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Elonis v. United States: The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment Rights in the New Era of Communication

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Elonis v. United States: The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment Rights in the New Era of Communication

Mary Margaret Roark*

I. INTRODUCTION

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”¹ Such protection has withstood the test of time and is heralded as one of our most precious rights as Americans. “The hallmark of the protection of free speech is to allow ‘free trade in ideas’—even ideas that the overwhelming majority of people might find distasteful or discomfoting.”² However, “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”³

One such form of speech is the “true threat.”⁴ In proscribing such speech, it becomes paramount to tread with care so as to not infringe upon the protections afforded by the First Amendment. Requiring only that a listener be reasonable in interpreting speech as a threat results in an improper intrusion upon that right. Requiring the speaker’s subjective intent, rather, will protect the sanctity of the First Amendment. Though many courts have adopted the objective test, the U.S. Supreme Court now has the opportunity, in deciding *Elonis v. United States*, to take a monumental step in protecting the First Amendment right to free speech. Holding that the speaker’s subjective intent to threaten is necessary for a true threat

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¹ U.S. CONST. amend. I.

² *Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); *see also* *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.”).

³ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

⁴ *Watts v. United States*, 394 U.S. 705, 708 (1969).

conviction will restore the broad protection afforded by the First Amendment and repair the erosion caused by decisions adopting an objective approach.

A. Hypothetical Threat Prosecution

Picture the following scenario. Your wife cheated on you, and tensions have been running high since you split. She called law enforcement several times and obtained a restraining order against you. You are angry. You have always been able to express your emotions through writing song lyrics. In fact, you have a Facebook page on which you often post them. In your frustrated mindset, you feel that you could channel this emotion into some lyrics. After you complete your post, you click “enter” and publish the words to your Facebook timeline.

Weeks later, you receive notice that you are being sued under 33 U.S.C. § 875(c) for transmitting through interstate commerce communication containing a threat to injure another person.⁵ Apparently your Facebook page viewers do not share your passion for communicating anger through online posting of song lyrics, even if you meant it as an artistic expression. During your trial, you want to explain yourself, but the judge has instructed that no consideration will be given to your state of mind while making the post. The only question is whether a reasonable person could interpret the communication as a threat. Suddenly, your decision to press enter and post those words—a decision that seemed virtually harmless at first—now has far greater consequences than you ever imagined. This hypothetical is strikingly similar to the situation before the Supreme Court in *Elonis v. United States*.⁶ The issue at hand requires the Supreme Court to again turn its attention to the issue of true threats and the requisite intent needed to prosecute a person for transmitting such threats.

B. The True Threat Doctrine

In *Elonis v. United States*, the Supreme Court granted certiorari to address whether the “conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant’s subjective intent to threaten.”⁷ Though the Court is examining the issue under a particular statute, it is likely that the decision will be

⁵ 33 U.S.C. § 875(c) (“[W]hoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.”).

⁶ 134 S. Ct. 2819 (2014).

⁷ *Id.*

uniformly applied to other statutory bans on threats by way of the “true threat” doctrine.⁸

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 or group of individuals.”⁹ The definition requires an intent to threaten; however, the speaker need not actually intend to carry out the threat for it to be a “true threat.”¹⁰ Additionally, “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”¹¹

This seemingly straight-forward doctrine has been muddled by Supreme Court opinions and lower courts’ interpretations of those opinions.¹² The freedom of speech is the foundational threshold of our constitutional rights;¹³ however, that foundational right has been chipped away throughout the years by various exceptions limiting what speech is protected.

The confusion surrounding “true threats” arises when we attempt to determine what intent is necessary for a true threats conviction. Is a subjective test to be used, in which the court examines whether the speaker intended to threaten, or should an objective test be used, in which a person may be found guilty regardless of his or her intent so long as a person is reasonable in perceiving the communication as a threat? In order to protect First Amendment freedoms, the Supreme Court in *Elonis v. United States* should require courts to consider subjective intent in the true threat analysis. Such a holding is necessary to protect against the many constitutional infringements that would occur otherwise.

⁸ *United States v. Elonis*, 730 F.3d 321, 324 (3d Cir. 2013) (analyzing the violation of the statute by examining the true threat doctrine).

⁹ *Black*, 538 U.S. at 360 (citing *Watts*, 394 U.S. at 708).

¹⁰ *Id.* at 360.

¹¹ *Id.*

¹² *Watts*, 394 U.S. at 708; *Black*, 538 U.S. at 360.

¹³ *Black*, 538 U.S. at 358 (2003) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); *see also* *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.”).

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C. United States v. Elonis

In *United States v. Elonis*, the Third Circuit analyzed a series of behaviors leading to the arrest of Mr. Elonis.¹⁴ Mr. Elonis was fired from his job following sexual harassment complaints and an altercation at a Halloween party.¹⁵ Following his termination, he posted an alleged threat on his Facebook page.¹⁶ He also made numerous posts about his wife, namely stating “someone out there should kill my wife,” “hurry up and die,” and “fold up your PFA and put it in your pocket [i]s it thick enough to stop a bullet?”¹⁷ Mr. Elonis also made a post alluding to the fact that he may have been planning to target an elementary school, stating, “hell hath no fury like a crazy man in a kindergarten class.”¹⁸ Lastly, he posted a threat to the FBI after an agent visited his home for questioning.¹⁹ These posts were the basis for Mr. Elonis’s arrest.²⁰

The Third Circuit, examining whether to convict Mr. Elonis, cited precedent that stated a true threat is one in which “a reasonable speaker would foresee the statement would be interpreted as a threat.”²¹ However, the court reevaluated its previous treatment of true threats in light of the Supreme Court’s holding in *Virginia v. Black*, which seems to require a finding of subjective intent in order to deem speech a true threat.²² After evaluating the *Black* opinion, the Third Circuit held that the Court did not intend to make its holding broad enough to require a court to find subjective intent for a true threat conviction.²³ To read it as such “would require adding language the Court did not write to read the passage as ‘statements where the speaker means to communicate [and intends the statement to

¹⁴ *Elonis*, 730 F.3d at 324.

¹⁵ *Id.* at 324.

¹⁶ *Id.*

¹⁷ *Id.* at 324–26.

¹⁸ *Id.* at 326.

¹⁹ *Id.*

²⁰ *United States v. Elonis*, 730 F.3d 321, 326 (3d Cir. 2013) (“Count 1 threats to patrons and employees of Dorney Park & Wildwater Kingdom, Count 2 threats to his wife, Count 3 threats to employees of the Pennsylvania State Police and Berks County Sheriff’s Department, Count 4 threats to a kindergarten class, and Count 5 threats to an FBI agent.”); *see* Appendix (full text available of all threats).

²¹ *Id.* at 323 (citing *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991)).

²² 538 U.S. at 359 (“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.).

²³ *Elonis*, 730 F.3d at 329.

be understood as] a serious expression of an intent to commit an act of unlawful violence.”²⁴ The Third Circuit further stated that communications could be considered threats even if some of them were not expressly threatening and some of them were conditional.²⁵

Mr. Elonis’s case is one of many cases surfacing in courts across the country involving a person whose communication may have been misinterpreted, leading to a conviction for transmitting a threat. Mr. Elonis, along with similarly situated defendants, are calling for courts to require a subjective intent to threaten in order to convict a person of transmitting a true threat.

II. TRUE THREAT DOCTRINE JURISPRUDENCE

Arguments regarding the standard to be used in analyzing threats can be traced as far back as the early twentieth century.²⁶ On one side of the argument, Judge Learned Hand advocated that courts should only apply an objective test focusing on the actual content of the speech.²⁷ Conversely, Justice Oliver Wendell Holmes believed the subjective intent of the speaker should also play a role in determining whether speech is a threat.²⁸ In keeping with this philosophy, Justice Holmes announced the “clear and present danger” test in *Schenck v. United States*, which protected political speech unless the advocacy produced a “clear and present danger of bringing about a substantive harm.”²⁹ This test was used in analyzing allegedly threatening statements for nearly half a century until the Supreme Court articulated a separate test specifically creating the true threats doctrine in 1969.³⁰

A. *Supreme Court of the United States*

The Supreme Court expressly addressed the issue of true threats for the first time in *Watts v. United States*.³¹ In *Watts*, a young man at a political rally stated, “If

²⁴ *Id.* (quoting *Black*, 538 U.S. at 359).

²⁵ *Id.* at 334.

²⁶ Scott Hammack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 68 (2002).

²⁷ *Id.* at 69 (citing *Masses Publ’g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917)).

²⁸ *Id.* (citing *Abrams v. United States*, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting)).

²⁹ *Id.* (citing *Schenck*, 249 U.S. 47, 52 (1919)).

³⁰ *Id.* at 72.

³¹ 394 U.S. 705 (1969).

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they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”³² The Court did not conduct an in-depth analysis, but instead decided the issue in a brief, five-page opinion.³³ In articulating the true threat doctrine, the Court stated that a statute which criminalizes a form of speech “must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.”³⁴ The Court stated that the particular statement at issue was hyperbole and not a true threat, especially considering the context, conditional nature, and the crowd’s reaction.³⁵ For this reason, many courts have interpreted *Watts* as establishing an objective standard for the true threats analysis.

The *Watts* decision was the first case in which the Supreme Court expressly noted the true threats concept; however, other cases offer further insight as to the permissible bounds of limiting the right to free speech. In *Chaplinsky v. New Hampshire*, the Court articulated that face-to-face communications may be prohibited if they are “plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker”³⁶

The Court also ruled on another seminal true threats case the same year as *Watts*. In *Brandenburg v. Ohio*, the Court examined free speech in the context of “incitement.”³⁷ The Court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁸ “[T]he 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 and steeling it to such action.”³⁹

³² *Id.* at 706.

³³ *Id.* at 707–08.

³⁴ *Id.* at 705–07.

³⁵ *Id.* at 708.

³⁶ 315 U.S. 568, 573 (1942).

³⁷ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁸ *Id.* at 447.

³⁹ *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

The Court later reiterated the broad protection afforded by the First Amendment in *NAACP v. Claiborne Hardware Co.*⁴⁰ There, the Court held that abrasive and violent words spoken at a rally were protected under the First Amendment.⁴¹ The “mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.”⁴² The Court further emphasized the important policy behind protecting such speech:

Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the “profound national commitment” that “debate on public issues should be uninhibited, robust, and wide-open.”⁴³

For years after the *Watts* decision, courts seemed to almost unanimously hold that an objective test was required under the true threat analysis, which would ask if a reasonable person would perceive the communication as a threat.⁴⁴ Courts differed only over the nuances of how to apply the objective test. One court found that the focus should be on the speaker, and the court should analyze whether a reasonable speaker would perceive that a listener would perceive the

⁴⁰ 458 U.S. 886 (1982).

⁴¹ *Id.*

⁴² *Id.* at 921 (citing *Brandenburg*, 395 U.S. at 447).

⁴³ *Id.* at 928 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁴⁴ *See, e.g.*, *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (would an objectively reasonable person perceive the communication as a threat); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994) (“Whether a communication in fact contains a true threat is determined by the interpretation of a reasonable recipient familiar with the context of the communication.”); *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997) (“if a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a serious expression of intent to harm”); *United States v. Bellrichard*, 994 F.2d 1318, 1323 (8th Cir. 1993) (“If a reasonable recipient, familiar with the context of the communication, would interpret it as a threat, the issue should go to the jury.”); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) (whether an ordinary, reasonable recipient who is familiar with context of threat would interpret it as threat of injury); *United States v. Vieffhaus*, 168 F.3d 392, 396 (10th Cir. 1999) (if a reasonable person would foresee the statement being interpreted by persons hearing or reading it); *United States v. Nishnianidze*, 342 F.3d 6, 16 (1st Cir. 2003) (would a reasonable person aware of the circumstances perceive it as threatening); *but see United States v. Twine*, 853 F.2d 676, 680–81 (9th Cir. 1988) (holding that the government must prove the defendant had a subjective intent to threaten).

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communication as a threat.⁴⁵ However, other courts typically only asked whether the recipient was reasonable in perceiving the speech as a true threat.⁴⁶ As a result, the speaker was at the mercy of the listeners and their interpretation of his or her speech.

The issue of true threats came before the Supreme Court again in 2003 when two separate cases were appealed to the high court. One case involved communication at an anti-abortion campaign, which allegedly constituted a true threat.⁴⁷ Another involved two consolidated cases in which two men had been convicted under a Virginia statute proscribing the burning of crosses because such activity conveyed an intent to intimidate.⁴⁸ The anti-abortion campaign case, *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists (Planned Parenthood)*, presented an ideal set of facts for the Court to address the issue; however, the Court declined to hear the case.⁴⁹

In *Planned Parenthood*, the American Coalition of Life Activists (ACLA) posted several anti-abortion advertisement-style materials, two of which were particularly shocking.⁵⁰ The “Deadly Dozen” poster listed thirteen doctors and their private information along with a heading of “GUILTY.”⁵¹ The “Nuremberg Files,” posted online, listed about 200 names of people associated with abortions, and they were color coded as follows: black font meant they were still working, grey font meant they were wounded, and a strikethrough meant they were deceased.⁵² The Ninth Circuit noted that “while advocating violence is protected, threatening a person with violence is not.”⁵³ “If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.”⁵⁴

⁴⁵ *United States v. Merrill*, 746 F.2d 458, 462 (9th Cir. 1984).

⁴⁶ *Kosma*, 951 F.2d at 557; *Darby*, 37 F.3d at 1066; *Miller*, 115 F.3d at 363; *Bellrichard*, 994 F.2d at 1323; *Sovie*, 122 F.3d at 125; *Viefhaus*, 168 F.3d at 396; *Nishnianidze*, 342 F.3d at 16.

⁴⁷ *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1064 (9th Cir. 2002).

⁴⁸ *Virginia v. Black*, 538 U.S. 343, 343 (2003).

⁴⁹ *Am. Coal. of Life Activists v. Planned Parenthood of the Columbia/Willamette, Inc.*, 539 U.S. 958 (2003).

⁵⁰ *Planned Parenthood*, 290 F.3d at 1064.

⁵¹ *Id.* at 1064–65.

⁵² *Id.* at 1065.

⁵³ *Id.* at 1071 (citing *Brandenburg*, 395 U.S. at 447).

⁵⁴ *Id.*

The court cited its own precedent and applied the reasonable speaker test: “Whether a particular statement may properly be considered to be a threat is governed by an objective standard—whether 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 intent to harm or assault.”⁵⁵ The court further included in its analysis the subjective intent to intimidate, which was required by the statute at issue.⁵⁶

This case presented an opportunity for the Supreme Court to clarify its position on what analysis courts should use in determining whether communication is a true threat; however, the Court denied certiorari.⁵⁷ Rather, the Supreme Court chose to address the issue of intent and true threats under the facts of *Virginia v. Black*.⁵⁸ The problem that developed after this holding was that the issue at hand did not truly turn on whether subjective or objective intent was required in analyzing true threats. Rather, the court examined the constitutionality of a Virginia statute, which criminalized the act of burning a cross and found that doing so would be prima facie evidence of intent to intimidate.⁵⁹

The Virginia statute at issue stated: “It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”⁶⁰

The Court stated, “Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate.”⁶¹ The language of the opinion can easily be read to advocate for a subjective intent requirement to a true threat conviction. The Court found that the doctrine of true threats will “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁶² The Court reasoned that the

⁵⁵ *Planned Parenthood*, 290 F.3d at 1074 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

⁵⁶ *Id.* at 1080.

⁵⁷ *Am. Coalition of Life Activists v. Planned Parenthood of the Columbia/Willamette, Inc.*, 539 U.S. 958 (2003).

⁵⁸ 535 U.S. 1094 (2002).

⁵⁹ *Black*, 538 U.S. at 348.

⁶⁰ *Id.*

⁶¹ *Id.* at 362.

⁶² *Id.* at 359.

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purpose of the prohibition is to protect individuals from fear of violence and the associated disruption; therefore, there is no requirement that the speaker actually intend to carry out the threat.⁶³ Intimidation is constitutionally proscribable “where a speaker directs a threat to a person or group of persons *with the intent* of placing the victim in fear of bodily harm or death.”⁶⁴ Furthermore, the Court found that the Virginia statute would not violate the First Amendment “insofar as it bans cross burning with *intent to intimidate*.”⁶⁵ These statements and more in the opinion draw emphasis to the speaker’s purpose or intent behind the action. However, opponents argue that the Court only discussed the person’s subjective intent because the Virginia statute required an “intent to intimidate.”⁶⁶

The result of this less than clear opinion is that circuit courts are unsure of what test to apply. The cases below illustrate the variety of factual scenarios and the courts’ analyses of them in light of the *Black* holding.

B. Circuit Courts of Appeal

While the majority of courts seem to apply the objective listener test, a closer look reveals mass confusion. While a few courts are steadfast in the logic underlying their analysis, the cases described below illustrate that many of the courts have doubts regarding the validity of the objective approach or are simply following the majority’s lead in adopting it.

In *United States v. White*, the Fourth Circuit thoroughly analyzed the *Black* holding but chose to reaffirm its objective approach, stating that the correct analysis is whether a person aware of the context would perceive the communication to be a threat.⁶⁷ The court examined the language in *Black* that stated that true threats “encompass those statements where the speaker *means to communicate* a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals,”⁶⁸ and found this only means that the speaker intended to communicate, not that he intended to threaten.⁶⁹

⁶³ *Id.* at 360.

⁶⁴ *Id.* (emphasis added).

⁶⁵ *Black*, 538 U.S. at 362 (emphasis added).

⁶⁶ *Elonis*, 730 F.3d at 328–29; *United States v. Clemens*, 738 F.3d 1, 10 (1st Cir. 2013).

⁶⁷ *United States v. White*, 670 F.3d 498, 509 (4th Cir. 2012).

⁶⁸ *Id.* at 508 (citing *Black*, 538 U.S. at 359).

⁶⁹ *Id.* at 509.

The court upheld its objective analysis noting that the Supreme Court gave no indication that it was redefining the crime to require specific intent.⁷⁰

The Eighth and Eleventh Circuits reached the same conclusion.⁷¹ In citing the majority of circuits that had analyzed the true threat doctrine after *Black*, the Eighth Circuit reaffirmed its test of analyzing whether a reasonable person would interpret the communication as a threat.⁷² The Eleventh Circuit also held that *Black* did not disrupt the objective analysis, which courts had accepted prior to the *Black* decision.⁷³ The Eleventh Circuit reaffirmed its objective analysis stating, “Knowingly transmitting the threat makes the act criminal—not the specific intent to carry it out or the specific intent to cause fear in another.”⁷⁴

Since *Black*, some courts have interpreted the true threats doctrine as requiring only an objective analysis, but have expressed doubts in doing so. The Second Circuit in *United States v. Turner* relied solely on its own precedent in holding that the analysis is whether a reasonable recipient, aware of the circumstances, would perceive the communication as a threat.⁷⁵ The court cited *United States v. Davila* in upholding its objective analysis.⁷⁶ However, the court noted that even though the *Davila* court post-dated *Black*, the court did not reexamine whether the Supreme Court’s decision altered the true threat analysis.⁷⁷ This speaks to the court’s uncertainty in the soundness of its precedent. Ultimately, the court used its previously established objective analysis to hold that Turner’s blog posts of judges’ photographs, work addresses, and a map of the courthouse could reasonably be interpreted as a threat.⁷⁸ And though the court stated subjective intent was not necessary, it noted that “Turner’s intent to interfere with these judges—to intimidate them through threat of violence—could not have been more clearly stated in his pointed reference to their colleague, whose family members

⁷⁰ *Id.*

⁷¹ *United States v. Nicklas*, 713 F.3d 435, 440 (8th Cir. 2013); *United States v. Martinez*, 736 F.3d 981, 986 (11th Cir. 2013) (upholding its test as to whether a reasonable person would interpret the communication as a threat).

⁷² *Nicklas*, 713 F.3d at 439–40.

⁷³ *Martinez*, 736 F.3d at 998.

⁷⁴ *Id.*

⁷⁵ *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013) (citing *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006)).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 423.

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had been killed.”⁷⁹ Similar decisions reaffirming the objective analysis—but with hesitation—have occurred in the Sixth and Seventh Circuits.

The Sixth Circuit, in *United States v. Jeffries*, stated that its precedent established the test of whether a reasonable observer would perceive the communication as a threat.⁸⁰ However, the court also noted the Ninth Circuit rejection of the objective test, stating that it may represent the best reading of the statute at hand.⁸¹ Judge Sutton wrote a dubitante opinion in *Jeffries* in which he stated that subjective intent is “part and parcel of the meaning of a communicated ‘threat’ to injure another.”⁸² Furthermore, Judge Sutton, in examining the history of the federal threat statute, 33 U.S.C. § 875(c), noted that it was initially written to prevent extortion.⁸³ In doing so, Congress required the person have intent to extort; however, when it later added the prevention of threats, no such intent was written into the statute.⁸⁴ Judge Sutton argues that Congress intended that intent in the extortion subsection be read throughout 33 U.S.C. § 875, which would require intent to threaten.⁸⁵ Moreover, he noted that “[e]very relevant definition of the noun ‘threat’ or the verb ‘threaten’ . . . includes an intent component” and does not recognize any objective component.⁸⁶ However, the court stated that it would not depart from precedent without a more clear direction to do so.⁸⁷

The Seventh Circuit, in *United States v. Parr*, spoke approvingly of the subjective approach.⁸⁸ While the court ultimately decided the case on other grounds, it did note, “It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality’s discussion of

⁷⁹ *Id.*

⁸⁰ *United States v. Jeffries*, 692 F.3d 473, 478 (6th Cir. 2012).

⁸¹ *Id.* at 481.

⁸² *Id.* at 484.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*; Thomas DeBauche, *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, 996 (2014).

⁸⁶ *DeBauche*, *supra* note 85, at 997 (quoting *Jeffries*, 692 F.3d at 483–84) (“[T]o declare (usually conditional) one’s intention of inflicting injury upon” a person, says one dictionary. 11 OXFORD ENGLISH DICTIONARY 352 (1st ed. 1933). “[A]n expression of an intention to inflict loss or harm on another by illegal means, esp. [sic] when effecting coercion or duress of the person threatened,” says another. WEBSTER’S NEW INT’L DICTIONARY 2633 (2d ed. 1955). “A communicated intent to inflict harm or loss on another,” says still another. BLACK’S LAW DICTIONARY 1489 (7th ed. 1999).).

⁸⁷ *Jeffries*, 692 F.3d at 481.

⁸⁸ 545 F.3d 491, 500 (7th Cir. 2008).

threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable.”⁸⁹

Alternately, one circuit has kept the reasonable *speaker* test. The First Circuit in *United States v. Clemens* addressed whether it was required to change its previous true threats analysis based upon the *Black* holding.⁹⁰ The court decided to follow its precedent in only requiring that a reasonable speaker would understand that the communication could be interpreted as a threat.⁹¹ In reaching this conclusion, the court cited other circuits that have reaffirmed their objective listener test following the *Black* holding.⁹² However, the First Circuit did not make an explicit rule on the issue; rather, it decided the issue on a plain error standard of review because *Clemens* did not raise the issue at the lower court.⁹³ The court found that even if there were error as to the standard, it was not plain, and that the defendant likely would have been convicted even if they had imposed the subjective analysis.⁹⁴

For years after *Black*, only the Ninth Circuit had unequivocally embraced a subjective intent analysis for true threats, stating that it is “not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death.”⁹⁵ In *United States v. Bagdasarian*, the court examined that “[b]ecause the true threat requirement is imposed by the Constitution, the subjective test set forth in *Black* must be read into all threat statutes that criminalize pure speech.”⁹⁶

The Ninth Circuit was joined in 2014 by the Tenth Circuit, which also explicitly adopted the subjective analysis. In *United States v. Heineman*, the court conducted an in depth analysis of the *Black* holding and also weighed First Amendment concerns against the concern for protecting the public from fear of violence.⁹⁷ The court noted that with statutes that criminalize speech, the statute “must be interpreted with the commands of the First Amendment clearly in

⁸⁹ *Id.*

⁹⁰ 738 F.3d 1, 10 (1st Cir. 2013).

⁹¹ *Id.* at 1 (“[W]e see no reason to depart from this circuit’s law that an objective test of defendant’s intent is used from the defendant’s vantage point.”).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (holding that proof of subjective intent could be proven by circumstantial evidence based on the particular facts).

⁹⁵ *United States v. Bagdasarian*, 652 F.3d 1113, 1116 (9th Cir. 2011).

⁹⁶ *Id.* at 1117.

⁹⁷ 767 F.3d 970, 982 (10th Cir. 2014).

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mind.”⁹⁸ In resolving the two conflicting concerns, the court stated, “When the speaker does not intend to instill fear, concern for the effect on the listener must yield.”⁹⁹

Notwithstanding the Court’s holding in *Black* or the circuit split, a subjective analysis of the speaker’s intent is required to protect First Amendment concerns in today’s society. The following section examines the negative practical implications of an objective test and advocates for the implementation of a subjective analysis.

III. PRACTICAL IMPLICATIONS: ADVOCATING FOR THE SUBJECTIVE APPROACH

Many courts have construed the true threat analysis as requiring only that the person hearing the communication is reasonable in interpreting it as a threat. In their reasoning, courts usually cite, among others, a concern for preventing “fear, disruption, and . . . risk of violence.”¹⁰⁰ However, equally if not more important is the protection of our individual right to free speech. The objective test, when put into practice, seems to unduly limit the content of one’s speech for fear that it may be interpreted by someone as a threat. Below are examinations of First Amendment concerns, which arise when a defendant is convicted of communicating a true threat without regard to his subjective intent. Requiring a finding of subjective intent to threaten will still serve the purpose of the true threat doctrine while simultaneously protecting speech that falls within the bounds of the First Amendment.

A. *Protecting Dissenting Opinions*

The objective test places all power solely in the hands of the listener. He or she need only act reasonably in interpreting the communication, and the jury may convict the speaker of threatening the person. “The purely objective approach allows speakers to be convicted for negligently making a threatening statement—that is, for making a statement the speaker did not intend to be threatening, but that a reasonable person would perceive as such. This potential chills core political speech.”¹⁰¹

There is no requirement that the communication reach the person to whom it is addressed or that the person even be physically capable of completing the

⁹⁸ *Id.* at 973.

⁹⁹ *Id.* at 982.

¹⁰⁰ *DeBauche*, *supra* note 85, at 993.

¹⁰¹ *White*, 670 F.3d at 524 (Floyd, J., dissenting in part and concurring in part).

threat.¹⁰² As a result, the true threat standard is met if *any person* reasonably perceives the communication as a threat.¹⁰³ The effect is that a person may feel threatened merely because the speech is violent or socially unacceptable, which is constitutionally improper.¹⁰⁴ “A statute that proscribes speech without regard to the speaker’s intended meaning runs the risk of punishing protected First Amendment expression simply because it is crudely or zealously expressed.”¹⁰⁵ Therefore, the objective test can have the effect of allowing a jury to convict a person for a threat, when in fact the communication was merely socially unacceptable or outside the norm.

Justice Marshall cautioned against an objective approach in his concurrence in *Rogers v. United States*, stating that in an objective approach,

[T]he defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker’s intention . . . charging the defendant with the responsibility for the effect of his statements on his listeners [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.¹⁰⁶

As a general matter, the fact that society may find speech offensive is not a sufficient reason for suppressing it. Speech that is called hateful, or speech that is unpopular, or speech with which people strongly disagree, may still be protected speech.¹⁰⁷

¹⁰² *Jeffries*, 692 F.3d at 483 (holding that conviction under 33 U.S.C. § 875(c) “does not require a threat to be communicated to its target”); *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997) (holding that a “prosecutable threatening communication need not be supported either by evidence of the author’s actual ability to carry out his threat”); see also *United States v. Parr*, 545 F.3d 491, 498 (7th Cir. 2008) (“It is well-established that the government is not required to prove that the defendant in a threat case intended or was able to carry out his threats.”).

¹⁰³ *DeBauche*, *supra* note 85, at 998.

¹⁰⁴ *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.”).

¹⁰⁵ Brief of American Civil Liberties Union, The Abrams Institute for Freedom of Expression, The Cato Institute, The Center for Democracy & Technology, and The National Coalition Against Censorship as Amicus Curiae, at 5, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983).

¹⁰⁶ *Rogers v. United States*, 422 U.S. 35 (1975) (J. Marshall, concurring).

¹⁰⁷ *Snyder v. Phelps*, 580 F.3d 206, 214 (4th Cir. 2009).

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The Supreme Court has recognized that such publicly unpopular speech is still entitled to protection. In *R.A.V. v. City of St. Paul*, the Court stated, “Essential to the formulation is the prepositional clause after ‘fear’; ‘fear’ and ‘fear of violence’ are two very different things.”¹⁰⁸ The Court again articulated this principle in *Black*, saying, “It should be clear, then, that true threats are only excepted from the First Amendment protection due to their capacity to intimidate, not due to their potential to create fear in a recipient listener.”¹⁰⁹ In short, speech can invoke fear and still be protected. When courts do not require juries to consider speakers’ subjective intents, these speakers may only protect themselves from liability by quieting their opinions.

B. Reducing the Chilling Effect

Requiring evidence of subjective intent reduces the potential chilling effect of § 875(c) by ensuring that only threats directed at specific individuals or groups are subject to liability.¹¹⁰ Most courts state that they are hesitant to require a subjective intent because courts have found that there is no need to find the speaker intended to carry out his threat. However, such concerns are without merit as courts have repeatedly held that there is no requirement that the speaker intend to carry out his threat.¹¹¹ Nor is there a requirement that there be a precise time in which the threat will be carried out or that the speech even be communicated to the victim.¹¹²

Opponents of the subjective approach say that requiring a subjective intent to threaten would be too high of a standard, ultimately allowing violators to walk free.¹¹³ It is of particular importance to remember that subjective intent can be established through any number of evidentiary findings. A full-blown confession of

¹⁰⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

¹⁰⁹ *Black*, 538 U.S. at 365.

¹¹⁰ Pedro Celis, *When Is a YouTube Video a “True Threat”?*, 9 WASH. J.L. TECH. & ARTS 227, 229 (2014).

¹¹¹ See, e.g., *Jeffries*, 692 F.3d at 478; *United States v. Lincoln*, 589 F.2d 379, 381 (8th Cir. 1979); *United States v. Chatman*, 584 F.2d 1358, 1361 (4th Cir. 1978).

¹¹² *United States v. Parr*, 545 F.3d 491, 497 (7th Cir. 2008); but see *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 616–17 (5th Cir. 2004) (holding that a threat must be “communicated to either the object of the threat or a third person”).

¹¹³ *United States v. Martinez*, 736 F.3d 981, 987–88 (11th Cir. 2013) (“Particularly noteworthy is the Third Circuit’s insight that “[l]imiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from the fear of violence and the disruption that fear engenders, because it would protect speech that a reasonable speaker would understand to be threatening.”) (quoting *Elonis*, 730 F.3d at 330).

the speaker's true intention is not necessary.¹¹⁴ The jury only need find that they believe the speaker intended that the communication be a threat. "Requiring the government to demonstrate subjective intent to threaten as part of any true threat prosecution strikes the constitutionally appropriate balance between the government's interest in protecting against the harms caused by threats and the country's constitutional tradition of encouraging the free and uninhibited exchange of ideas."¹¹⁵

One might argue that rather than impose a subjective approach on true threats, speakers should bear the burden and be more careful with their word choices. However, courts have found that even where there is not an explicit threat, a jury's finding that the person reasonably interpreted a statement as a threat is sufficient to convict.¹¹⁶ "The purely objective approach allows speakers to be convicted for negligently making a threatening statement—that is, for making a statement the speaker did not intend to be threatening, but that a reasonable person would perceive as such. This potentially chills certain speech."¹¹⁷ For example, in *United States v. Clemens*, the First Circuit upheld a jury conviction in which the following statement was found to be a true threat: "I really, truly and sincerely wish you were dead. Oh, how I wish a 10-ton I-beam would fall on you. . . . Boy, would I love to see that! Perhaps someday I will."¹¹⁸ The court affirmed the conviction, notwithstanding its ambiguity, holding that the only requirement is that a reasonable person would expect someone to interpret the statement as a threat.¹¹⁹

Similarly, the Second Circuit affirmed a jury conviction where a man stated on his blog that judges should be killed following a court opinion.¹²⁰ The post was later updated to include personal information, room numbers, and a map for

¹¹⁴ See, e.g., *Celis*, *supra* note 110, at 229 ("Subjective intent to threaten [can be] demonstrated by evidence that the [communication] was disseminated to the threatened individual or that the threat was made to further a purpose through intimidation.").

¹¹⁵ Brief of American Civil Liberties Union, The Abrams Institute for Freedom of Expression, The Cato Institute, The Center for Democracy & Technology, and The National Coalition Against Censorship as Amicus Curiae, at 23, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983).

¹¹⁶ *Elonis*, 730 F.3d at 334 ("there is no rule that a conditional statement cannot be a true threat"); *Clemens*, 738 F.3d at 8 ("We have rejected any requirement that threats be 'unequivocal, unconditional, and specific.'").

¹¹⁷ *White*, 670 F.3d at 524.

¹¹⁸ *Clemens*, 738 F.3d at 5.

¹¹⁹ *Id.* at 12; see also *White*, 670 F.3d at 502–03 (4th Cir. 2012) (affirming a conviction that the following statement was a threat: "Lord knows that drawing too much publicity and making people upset is what did in Joan Lefkow, . . . Lefkow was a judge whose husband and mother had been murdered by a disgruntled litigant[.]").

¹²⁰ *Turner*, 720 F.3d at 415.

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navigating the courthouse.¹²¹ The court held that the communication could reasonably be interpreted as a threat.¹²² The injustice here is not the ultimate findings of the juries; rather, it is that the juries are explicitly kept from giving any consideration whatsoever to the speaker's intention.¹²³ The result is that the objective approach may allow juries to convict a person based on speech that is in fact protected under the First Amendment.¹²⁴ A subjective intent requirement is necessary to retain the First Amendment protections guaranteed in the Constitution. The fact that the true threat doctrine limits that protection demands application of a subjective intent approach to ensure that only truly proscribable speech is regulated. Similarly, incitement, another unprotected area of speech, requires the subjective intent of "advocacy [that] is directed to inciting or producing imminent lawless action."¹²⁵ Therefore, the only logical conclusion is that threats should require the same subjective intent.

C. *Twenty-First Century Communication Practices*

The transition to online communication practices also brings to light concern over the use of an objective approach. Methods of communication have drastically changed with the turn of the twenty-first century. People are more interconnected than ever before, and the typical sequence of thought is post now, think later.¹²⁶ "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."¹²⁷ Now, more than ever, "[t]he content on the Internet is as diverse as human thought."¹²⁸ The result with respect to an objective true threats analysis is that a person posting a message may be liable to any person who then

¹²¹ *Id.* at 415–16.

¹²² *Id.* at 425.

¹²³ *Clemens*, 738 F.3d at 12; *White*, 670 F.3d at 512; *Turner*, 720 F.3d at 425.

¹²⁴ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment protects the advocacy of violence and that speech will not be afforded such protection only if it is intended to cause "imminent lawless action").

¹²⁵ Brief of The Reporters Committee for Freedom of the Press and Nine Media Organizations as Amicus Curiae, at 11, *Elonis v. United States*, 134 S. Ct. 2819 (No. 13-983) (2014) (quoting *Brandenburg*, 395 U.S. at 447).

¹²⁶ Hammack, *supra* note 26, at 83 ("Now, in a fit of rage, people can email or post a threat, that with even a moment's reflection they otherwise would not have. Once the message is out in cyberspace, it is often impossible to delete and may continue to incite readers long after the speaker has moderated her position.").

¹²⁷ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

¹²⁸ *Id.*

reads that post and reasonably interprets it as a threat. This range of liability is vast considering that there is no requirement that the threat be communicated to the intended person or with any immediacy or specificity.¹²⁹

Communication across the Internet allows for the reader to interpret words with very few limitations, without regard as to who the person is, his or her mindset, tone of voice, or intended audience.¹³⁰ “A speaker may post a statement online with the expectation that a relatively small number of people will see it, without anticipating that it could be read—and understood very differently—by a much broader audience.”¹³¹

“Internet users often assume entirely new identities, sometimes with new personalities, and occasionally even with a new gender.”¹³² This “fantasy-type world” can alter a speaker’s cognitive skills, which some have even characterized as a defense known as “Internet intoxication.”¹³³ Consequently, the subjective approach is required to adapt the legal analysis to communication transmitted across the Internet.

The Ninth Circuit recognized the new complexities involved in speech disseminated through the Internet in its application of the subjective approach in *United States v. Bagdasarian*.¹³⁴ In *Bagdasarian*, a man posted numerous violent statements in an online message board, which advocated that President Obama should be killed.¹³⁵ The court held that no reasonable person could find that this man intended to threaten the life of President Obama.¹³⁶ The court held that “[a] statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal.”¹³⁷ The court further stated that *Black* requires the State to punish only those threats in which the “speaker means to

¹²⁹ *Clemens*, 738 F.3d at 8; *Turner*, 720 F.3d at 424.

¹³⁰ Hammack, *supra* note 26, at 84 (“Thus, an Internet threat is more intimidating than a threat made in other media.”).

¹³¹ Brief of American Civil Liberties Union, The Abrams Institute for Freedom of Expression, The Cato Institute, The Center for Democracy & Technology, and The National Coalition Against Censorship as Amicus Curiae, at 25, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983).

¹³² Hammack, *supra* note 26, at 84.

¹³³ *Id.*

¹³⁴ *Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011).

¹³⁵ *Id.* at 1115–16.

¹³⁶ *Id.* at 1123.

¹³⁷ *Id.* at 1122.

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communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”¹³⁸

Without the protection that the subjective analysis provides, a disproportionate amount of people will be prosecuted for communicating virtually innocent, constitutionally protected speech.¹³⁹

A subjective intent requirement addresses this problem by allowing a jury to consider more evidence contextualizing the online comment than could be considered under a purely objective standard, including the defendant’s intended audience, other remarks clarifying the challenged statement’s meaning, the defendant’s motive for making the statement, and so forth.¹⁴⁰

D. Protecting Creative Expression

The protection of artistic expression also requires the adoption of a subjective intent requirement in analyzing true threats. The Supreme Court has emphasized the importance of protecting dissenting political speech.¹⁴¹ However, in practice, that is not always the result. For example, in *Jeffries*, the court affirmed the jury’s conviction that a music video posted on YouTube constituted a threat against a judge.¹⁴² The court held that the defendant could not insulate his threat by putting it in the form of a music video.¹⁴³ The court, however, did not allow evidence of the defendant’s subjective intent.¹⁴⁴ Nor did the court allow evidence that the defendant

¹³⁸ *Id.* at 1117 (quoting *Black*, 538 U.S. at 359).

¹³⁹ See, e.g., Hunter Stewart, *Caleb Clemmons, Georgia Southern University Student, Jailed Over Tumblr Remark*, HUFFINGTON POST (Aug. 12, 2013, 3:07 PM), http://www.huffingtonpost.com/2013/08/12/caleb-clemmons-jailed-tumblr-remark_n_3743477.html (student arrested for a post stating that he was going to post a threat on his account as a literary experiment to see if he would be prosecuted).

¹⁴⁰ Brief of American Civil Liberties Union, The Abrams Institute for Freedom of Expression, The Cato Institute, The Center for Democracy & Technology, and The National Coalition Against Censorship as Amicus Curiae, at 27, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983).

¹⁴¹ *Cohen v. California*, 403 U.S. 15 (1971) (protecting “Fuck the Draft” as political speech).

¹⁴² *Jeffries*, 692 F.3d at 482.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

had previously posted numerous other videos in an effort to show the jury his odd sense of humor.¹⁴⁵

Similarly, allegedly threatening rap lyrics were at issue in *Bell v. Itawamba County School Board*. In this case, an aspiring rap artist and high school student was punished for recording a rap song including the following lyrics: “looking down girls’ shirts/drool running down your mouth/messing with wrong one/going to get a pistol down your mouth,” and “middle fingers up if you can’t stand that nigga/middle fingers up if you want to cap that nigga.”¹⁴⁶ The artist used alleged actions of a teacher (which were told to him by the alleged victims) as inspiration for rap lyrics.¹⁴⁷ The rap artist did not bring his recording to school; rather, he posted it on Facebook, which is how students and teachers at school discovered it.¹⁴⁸ The court found that the First Amendment did not protect the lyrics of his song; therefore, the school board was appropriate in taking action against the rap artist based upon the finding that the lyrics constituted a threat.¹⁴⁹

As illustrated above, the concern in criminalizing speech without requiring subjective intent is especially heightened with respect to rap lyrics. “To an outside observer, for instance, the frenetic and aggressive maneuvers of break dancers engaged in head-to-head competitions (called “battles”) can appear out of control or violent; in fact, there have been cases in which police intervened because they mistakenly believed the dancers were fighting.”¹⁵⁰ Requiring subjective intent would protect this form of art and expression while regulating the speech, which meets the threshold of being a true threat.

E. Protecting Satire and Hyperbole

Protection of speech that is meant for entertainment purposes also requires the implementation of a subjective analysis. It is a fundamental truth that hyperbole is protected under the First Amendment.¹⁵¹ The protection of “loose, figurative, or hyperbolic language” assures that “public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added

¹⁴⁵ *Id.*

¹⁴⁶ *Bell v. Itawamba Cnty. Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 840.

¹⁵⁰ Brief of the Marion B. Brechner First Amendment Project and Rap Music Scholars (Professors Erik Nielson and Charis E. Kubrin) as Amicus Curiae, at 8, *Elonis v. United States*, 134 S. Ct. 2819 (2014) (No. 13-983).

¹⁵¹ *Watts*, 394 U.S. at 708.

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much to the discourse of this Nation.”¹⁵² Despite this well-established principle, several situations have arisen involving the allegation that a speaker’s hyperbolic speech is a threat. In one case, an newspaper editorial contained a comedic narrative of how terribly George W. Bush performed as a president.¹⁵³ The editorial asked Jesus to “claim the life” of then-President Bush and several members of his administration, adding that it would be fine if Jesus sent “some crazy mortal” to do the job.¹⁵⁴ Secret Service invaded the publisher’s offices and told them charges would be pressed.¹⁵⁵ Though the incident did not result in a conviction, the intrusive nature and harassment that ensued places great hardship on the defendants. Clearly establishing a subject intent requirement would prevent such meritless actions.

A similar incident occurred in Arizona. In 2003, the *Tucson Citizen* published a letter to the editor that stated, “Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter.”¹⁵⁶ The trial court allowed an action by a Muslim couple, which contained claims of assault and intentional infliction of emotional distress.¹⁵⁷ The Arizona Supreme Court ultimately dismissed the claim, but it did so under an objective standard citing that the conditional nature and ambiguity precluded anyone from finding there was a true threat.¹⁵⁸ The courts that do not give any deference to the fact that language is conditional or ambiguous may not have reached the same result.¹⁵⁹

One of the most alarming recent cases involves concerns of both Internet communication and hyperbole. Justin Carter, a 19-year-old boy in San Antonio, Texas, was arrested for a post made on a Facebook group for fans and players of League of Legends, a popular video game.¹⁶⁰ Another poster called Carter “crazy” to which he replied, “I’m fucked in the head alright. I think I’ma shoot up a

¹⁵² *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (1990).

¹⁵³ Lauren Gilbert, *Mocking George: Political Satire as ‘True Threat’ in the Age of Global Terrorism*, 58 U. MIAMI L. REV. 843, 848 (2004).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Citizen Publishing Co. v. Miller*, 115 P.3d 107, 109 (Ariz. 2005).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 115.

¹⁵⁹ *Clemens*, 738 F.3d at 12; *White*, 670 F.3d at 512; *Turner*, 720 F.3d at 425.

¹⁶⁰ Doug Gross, *Teen in jail for months over ‘sarcastic’ Facebook threat*, CNN (July 3, 2013, 7:18 AM), <http://www.cnn.com/2013/07/02/tech/social-media/facebook-threat-carter>.

kindergarten and watch the blood of the innocent rain down and eat the beating heart of one of them.”¹⁶¹ The post was followed by “J/K” and “LOL,” serving as abbreviations of “just kidding” and “laughing out loud,” respectively.¹⁶² Nevertheless, a woman in Canada reported the threat, which resulted in authorities jailing Carter.¹⁶³ The teen was released after five long months, when an anonymous donor paid his bail.¹⁶⁴ The fact that what appears to be a joke made by a teenager may result in a true threat conviction is particularly alarming. Furthermore, the case illustrates how once words are posted, they may be interpreted by an undeterminable audience. It is unlikely that Carter intended for a woman in Canada to interpret his comments as a threat, but requiring only an objective intent could lead to that result. This case has not yet been heard before a court.¹⁶⁵ Carter hopes that the Supreme Court’s decision in *Elonis* will result in his charges being dismissed.¹⁶⁶

IV. CONCLUSION

As the previously mentioned cases illustrate, millions of people across our nation who speak words they may believe are protected may unknowingly be subjecting themselves to liability for communicating a “true threat.” Without analyzing the speaker’s subjective intent, this will result in the conviction of a speaker simply because someone, somewhere interpreted his or her speech as a threat, by no intention of the speaker. Many proponents of the objective approach have expressed concerns that the difficulty in proving subjective intent will undermine the purpose of prosecuting those who communicate true threats.¹⁶⁷ On the contrary, it will simply ensure that only those who communicate true threats are found guilty, rather than those who are communicating within their First Amendment rights. Most importantly, the subjective analysis does not set the burden of proof too high. There is no confession of the defendant’s mindset

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Brandon Griggs, *Teen jailed for Facebook ‘joke’ is released*, CNN (July 12, 2013, 12:56 PM), <http://www.cnn.com/2013/07/12/tech/social-media/facebook-jailed-teen>.

¹⁶⁵ *Id.*

¹⁶⁶ Zeke MacCormack, *High Court Case Could Affect Comal County’s Accused Facebook Threatener*, SAN ANTONIO EXPRESS-NEWS (Nov. 30, 2014, 9:39 PM), <http://www.expressnews.com/news/local/article/High-court-case-could-affect-Comal-County-s-5926275.php>.

¹⁶⁷ Celis, *supra* note 110, at 236.

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needed. Subjective intent may be deduced based upon objective evidence.¹⁶⁸ For example, a jury can infer intent to kill when a person uses a deadly weapon, without any subjective evidence about the defendant's state of mind.¹⁶⁹ Likewise, subjective intent to threaten may be deduced from the defendant's conduct. The subjective analysis simply provides fair opportunity for the defendant to explain the speech and ultimately diminishes an objective standard's chilling effect.

Punishing a speaker without examining his or her subjective intent results in consequences that are contrary to intentions of legal punishment and serves as an obstacle to the practical operation of the justice system. An objective analysis alone unduly hinders speech and takes away a significant component of the First Amendment right to freedom of speech. The Supreme Court in its decision in *Elonis v. United States* has the opportunity to restate the broad protection afforded by the First Amendment. The Court should articulate a new standard required for a true threat conviction—requiring the speaker's subjective intent to threaten.

¹⁶⁸ Celis, *supra* note 110.

¹⁶⁹ *Id.*

APPENDIX

*Threats Made by Mr. Elonis*Threats made to Dorney Park employees:

Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?¹⁷⁰

Threats made to Mrs. Elonis:

Did you know that it's illegal for me to say I want to kill my wife?

It's illegal.

It's indirect criminal contempt.

It's one of the only sentences that I'm not allowed to say.

Now it was okay for me to say it right then because I was just telling you that it's illegal for me to say I want to kill my wife.

I'm not actually saying it.

I'm just letting you know that it's illegal for me to say that.

It's kind of like a public service.

I'm letting you know so that you don't accidentally go out and say something like that.

Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

It's an incomplete sentence but it may have nothing to do with the sentence before that. So that's perfectly fine.

Perfectly legal.

¹⁷⁰ *Elonis*, 730 F.3d at 324.

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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?¹⁷⁴

Threats to FBI:

You know your shit's ridiculous when you have the FBI knockin' at yo' door

Little Agent Lady stood so close

Took all the strength I had not to turn the bitch ghost

Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her jugular in the arms of her partner

[laughter]

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

Cause little did y'all know, I was strapped wit' a bomb

Why do you think it took me so long to get dressed with no shoes on?

I was jus' waitin' for y'all to handcuff me and pat me down

Touch the detonator in my pocket and we're all goin'

[BOOM!]¹⁷⁵

¹⁷⁴ *Id.* at 326.

¹⁷⁵ *Id.* at 334.