But I know at least he's heard it / 'Cause Agent Orange just sent the Secret Service / To meet in person to see if I really think of hurtin' him").

258 The subjective test for a true threat has particular significance for political dissent because a low *mens rea* generally results in more emphasis on the objective test and studies suggest such tests are vulnerable to implicit bias. *See, e.g.*, Brief of the Rutherford Institute, Amicus Curiae in Support of the Petitioner at 13, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983) (noting that

3. PUBLIC OFFICIALS AND THE ASSUMPTION OF RISK OF THREATS

In addition to the particular importance of political speech, the decision to pursue a public life, with the consequent understanding of the potential for threats, offers some justification for the provision of greater constitutional protection for speech on matters of public concern. Unfortunately, for a significant number of public officials, whether working at a national or local level, election or appointment to their posts brings threats of violence, including death threats.[259] Public figures also face threats of violence on a regular basis.[260] Advance knowledge of the risk, and, in many instances, the likelihood of threats while in the public eye, presumably renders receipt of threats somewhat more tolerable for government officials and public figures.

The Supreme Court's decision in *Hustler Magazine v. Falwell* emphasizes the Court's expectation that public officials and figures must endure harsher public criticism than other individuals in order to protect core political speech consistent with the First Amendment, even when such speech causes severe emotional harm.[261] *Hustler* involved a lawsuit brought by televangelist and political

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the objective test can be applied in a biased manner because factfinders are asked "whether a reasonable person would feel afraid" but "[s]tereotypes, prejudices . . . can all contribute to fear, regardless of whether a comment is actually intimidating.").

[259] *See, e.g.*, Isaac Avilucea, *Mayor Kelly Yaede Receives Death Threat, Woman in Video Shouts, 'I Wanna Kill You Right Now*,' TRENTONIAN (June 11, 2019), https://www.trentonian.com/news/mayor-kelly-yaede-receives-death-threat-woman-in-video-shouts/article_9b03ac6e-8c60-11e9-9a65-5344d2500882.html; Biran Lisi, *School Board Receives Death Threats Following Arrest and Forcible Removal of Teacher at Meeting*, DAILY NEWS (Jan. 10, 2018, 10:59 AM), https://www.nydailynews.com/news/national/school-board-death-threats-teacher-removed-meeting-article-1.3748559.

[260] *See, e.g.*, Todd Malm, *Cardi B Cancels Concert in Indianapolis Due to Security Threat*, CELEBRITY INSIDER (July 31, 2019, 5:27 PM), https://celebrityinsider.org/cardi-b-cancels-concert-in-indianapolis-due-to-security-threat-307041/; Amy Mackelden, *Meghan Markle Avoids Newspapers and Twitter Following Racist Abuse*, HARPER'S BAZAAR (March 9, 2019, 10:57 AM), https://www.harpersbazaar.com/celebrity/latest/a26771371/meghan-markle-online-trolls-racist-abuse-avoids-twitter/.

[261] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (holding that a public figure cannot recover intentional infliction of emotional distress damages without proving "a false statement of fact made with 'actual malice.'").

commentator Reverend Jerry Falwell, in response to a "highly offensive" parody of him in *Hustler* magazine.[262] Recognizing that "robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office," the Court applied the *New York Times* heightened *mens rea* standard for defamation against a public official to this case involving public figure.[263] However, the Court did not suggest it would consider imposing a similar requirement for a private person to recover for intentional infliction of emotional distress.[264] Rather, in the defamation context, the Court has stated "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[265]

Threats of violence presumably cause more aggregate emotional harm than other types of speech sufficient for a claim of intentional infliction of emotional distress. However, the principle that public protest context speech warrants a heightened level of constitutional protection that is unavailable for private context speech remains the same.[266] In sum, the Court's reasoning in *Hustler*, along with its other defamation cases and incitement jurisprudence, offer support for an approach to true threats that provides greater protection for speech impacting public officials than for words harming private individuals.[267]

Some might question the feasibility of a multi-tiered approach to the subjective test for true threats and argue that such a standard would be difficult to implement. However, the Supreme Court's longstanding defamation jurisprudence belies this concern in that it has developed to include a greater number of analytical variables than the proposed approach to true threats.[268] In addition, the

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[262] *Id.* at 48 (describing that the parody depicted Falwell's first sexual encounter as occurring with his mother in an outhouse).

[263] *Id.* at 50–51 (defining public figures as those "intimately involved in the resolution of important public questions or, [who] by reason of their fame, shape events in areas of concern to society at large.").

[264] *See id.* at 49.

[265] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

[266] *Hustler Magazine, Inc*., 485 U.S. at 52.

[267] *Cf. id.* at 51, 57.

[268] *See* Batchis *supra* note 183, at 49–50 (noting that in addition to distinguishing between public official, public figures, and private individuals allegedly defamed by speech on matters of public versus private concern, the Supreme Court has varied *mens rea* requirements-based type of damages at issue).

Supreme Court's concern in *Watts* for the disruption caused by true threats applied with special force to threats against the President may suggest a potential objection to a purpose or knowledge standard for true threats in the public protest context.[269] However, Congress has historically chosen a specific intent standard with respect to federal laws banning threats against the President despite undoubtedly wishing to deter threats which interfere with governmental functions.[270] In addition, caselaw suggests that many individuals who utter threats against the President, as well as other prominent officials and public figures, will not be deterred by a low requisite *mens rea* for true threat liability.[271] In short, the Court's offhand comments in *Watts* should not be read as suggesting that it would find the Constitution required a low *mens rea* for true threats in the public protest context.

Finally, some have argued that the advent of the Internet and other technologies, which have increased the frequency of all types of threats, suggest that a First Amendment requirement of a purpose or knowledge standard for true threats will offer insufficient protection for victims.[272] Others have argued that the dynamics of new communication channels render assessment of the intentions of

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[269] *See* Watts v. United States, 394 U.S. 705, 707 (1969).

[270] *See, e.g.*, 18 U.S.C. § 871(a) (2018) (requiring knowledge and willfulness for conviction).

[271] High profile public officials often draw attention and threats from people with mental health issues and political extremists willing to risk criminal liability for their causes. *See, e.g.*, Rogers v. United States, 422 U.S. 35, 41–42 (1975) (Marshall, J., concurring) (describing how a man suffering from alcoholism wandered into coffee shop stating that he was Jesus Christ and that he was "going to go to Washington to 'whip Nixon's ass,' or to 'kill him in order to save the United States.'"); Kelly Weill et al., *Congressional Shooter Loved Bernie, Hated 'Racist' Republicans, and Beat His Daughter*, DAILY BEAST, http://www.thedailybeast.com/congressional-shooter-loved-bernie-sanders-hated-racist-and-sexist-republicans (last updated June 14, 2017, 11:56 PM) ("The gunman who attacked members of Congress on Wednesday morning . . . had a long history of domestic violence that included the use of a gun and hated Republicans.").

[272] *See, e.g.*, Alison J. Best, Note, Elonis v. United States: *The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 MD. L. REV. 1127, 1155 (2016) (discussing role of Internet in rise of true threat litigation in the last decade and arguing in part that "applying a purely subjective intent standard raises concerns that true threats would be too hard to prove in the context of social media.").

a speaker threatening violence more difficult, and they recommend additional legal protections for those accused of uttering true threats to avoid overdeterrence of legitimate speech.[273] Since communication technologies continue to evolve rapidly and strong arguments exist that these developments raise challenges for both alleged victims and defendants in true threat litigation,[274] it seems ill-advised to attempt to build detailed rules for true threat jurisprudence on the basis of such issues.[275] In sum, the high value of core political speech and its relative vulnerability to self-censorship, as well as the assumption of the risk of threats by public officials and figures, warrant a heightened *mens rea* for public protest context true threats pursuant to the First Amendment.

B. *Lower Mens Rea for Private Context Threats*

In contrast to threats in the public protest context, threats of violence against private individuals, and threats against public officials and figures that are not part of a public critique, have little or no First Amendment value to potentially outweigh the injury caused by the speech.[276] In this regard, private context threats resemble defamation of a private figure and thus merit a lower level

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[273] *See, e.g.*, Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I [gun emoji] U: Considering the Context of Online Threats*, 106 CAL. L REV. 1886, 1925 (2018) (advocating creation of a procedural mechanism for raising a "context" defense to a prosecution for threats on social media prior to trial).

[274] Jessica L. Opila, Note, *How* Elonis *Failed to Clarify the Analysis of "True Threats" in Social Media Cases and the Subsequent Need for Congressional Response*, 24 MICH. TELECOM. & TECH. L. REV. 95, 97 (2017).

[275] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) ("[W]e cannot appreciate yet [the Cyber Age's] full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].").

[276] *Elonis* Oral Argument, *supra* note 21, at 27 ("[Negligence] may be a low standard, but to my mind, it doesn't eliminate a whole lot of valuable speech at all."); *see also* Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: [T]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialog of ideas; and the threat of liability does not pose the risk of a reaction of self-censorship on matters of public import.") (internal quotation marks and citations omitted).

of constitutional protection via the *mens rea* requirement than public protest context threats. Specifically, the Supreme Court should find that, for a statement to qualify as a true threat, the Constitution requires a subjective *intent to threaten* reflecting at least *recklessness* on the part of the speaker for criminal law cases and a *general intent to communicate a true threat*, but without regard to any intent to threaten, in civil matters.

Several considerations beyond the analogy to defamation and the assumption of a risk of threats by public officials and figures discussed above support a reading of the First Amendment to require a lower *mens rea* to prove a true threat in the private versus public protest context. First, at the time he receives a true threat, a government official or public figure will be more likely to have protection already in place at work, and occasionally at home as well, and to have access to increased protection in response to a threat than a private person.[277] Access to enhanced public resources for protection will presumably reduce the actual risk of violence for a public official or figure and may also blunt the emotional harm of a threat.[278] In addition, the costs of self-help "remedies" for a threat of violence, such as privately contracted security personnel, are more likely to be financially accessible to the subset of public officials and public figures most likely to receive death threats, namely individuals with high profile government positions or with celebrity status in the popular culture, than to other threat victims.[279]

Second, with threats communicated through a *private* channel, the particular harm suffered by *any* victim, whether a public or private individual, suggests the need to limit the application of a heightened (purpose or knowledge) *mens rea* for true threats to only those threats uttered in the context of a *public* protest against public officials and figures. For example, a threat communicated through a private channel "will often involve an invasion of personal space (a

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[277] *See* Donald J. Mihalek & Richard M. Frankel, *Protecting US Government Leaders: Who Gets Security and Why: Analysis*, ABC NEWS (Oct. 18, 2019, 5:06 AM), https://abcnews.go.com/Politics/protecting-us-government-leaders-security-analysis/story?id=66258938.

[278] *See id.*

[279] *See, e.g.*, Kenzie Bryant, *The Staggering Price Tag on Safety in the Modern Celebrity World*, VANITY FAIR (Nov. 4, 2016), https://www.vanityfair.com/style/2016/11/bodyguard-security-cost-kim-kardashian-brad-pitt.

phone call to the home, for example) that increases the target's sense of assault and denies the target any sense of personal refuge or margin of safety from antagonists."[280] Unlike public protest context threats, privately communicated threats have "inherently ominous overtones" and thus cause special harm regardless of the target's identity.[281] When a government official receives a threat in *private*, even when coupled with a reference to a matter of public concern, she can reasonably assume the speaker does not seek to influence the marketplace of ideas but instead wishes to intimidate or coerce her.[282] Threats of violence communicated through private channels to a government official do not advance a broader political discussion.[283]

Finally, with respect to private context threats, the victim will generally have personal connections with the individual making the threat, rendering total avoidance of that person following a threat difficult.[284] For example, Elonis threatened his estranged wife who, as a result of their having two minor children in common, would

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[280] Gey, *supra* note 230, at 1351.

[281] *Id.*

[282] *Id*. at 1350–51. Cases involving true threats directed at public officials on matters of public concern may occasionally present difficulties in discerning whether those threats were publicly or privately communicated (i.e., a threat indicating that the speaker will kill the target if he doesn't vote for particular legislation sent directly to a legislator's work email address but also cc'ing several of the speaker's friends or family members). *See* Healy, *supra* note 237, at 724 (discussing challenges in determining whether speech is public or private in the context of incitement).

[283] *See, e.g.*, United States v. Hoff, 767 F. App'x 614, 622 (6th Cir. 2019) (defendant left voicemail messages for his Congressman which included statements such as, "[l]eave Obamacare alone or die."); United States v. Haddad, 652 F. App'x 460, 462 (7th Cir. 2016) (defendant sent letters to local elected officials and to oil executives stating "[w]e will so happily and without mercy kill your families."). It is also worth noting that not all threats of violence against public officials in a *public* setting automatically warrant First Amendment protection. A person who publicly spews mere personal animus against a politician that includes a threat of violence but does not refer to matters of public concern fails to offer any contribution to public debate which the Constitution aims to protect.

[284] *See* Elonis v. United States, 135 S. Ct. 2001, 2004, 2006 (2016) (noting that defendant threatened his wife which prompted her to seek a restraining order for her and their shared children).

almost certainly face future contact with him.[285] Each time a private individual interacts with a person who has threatened her, the contact could retraumatize the victim, compounding the emotional injury from the initial threat.[286] However, in most instances, the lack of a social or an ongoing work related connection will enable public officials and figures to avoid future contact with people who have publicly threatened them, thus reducing their risk of suffering actual violence.[287] For example, Elonis also threatened an FBI agent who, unlike Elonis' estranged wife, did not have a personal connection to him and thus could cease all contact with him following the conclusion of her investigation or perhaps the transfer of that investigation to another agent.[288] A person threatened in a private context will also be more likely to feel betrayed by the speaker because of the likelihood of a prior relationship, whereas such feelings are not generally present for the target of a public protest context threat.[289] Thus, the heightened victim impact of a privately communicated threat weighs in favor of a lower *mens rea* for such

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[285] *Id*. at 2004. For domestic violence victims who have children in common with a former intimate partner, courts often include visitation orders to prohibit or limit contact between a victim and a domestic violence perpetrator. *See* Debrina Washington, *The Impact of Domestic Violence on Child Custody Cases*, VERY WELL FAMILY, https://www.verywellfamily.com/domestic-violence-in-child-custody-cases-2997623 (last updated Sept. 12, 2019) (discussing the impact on visitation rights for an accused). However, perpetrators frequently do not comply with these terms imposing contact limitations. Melanie F. Shepard & Annelies K. Hagemeister, *Perspectives of Rural Women: Custody and Visitation with Abusive Ex-Partners*, 28 J. WOMEN & SOC. WORK 165, 167, 171 (2013).

[286] Shepard & Hagemeister, *supra* note 285, at 171. This argument also applies to public officials and figures threatened through private channels. *See Hoff*, 767 F. App'x at 620–23.

[287] In the case of elected officials, however, First Amendment concerns attach when trying to block constituents on social media. Davison v. Randall, 912 F.3d 666, 672–73 (2019) (holding that the chair of a county Board of Supervisors could not block one of her constituents on Facebook).

[288] *Elonis*, 135 S. Ct. at 2006.

[289] Privately communicated threats against public officials addressing matters of public concern will likewise not cause feelings of personal betrayal unless the victim happens to have a relationship with the speaker. In any event, under the multi-tiered approach proposed in this Article, such private context threats would be subject to a lower *mens rea*. *See* Rogers v. United States, 422 U.S. 35, 42 (1975) (Marshall, J., concurring) (discussing the threat made by defendant to officers at a hotel against the President).

threats whether against public officials, public figures, or private individuals.

Some have argued that a purpose or knowledge standard for true threats renders threatening speech likely, and thus serves to expose potential violence to prevention efforts by law enforcement.[290] With respect to public officials and figures, it seems reasonable to assume that a heightened *mens rea* which maximizes free speech protections will expose potential threats through volatile public expression and thereby allow for action to increase safety. However, with respect to threats against private individuals, the threat target is likely to have a prior relationship with the speaker and thus to be already aware of the speaker's ill will.[291] As a result, although a heightened *mens rea* requirement will generally provide more frequent alerts to potential danger, it would likely offer little new information to improve the safety of private individuals threatened with violence.

1. RECKLESSNESS STANDARD FOR TRUE THREATS IN CRIMINAL CASES

The limited First Amendment value of private context threats and their high degree of resultant harm argue against a finding that the Constitution requires a specific intent (purpose or knowledge) standard for true threat liability. In addition, such a heightened *mens rea* would make prosecutions exceedingly difficult in some cases, including those involving domestic violence for victims who seek to pursue criminal charges. However, the aversion of many victims to policies focusing on criminal legal system solutions in response to domestic violence, to crime in general, or to both, suggests that a low *mens rea* requirement pursuant to the First Amendment for true threat prosecutions would not be in line with their wishes.[292] In the aggregate, the differing perspectives of domestic violence victims suggest that interpreting the Constitution to require an intermediary

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[290] Scholars have referred to this justification for a more permissive subjective test for true threats as the visibility of danger rationale. *See e.g.*, Daniel T. Kobil, *Advocacy On Line:* Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 238 (2000); *see also* Marc Rohr, *"Threatening" Speech: The Thin Line Between Implicit Threats, Solicitation, and Advocacy of Crime* 27 (Nova Southeastern Univ. Legal Studies Paper No. 14-002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501042.

[291] *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2006 (2015).

[292] *See supra* Section II.C.

level of intent for a criminal conviction for uttering a private context true threat, namely *recklessness* on the part of the speaker as to an *intent to threaten*, would best serve victim interests overall.[293]

Some jurisdictions have interpreted statutes criminalizing threats to require a *purpose to threaten* for conviction and, in prosecutions pursuant to such laws, the question of the *mens rea* required by the Constitution for a true threat becomes moot.[294] However, in jurisdictions which currently allow conviction based solely on *intent to communicate* a true threat, meeting the objective test, a First Amendment requirement of recklessness with respect to the *intent to threaten* will increase the difficulty of proving criminal liability.[295] In these instances, the proposed subjective test (*recklessness*) for private context true threats in criminal cases will increase the importance of victim cooperation in prosecutions, and thus has the potential to enhance respect for victim autonomy.

2. General Intent Standard for True Threats in Civil Cases

In contrast to criminal prosecutions for true threats, which arise in a wide range of circumstances, true threat jurisprudence in civil cases is implicated almost exclusively with respect to private context threats in civil protection orders; as a result, domestic violence victims' concerns warrant special consideration here.[296] In

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[293] *See supra* Section II.C.

[294] *See, e.g.*, State v. Perkins, 614 N.W.2d 25, 30 (Wis. Ct. App. 2000).

[295] *See, e.g.*, United States v. Jeffries, 692 F.3d 474, 484–85 (6th Cir. 2012) ("an objective test . . . asks only whether a reasonable listener would understand the communication as an expression of intent to injure, permitting a conviction not because the defendant intended his words to constitute a threat to injure another but because he should have known others would see it that way.").

[296] *See, e.g.*, Parocha v. Parocha, 418 P.3d 523, 526 (Colo. 2018) (civil protection order based on private threats to wife); Ngqakayi v. Ngqayaki, No. 2007 CA 85, 2008 WL 4278334, at *1–2 (Ohio Ct. App. Sept. 19, 2008) (involving civil protection order for threat in private context); Henry v. Henry, No. 04CA2781, 2005 WL 43888, at *2 (Ohio Ct. App. 2005) (involving civil protection order for husband's death threats to wife in private). True threat issues may also be raised occasionally in the tort context in jurisdictions recognizing negligent infliction of emotional distress claims. *See* Julie A. Davies, *Direct Actions for Emotional Harm: Is Compromise Possible?*, 67 WASH. L. REV. 1, 3 (1992). In addition, civil cases involving true threats and related First Amendment arguments arise in the context of students suing school boards or other school

the civil context, the Supreme Court should find that a subjective intent to communicate a statement qualifying as a true threat pursuant to the objective test satisfies any free speech concerns. Victim interests support a low *mens rea* for true threats, maximizing access to civil protection orders, for a number of reasons.[297]

First, as discussed, domestic violence victims suffer more acutely from the negative effects of true threats than many other threat victims, which in turn justifies a lower *mens rea* with respect to civil cases than in criminal matters.[298] Second, the effects of the entry of a civil protection order against a defendant, while significant, are much less severe than the consequences of a criminal conviction, and thus a lower *mens rea* here causes fewer concerns regarding excessive speech regulation than it would in the criminal context.[299]

While some jurists may question whether a basis exists upon which to apply a lower *mens rea* to true threats in civil versus criminal cases, this approach is consistent with the Supreme Court's use of penalty-sensitive free speech analysis in its First Amendment jurisprudence, albeit in a limited number of cases to date.[300] As Professor Michael Coenen has explained, penalty-sensitive free speech analysis looks to the constitutionality of a speech limitation in light of the severity of the criminal punishment or civil penalty attached to it.[301] In doing so, penalty sensitivity "posits a positive correlation between the harshness of the governmental sanction and

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authorities following discipline for allegedly threatening speech. *See, e.g.*, *Student Accused of Making Online Threats Directed at Emmerich Manual High School Arrested*, *supra* note 164. However, in school cases involving threats, a different standard applies pursuant to *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

297 *See supra* Section II.B.

298 *See supra* Section II.A.

299 Jessica Miles, *We Are Never Ever Getting Back Together: Domestic Violence Victims, Defendants, and Due Process*, 35 CARDOZO L. R. 141, 151, 174 (2013) (describing the range of potential collateral consequences for defendants of civil protection orders, including criminal record notations and firearms restrictions).

300 Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 995–96 (2012) [hereinafter Coenen, *Of Speech and Sanctions*].

301 *Id.* at 1000.

the strength of the speaker's First Amendment claim."[302] While the concept of penalty-sensitive First Amendment analysis remains the subject of debate, it has garnered increasing scholarly recognition in recent years.[303] Further support for the proposed approach to true threats may also be found in other areas of constitutional law reflecting penalty sensitivity by distinguishing between rights available in civil and criminal cases (i.e., right to counsel).[304]

Third, any determination that liability for a true threat requires proof of the speaker's subjective intent to threaten "will create a significant hurdle to the issuance of protection orders for victims."[305] While subjective intent is "by its nature . . . difficult to demonstrate,"[306] establishing intent would likely be more challenging in domestic violence matters, as compared to other true threat cases, due to the special ability of many domestic violence perpetrators for deception.[307] Domestic violence perpetrators gain

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[302] *Id.*

[303] *See, e.g.*, *id.* at 995 (arguing "[p]enalty-sensitive free speech may be less prevalent than its penalty-neutral counterpart, but it is by no means non-existent."); Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1601 (2017) (arguing that Justice Oliver Wendell Holmes discussed "speech specific, penalty-sensitive concerns" in his dissent in *Abrams v. United States*, 250 U.S. 616 (1919)); Margo Kaminski, *Copyright Crime and Punishment: The First Amendment's Proportionality Problem*, 73 MD. L. REV. 587, 590 (2014) (arguing "courts should . . . reintegrate elements of proportionality analysis into First Amendment jurisprudence."); Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L L. & POL'Y 409, 441 (2013) (arguing for the application of the balancing test in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), in the context of civil and administrative sanctions and strict scrutiny for criminal sanctions).

[304] Coenen, *Of Speech and Sanctions*, *supra* note 300, at 1022–26; s*ee also* Batchis *supra* note 183, at 44 (suggesting "[a] nuanced doctrinal rule governing the true threats category might distinguish among various possible sanctions that would apply to true threats" with "[a] higher level of intent . . . required to ratchet-up the sanctions imposed.").

[305] Brief of the Domestic Violence Legal Empowerment and Appeals Project and Professor Margaret Drew as Amici Curiae, *supra* note 21, at 28–29.

[306] United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997).

[307] POWER AND CONTROL WHEEL, *supra* note 108; *see also Wheels*, DOMESTIC ABUSE INTERVENTION PROGRAMS, https://www.theduluthmodel.org/wheels/ (last accessed Jan. 26, 2020) (describing Power and Control Wheel utilized by wide range of professionals including court personnel, law enforcement, and prosecutors in the United States as well as other countries).

and maintain power and control over their victims with a range of abusive behaviors, many of which involve manipulation, as perhaps best represented in the *Power and Control Wheel* developed by domestic violence experts.[308] Abusive behavioral strategies include responding to domestic violence allegations by "minimizing, denying [the abuse], and blaming [the victim]."[309] In true threat litigation, perpetrators can use these manipulative skills to claim that they had no intent to threaten the victim, but rather merely sought to "vent their frustration, to make a joke, [or] to express themselves artistically."[310] Domestic violence perpetrators tend to be successful in deceiving fact finders as to their intentions, and research establishes that fact finders demonstrate bias on issues of credibility in favor of perpetrators to the detriment of domestic violence victims.[311]

Further complicating problems of proof for a domestic violence victim, a former intimate partner can use facially ambiguous words that nonetheless clearly communicate a threat to her based on the couple's shared history, which can then aid the defendant in his efforts to deny his intent to threaten her.[312] During oral argument in

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[308] POWER AND CONTROL WHEEL, *supra* note 108; *see also Wheels*, *supra* note 307.

[309] POWER AND CONTROL WHEEL, *supra* note 108 (listing strategies as "[m]aking light of the abuse," "[s]aying the abuse didn't happen," or "[s]aying she caused it.").

[310] Brief Amici Curiae the National Network to End Domestic Violence, et al., *supra* note 21, at 21–22; *see also* Chemaly & Franks, *supra* note 155 (noting that subjective intent requirement for true threats "might allow domestic violence abusers to create plausible defenses for themselves by claiming that they never really 'meant' their threats as threats.").

[311] DAVID ADAMS, WHY DO THEY KILL? MEN WHO MURDER THEIR INTIMATE PARTNERS 26 (2007) ("Many batterers avoid detection . . . precisely because they do not fit the stereotypes about them."); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER, SOC. POL'Y & LAW 657, 690–92 (2003) (noting that judges' credibility assessments are often incorrect in this context because "many common assumptions about witness credibility backfire when applied to victims and perpetrators of domestic violence."); *see also* Aníbal Rosario-Lebrón, *Evidence's #MeToo Moment*, 74 U. MIAMI L. REV. 1, 49–56 (2019) (explaining how character for truthfulness evidence is used to play on pre-existing biases toward victims of domestic violence).

[312] Joanne Belknap et al., *The Roles of Phones and Computers in Threatening and Abusing Women Victims of Male Intimate Partner Abuse*, 19 DUKE J. GENDER

Elonis, Justice Alito recognized that a heightened *mens rea* for true threats would pose special problems for domestic violence victims, commenting that such a rule would offer "a roadmap for threatening a spouse and getting away with it" by "put[ting] [the threat] in rhyme and . . . say[ing], I'm an aspiring rap artist."[313]

Finally, whereas in criminal cases, implicit bias concerns generally focus on discrimination against defendants, in civil protection order cases, implicit bias will be more likely to disadvantage domestic violence victims than defendants.[314] Specifically, because most intimate partner pairings in the United States are monoracial and the vast majority of domestic violence victims are women, to the extent implicit or explicit biases factor into civil protection order decisions, an inference can be drawn that gender will generally be the most salient point on which implicit bias may impact outcomes.[315] Given research findings that the majority of Americans hold implicit biases in many areas in favor of men over women, in civil protection order cases, any gender bias will generally inure in favor of male defendants.[316] Similarly, with respect to bias against immigrants, domestic violence victims are more likely to be immigrants—particularly undocumented immigrants—than their former intimate partners, given the dynamics of power and control inherent in domestic violence.[317] As a result, any bias against immigrants in adjudicating civil protection

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L. & POL'Y 373, 379 (2012) (former intimate partner stalkers typically have more access to information than stranger or acquaintance stalkers including "secrets, words and behaviors that are particularly humiliating or frightening to their victims.").

313 *Elonis* Oral Argument, *supra* note 21, at 59.

314 *See* Meier, *supra* note 312, at 690–91 (noting that domestic violence batterers are more likely to be convincing witnesses, while victim's demeanors "do not enhance women's credibility in the eyes of a judge or other evaluator.").

315 *See supra* note 6 and accompanying text; WENDY WANG, THE RISE OF INTERMARRIAGE, PEW RES. CTR. (Feb. 16, 2012), https://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/ ("About 15% of all new marriages in the United States in 2010 were between spouses of a different race.").

316 *See* Rosario-Lebrón, *supra* note 312, at 19–37; Pragya Agarwal, *Here Is How Unconscious Bias Holds Women Back*, FORBES (Dec. 17, 2018, 10:35 AM), https://www.forbes.com/sites/pragyaagarwaleurope/2018/12/17/here-is-how-unconscious-bias-holds-women-back/#3bdf17e62d4f.

317 *See supra* Section II.A.

order cases will likely favor defendants. Full consideration of all potential types of implicit bias which can arise in civil protection order hearings is beyond the scope of this Article. However, as the foregoing analysis suggests, domestic violence victims, rather than defendants, are more likely to be disadvantaged by implicit bias in civil protection order cases.[318] In sum, in light of the serious harm true threats cause domestic violence victims and the relatively modest consequences of a civil protection order for defendants in comparison to criminal penalties, as well as the disadvantages faced by domestic violence victims in litigating these cases, the balance weighs in favor of a subjective test requiring only a general intent *to communicate* an objective true threat for liability.

CONCLUSION

True threat jurisprudence offers the opportunity for the Supreme Court to utilize insights from First Amendment decisions regarding other categories of unprotected speech, particularly defamation and incitement, to reflect the optimal constitutional balancing of free speech rights and protection of individuals, in particular domestic violence victims, from harm. In light of this guidance, the Court should use a multi-tiered approach to the question of the constitutionally requisite *mens rea* that must be coupled with a finding pursuant to the objective test for a true threat. This multi-tiered standard should require, first, that public protest context threats of violence (i.e., against public officials and figures and publicly communicated on matters of public concern) receive heightened constitutional protection: a specific intent to threaten (purpose or knowledge) standard for liability. Second, private context threats (i.e., privately communicated threats whether against private individuals *or* public officials or figures) should require an intermediate level of subjective intent to threaten (recklessness) for a criminal conviction. Finally, for entry of a civil protection order or other civil judgment, private context threats should require only a general intent to communicate an objectively threatening statement and not a subjective, specific intent to threaten. True threat jurisprudence gives domestic violence advocates an opportunity to continue to shift the priorities of the feminist anti-violence

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318 *See supra* Section IV.B.2.

movement away from prioritizing criminalization—which has often been ineffective and had unintended consequences—to instead focus on preventing and remedying domestic violence through civil protection orders and other solutions which better reflect the concerns of all victims. In working to ensure that true threat jurisprudence maximizes civil protection order access and provides some level of criminal legal system relief from threats, while also offering a heightened constitutional buffer for impassioned political protest, advocates can improve society's effectiveness in responding to domestic violence.