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"True Threats" and the Issue of Intent

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"TRUE THREATS" AND THE ISSUE OF INTENT

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[*] J.D. expected May 2007, University of Virginia School of Law; M.A. History expected May 2007, University of Virginia. First, I would like to thank Josh Wheeler for introducing me to the case of *Virginia v. Black* and the area of "true threats." This Note would not exist if not for his guidance. I also would like to thank Dean John Jeffries, Jr., and Professor John Harrison; their teachings have greatly influenced my thoughts not only on this topic specifically but on the law more generally. Additionally, I am grateful to Professor Robert O'Neil for his helpful suggestions. I also owe a debt of gratitude to the talented editors of the Virginia Law Review, especially Angela Harris, for their helpful comments. Finally, a special thanks to my best editor, Alison Ferland, for her love and support.

> "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. The speaker need not actually intend to carry out the threat.
>
> –Justice O'Connor's opinion of the Court in *Virginia v. Black*[1]

INTRODUCTION: WADING THROUGH MUDDIED WATERS

SOME Supreme Court decisions clarify a murky area of the law. Others further muddy an area in need of clarification. Unfortunately, the Court's decision in *Virginia v. Black* has proven to be another instance of the latter. For the first time, the Court in *Black* defined the term "true threat";[2] however, in providing a definition, the Court created more confusion than elucidation. Instead of clearly articulating the contours of what constitutes a "true threat," the Court's definition (and opinion) spawned as many questions as answers.[3] One critical question the Court's ambiguous language failed to answer is what intent, if any, the government must prove a speaker had in order for his communication to qualify as a "true threat" and, thus, unprotected speech. Put another way, what is the required mens rea for threatening speech to be constitutionally criminalized? A brief comparison of two recent (post-*Black*) lower court opinions demonstrates the uncertainty underlying this specific area of "true threats" jurisprudence.

In *United States v. Bly*,[4] a federal district court refused to dismiss an indictment against a defendant charged with, inter alia, mailing a threatening communication in violation of federal law.[5] The court

[1] 538 U.S. 343, 359–60 (2003) (internal citations omitted).

[2] See id. and accompanying text.

[3] See Steven G. Gey, A Few Questions About Cross Burning, Intimidation, and Free Speech, 80 Notre Dame L. Rev. 1287, 1290 (2005) ("The mark of a badly written opinion is that the reader has more questions about the state of the law after reading the opinion than before. By that measure Justice O'Connor's *Black* opinion is very badly written.") [hereinafter Gey, A Few Questions].

[4] No. CRIM. 3:04CR00011, 2005 WL 2621996 (W.D. Va. Oct. 14, 2005).

[5] 18 U.S.C. § 876 (2000) ("Whoever knowingly so deposits or causes to be delivered as aforesaid [in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon], any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing

held that to meet its burden, the government did not need to "allege an intent to intimidate."[6] For the defendant's letter to constitute a "true threat," and thus fall outside the ambit of First Amendment protection, the government only needed to prove that "'an ordinary, reasonable recipient who is familiar with the context of [the] letter would interpret it as a threat of injury.'"[7] Whether the defendant intended for the communication to be threatening was immaterial. Conversely, in *United States v. Magleby* (decided only two months prior to *Bly*), the United States Court of Appeals for the Tenth Circuit posited that true threats "must be made 'with the intent of placing the victim in fear of bodily harm or death.'"[8] According to this court, absent the speaker's intent to threaten, the communication could not constitute a "true threat" and was therefore constitutionally protected under the First Amendment.

Such disparate conceptions have significant consequences: a communication considered a "true threat" in one jurisdiction may be deemed protected speech in another. While this doctrinal split is important in its own right, perhaps more significant is that each court relied on the same source as justification for its approach—the *Black* Court's aforementioned definition of "true threats." Notably, both courts in *Bly* and *Magleby* claimed their respective interpretations of *Black* as the legal high ground.[9]

A main purpose of this Note is to explain why (and how) lower courts, such as the two discussed above, have taken various approaches—based on their different interpretations of *Black*—to the intent standard of the "true threats" doctrine. Consequently, the impact of *Black* on the true threats jurisprudence will be explored. More generally, this Note will focus on the role of intent in defining "true threats." It will examine the various intent standards that

any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both.").

[6] *Bly*, 2005 WL 2621996, at *2.

[7] Id. (quoting United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973)).

[8] 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting *Black*, 538 U.S. at 360).

[9] The district court in *Bly*, which held that the speaker does not need to have the intent to threaten for his words to constitute a "true threat," stated that "*Black* could not be clearer on this point." 2005 WL 2621996, at *2. Similarly, the Tenth Circuit in *Magleby*, which held that the speaker does need to have the intent to threaten for his words to constitute a "true threat," directly quoted and cited the definition provided in *Black* when outlining its own interpretation of "true threats." 420 F.3d at 1139.

have been proposed and how courts have treated them. By analyzing the jurisprudence from both a pre- and post-*Black* perspective, this Note hopes to achieve a more comprehensive understanding of the issue of intent, and its disputed place in the "true threats" doctrine, than has been achieved in earlier (albeit limited) scholarship.[10]

Because the focus of this Note is on the issue of intent, other unresolved matters related to the true threats doctrine will not be discussed. For instance, the degree of immediacy[11] or specificity[12] re-

[10] While the area of "true threats" has received relatively little attention, the most incisive articles examining the doctrine and its various intent standards were written before *Black* was decided. 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, 937–1010 (providing an impressive compilation of each circuit's approach to "true threats"); Steven G. Gey, The *Nuremberg Files* and the First Amendment Value of Threats, 78 Tex. L. Rev. 541, 565–98 (2000) [hereinafter Gey, *Nuremberg Files*]; Jordan Strauss, Context is Everything: Towards a More Flexible Rule for Evaluating True Threats Under the First Amendment, 32 Sw. U. L. Rev. 231 (2003).

Articles written after *Black* either give cursory treatment to the issue of intent or focus on other topics, such as the Court's language concerning intimidation or its holding on the legality of cross-burning. See, e.g., Gey, A Few Questions, supra note 3, at 1325–56; Roger C. Hartley, Cross Burning—Hate Speech as Free Speech: A Comment on *Virginia v. Black*, 54 Cath. U. L. Rev. 1 (2004); W. Wat Hopkins, Cross Burning Revisited: What the Supreme Court Should Have Done in *Virginia v. Black* and Why It Didn't, 26 Hastings Comm. & Ent. L.J. 269 (2004).

Interestingly, most of the articles written after *Black* are more concerned with the ramifications of the Ninth Circuit's 2002 en banc decision in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), than the Supreme Court's 2003 *Black* opinion. See, e.g., Jennifer Elrod, Expressive Activity, True Threats, and the First Amendment, 36 Conn. L. Rev. 541, 544, 585–608 (2004); Matthew G.T. Martin, Comment, True Threats, Militant Activists, and the First Amendment, 82 N.C. L. Rev. 280, 297–325 (2003); Lori Weiss, Note, Is the True Threats Doctrine Threatening the First Amendment? *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists* Signals the Need to Remedy an Inadequate Doctrine, 72 Fordham L. Rev. 1283 (2004).

[11] See, e.g., *Planned Parenthood*, 290 F.3d at 1105–07 (Berzon, J., dissenting) (explaining that she "would not include the imminence or immediacy of the threatened action as a prerequisite to finding a true threat"); United States v. Baker, 890 F. Supp. 1375, 1385–86 (E.D. Mich. 1995) (discussing an immediacy requirement for the communication to constitute a true threat); State v. DeLoreto, 827 A.2d 671, 682 (Conn. 2003) (citing *Black* for the proposition that "[i]mminence, however, is not a requirement under the true threats doctrine").

[12] See, e.g., United States v. Fulmer, 108 F.3d 1486, 1492 (1st Cir. 1997) ("The use of ambiguous language does not preclude a statement from being a threat."); United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994) ("An absence of explicitly threatening language does not preclude the finding of a threat . . . ."); United States v. Carmichael, 326 F. Supp. 2d 1267, 1281–84 (M.D. Ala. 2004) (discussing whether a website

quired for the communication to constitute a true threat will not be addressed. Other issues regarding the actus reus of a "true threat," such as defining what constitutes a truly threatening statement, also fall outside the scope of this Note. Similarly, the area of electronic threats, an emerging subset of the "true threats" jurisprudence, will be dealt with only where it raises a pertinent intent issue.[13] This Note is focused on one question: what is the minimum mens rea required for threatening speech to be constitutionally prohibited?

This Note will proceed in five Parts. Part I will serve as a short introduction to the category of true threats and its place within First Amendment jurisprudence. Part II will examine the history of true threats and intent leading up to *Virginia v. Black*, highlighting the foundational opinion of *Watts v. United States* and the various intent approaches that became available in its wake. Part III will discuss the potential interpretations of the language in *Black*, and Part IV will explain how lower courts have treated the Court's definition of true threats in *Black*. Finally, Part V will address the normative arguments for each intent approach and suggest which standard the Court should adopt.

I. PUNISHING PURE SPEECH: THE PROSCRIPTION OF TRUE THREATS

Whenever pure speech is regulated, it must be done with caution and precision.[14] As the Court correctly explained in its first true threats case, *Watts v. United States*, "a statute . . . which makes criminal a form of pure speech[] must be interpreted with the commands of the First Amendment clearly in mind. What is a

that lacks any explicitly threatening language constitutes a true threat); *Baker*, 890 F. Supp. at 1386, 1388–90 (analyzing the degree of specificity required for the communication to constitute a true threat).

For an influential opinion which addresses both the issues of immediacy and specificity, see *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976). Despite its relatively important contribution to the true threats jurisprudence more generally, the *Kelner* decision will receive scarce attention here because of its minimal discussion of intent.

[13] See, e.g., infra Section II.E. (discussing the Ninth Circuit's 2002 *Planned Parenthood* decision).

[14] See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982) ("'precision of regulation' is demanded" in the "context of constitutionally protected activity") (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

threat must be distinguished from what is constitutionally protected speech."[15] Nevertheless, pure speech can be punished in a manner consistent with the First Amendment. In *Chaplinsky v. New Hampshire*, the Court reiterated that free speech is not absolute: "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[16] Such classes of speech include libel, obscenity, and fighting words—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[17] Although the Court in *Chaplinsky* did not refer to true threats in its list of exemplary categories, it later recognized threats as another exception in *Watts*. There, the Court held that, like libel and obscenity, true threats may be punished without violating the First Amendment.[18]

Even though *Watts* does not cite *Chaplinksy*, the classification of true threats as unprotected speech is clearly congruent with the latter's rationale of regulating expression that by its "very utterance inflict[s] injury."[19] According to the Court in *Black*, "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[20] Instead of conveying a fact, idea, or opinion, a true threat causes fear, disruption, and a risk of violence.[21] Its contribution to public debate and to the marketplace of ideas, the core values of

[15] 394 U.S. 705, 707 (1969) (per curiam).

[16] 315 U.S. 568, 571–72 (1942); see also *Black*, 538 U.S. at 358 ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.") (citing *Chaplinsky*).

[17] *Chaplinsky*, 315 U.S. at 572.

[18] *Watts*, 394 U.S. at 707 (holding that a statute which punishes threatening speech is constitutional on its face).

[19] *Chaplinksy*, 315 U.S. at 572. The Court in *Watts* did not explicitly treat true threats as a categorical exception to the First Amendment, as the Court in *Chaplinsky* had treated libel and obscenity. However, subsequent cases made clear that *Watts* stands for the proposition that true threats are a categorical exception to the First Amendment. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[20] *Black*, 538 U.S. at 360 (alteration in original) (quoting *R.A.V.*, 505 U.S. at 388).

[21] See United States v. Aman, 31 F.3d 550, 555 (7th Cir. 1994) ("The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense.") (quoting United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991)).

the First Amendment, is de minimis. As Professor Steven Gey suggests, a true threat falls "outside the scope of First Amendment protection because it operates more like a physical action than a verbal or symbolic communication of ideas or emotions."[22] In addition to the personal costs associated with fear and disruption, true threats are responsible for the social costs of investigating and preventing potential violence.[23] This is most apparent when threats are directed at government officials and other public figures. Like the other classes of punishable speech, true threats serve "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[24]

While the reasons for proscribing true threats may be agreed upon, attempts at defining the scope of this First Amendment exception, and determining a proper intent standard, have proven more elusive. Unlike the *Chaplinsky* triumvirate of libel,[25] obscenity,[26] and fighting words,[27] the category of true threats suffers from

[22] Gey, *Nuremberg Files*, supra note 10, at 593; see also State v. DeLoreto, 827 A.2d 671, 680 (Conn. 2003) ("It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved.") (internal quotations and citations omitted).

[23] Elrod, supra note 10, at 547–48 ("As proscribable acts, true threats have a number of detrimental impacts on society . . . [including] the cost of protecting against, reducing, preventing, or eliminating the threatened violence.").

[24] *Chaplinsky*, 315 U.S. at 572.

[25] Although complex (perhaps unnecessarily so), the constitutional law of libel, and the legal standards and tests associated with it, have been clearly defined. See generally N.Y. Times v. Sullivan, 376 U.S. 254 (1964) (defining libel law for public officials and introducing the "actual malice" test); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (defining libel law for public figures); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (defining libel law for non-public figures).

[26] See generally Miller v. California, 413 U.S. 15, 24 (1973) (limiting regulation of obscene material to works depicting or describing sexual conduct and "which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value"); New York v. Ferber, 458 U.S. 747 (1982) (holding that child pornography is unprotected speech under the First Amendment).

[27] See generally *Chaplinsky*, 315 U.S. at 574 (holding that words which are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace" are not protected speech); Cohen v. California, 403 U.S. 15, 20 (1971) ("This Court has also held that the States are free to ban . . . so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.") (citing *Chaplinsky*).

the lack of a clearly discernable definition. Part of the problem can be attributed to the relatively few times the Supreme Court has squarely addressed the issue (only twice—in *Watts* and in *Black*). Moreover, when the Court has confronted the meaning of true threats, it has done so ambiguously. As a result, especially when it comes to the issue of intent, the true threats jurisprudence as it currently stands does not represent, in the words of *Chaplinksy*, a "well-defined and narrowly limited class[] of speech."[28] Explaining how that happened is where this Note now turns.

II. DEVELOPING AN INTENT STANDARD: THE ROAD TO *BLACK*

A. The First Step: Watts v. United States

The Court first addressed the subject of true threats in *Watts*; however, it had little to offer when it came to the issue of intent. Robert Watts was convicted for violating a federal statute that prohibited "knowingly and willfully" making a threat "to take the life of or to inflict bodily harm upon the President of the United States."[29] In 1966, during a political debate at a public rally, Watts made the following statement regarding the receipt of his draft classification: "I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[30] In a short per curiam opinion, the Court held that "the statute initially requires the Government to prove a true 'threat.'"[31] Because the Court did not

[28] *Chaplinsky*, 315 U.S. at 571.

[29] Watts v. United States, 394 U.S. 705, 705 (1969). The federal statute under which Watts was prosecuted, still in force today in almost identical form, was 18 U.S.C. § 871(a) (1964). Because most circuit court opinions that address the issue of intent for true threats tend to be about threats against the President, most of the opinions and decisions considered in this Note are based on prosecutions under Section 871. However, because nearly every circuit (correctly, in the eyes of this author) applies the same intent standard for true threats, regardless of the alleged target, see infra note 75, this Note will treat cases involving threats against the President the same as, and interchangeably with, cases involving threats against private persons. Thus, this Note will specify that a case discussed involves a threat against the President only when such a fact seems particularly pertinent or interesting.

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

[31] Id. at 708. This was the first time the Court had ever used the term "true threat." It most likely included the adjective "true" in order to distinguish threats that were not protected by the First Amendment from those threatening statements that were, such as Watts's "political hyperbole." The addition of such an adjective to distinguish similar concepts is common in the legal lexicon. The best example is perhaps the term

"believe that the kind of political hyperbole indulged in by [Watts] fits within that statutory term," it reversed the conviction.[32] The Court relied on three factors, which this Note will call the "*Watts* factors," in holding that Watts's statement was not a true threat: the statement (1) was made during a political debate, (2) was expressly conditional in nature, and (3) caused the listeners to laugh.[33] In addition to establishing a true threats exception, the lasting significance of *Watts*, at least when applied by future courts, has been the relevance of these three *Watts* factors.[34]

The Court in *Watts* had precious little to say on the issue of intent. In a brief discussion of the statute's use of the term "willfulness," the Court noted that the majority of the D.C. Circuit subscribed to the view, first espoused in *Ragansky v. United States*, that the willfulness requirement was met if "the speaker voluntarily uttered the charged words with 'an apparent determination to carry them into execution.'"[35] Skeptical of such an interpretation, the Court made the following observation: "[p]erhaps this interpretation is correct, although we have grave doubts about it."[36] Nevertheless, because the Court found Watts's speech to fall outside the scope of true threats, it reasoned that it need not conclusively decide the intent issue.[37] It is important to point out that the Court's

"actual notice," commonly used in property and procedure law. "Actual notice" is the same thing as "notice" (just as "true threats" are "threats"), but the adjective, "actual," is included to distinguish "actual notice" from "constructive notice." Similarly, "true" threats are distinguished from those threats which constitute protected speech.

[32] Id.

[33] Id. at 707–08.

[34] See Strauss, supra note 10, at 242–43; see also, e.g., United States v. Cooper, 865 F.2d 83, 85 (4th Cir. 1989) (applying the *Watts* factors in affirming the defendant's conviction).

[35] *Watts*, 394 U.S. at 707–08 (quoting Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918)) (emphasis omitted).

[36] *Watts*, 394 U.S. at 708 (citing Watts v. United States, 402 F.2d 676, 686–93 (D.C. Cir. 1968) (Wright, J., dissenting) (rejecting the *Ragansky* approach and arguing that the government should have to prove that the defendant intended to carry out the threat)).

[37] There are several plausible explanations (or, more appropriately, speculations) as to why the Court addressed the meaning of true threats and the issue of intent in such an imprecise manner. The Court was closely divided, with three justices dissenting and one justice who would have denied the petition for certiorari. *Watts*, 394 U.S. at 708, 712. As noted above, the Court announced its decision in a short per curiam opinion. Perhaps the Court wrote per curiam because the majority could not agree on a rationale and, thus, could not provide a more detailed explanation for its judgment.

analysis throughout the opinion seems more concerned with statutory construction than with constitutional interpretation. Nevertheless, on the issue of intent, it was first down and the Court punted.

Subsequent Supreme Court decisions, until *Black*, usually addressed true threats tangentially and typically had nothing to say regarding the issue of intent.[38] As one commentator put it, writing on the eve of *Black*, "[f]or the Supreme Court, threat speech started, and apparently ended, with *Watts v. United States*."[39] Consequently, lower courts, left with little guidance, blindly searched for an answer to the following question: what mens rea, if any, must a speaker have for his communication to constitute a true threat?

Possible evidence of this is Justice Douglas's concurring opinion, in which no other justice joined, that focuses on the history of laws prohibiting threats against a country's leader. Id. at 709. Additionally, *Watts* was decided only a few years after the assassinations of President John F. Kennedy and Martin Luther King, Jr. With such a delicate history serving as the backdrop, perhaps the Court simply wanted to reach its decision as narrowly as possible without limiting the scope of the statute any more than necessary. Whatever the explanation for the Court's terse treatment of the issue, the opinion failed to provide any concrete guidance.

[38] In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the Court dealt with threatening speech but in the context of incitement. Relying on its incitement doctrine, the Court held that a speaker who threatened violence against boycott breakers could not be held liable for merchant losses because his speech did not incite imminent, lawless action (and thus was protected). Id. at 925–29. The Court also noted that the speaker's "'threats' of vilification or social ostracism . . . [were] constitutionally protected." Id. at 926.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992), the Court was bound by the Minnesota Supreme Court's interpretation of the statute at issue as prohibiting only fighting words (and not true threats). However, the Court did refer to the "true threats" exception as an example of what could constitute permissible viewpoint discrimination. Id. at 388. The Court explained that Congress could "criminalize only those threats of violence that are directed against the President" because "the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." Id. (citing *Watts*, 394 U.S. at 707, and 18 U.S.C. § 871 (1964)). Additionally, the *R.A.V.* decision was the first time the Court provided a specific set of reasons why true threats may be regulated. See supra note 20 and accompanying text. But, alas, the Court did not address the issue of intent.

Finally, in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994), the Court merely reiterated that threats, "however communicated, are proscribable under the First Amendment."

[39] Strauss, supra note 10, at 242.

B. Available Approaches: Objective and Subjective Standards and Why the Difference Matters

Before examining how lower courts after *Watts* addressed the issue of intent, it may be helpful to introduce the main approaches and explain why the differences between them are significant. The available standards generally fall into one of two categories: an objective test or a subjective test. An objective test defines a true threat as a communication that a reasonable person would find threatening. 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.[40]

All objective tests require one general intent element—the defendant must have knowingly made the statement. Therefore, the government must prove that the "statement was not the result of mistake, duress, or coercion."[41] For example, "a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat."[42] Similarly, if the speaker involuntarily made the statement, it would not pass the objective test. This is the only general intent element required by all forms of the objective test. As will be discussed below, the reasonable speaker test includes an additional general intent element.

Conversely, a subjective test requires the government to prove one general intent element and one specific intent element before the communication is considered unprotected speech. The subjec-

[40] See Blakey & Murray, supra note 10, at 937–1002; Strauss, supra note 10, at 247–56. The aforementioned *Bly* opinion is an example of a reasonable listener objective test. See supra notes 4–7 and accompanying text.

[41] United States v. Hart, 457 F.2d 1087, 1091 (10th Cir. 1972) (emphasis omitted).

[42] Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918). The court in *United States v. Kosma*, 951 F.2d 549, 558 (3d Cir. 1991), provided two examples of how someone could make a threat unknowingly. First, if "a non-English speaker . . . unwittingly reads aloud a threatening statement in English, which he does not know to be a threat," he would not have knowingly made a true threat. Similarly, if "a person . . . writes a threatening letter to the President and places it in his desk with no intention of sending it, yet later finds that a family member has accidentally mailed the letter," he would not have knowingly mailed the communication. Id. Neither person would have made a true threat because the proscribed conduct in both circumstances was not done "knowingly." However, as one can see, only in rare circumstances will this "knowingly" requirement not be met.

tive test comes in two forms: the specific intent to carry out the threat test and the specific intent to threaten test. Like the objective tests, both subjective tests require that the defendant knowingly made the statement. In addition, the specific intent to carry out the threat version states that the government must also prove that the defendant actually intended to carry out the threat. The second type of subjective standard, the specific intent to threaten test, instead requires the government to show that the defendant also intended for the communication to be threatening (or intended for the recipient to feel threatened).[43]

The differences between the objective and subjective tests are significant in two respects. First, the defenses available to a defendant depend on which test the court applies. For instance, a defense that the speaker did not intend for the statement to be threatening would not be permitted in an objective test jurisdiction because it would be irrelevant. Similarly, defenses based on mental defect or voluntary intoxication, which are available in most jurisdictions as a defense to specific intent crimes, would only be available when a court applies a subjective test, not an objective test. In *United States v. Twine*, the court recognized such a distinction.[44] There, the defendant was convicted of violating two federal statutes which prohibited the making of threats.[45] In determining whether the defendant's diminished capacity defense was permissible, the court explained that it must first "determine whether the aforementioned statutes require proof of specific intent. This inquiry is necessary because diminished capacity, like voluntary intoxication, generally is only a defense when specific intent is at issue."[46] Another example is *United States v. Myers*, where the court held that a defendant who had been diagnosed with post-traumatic stress disorder could not raise a diminished capacity defense after the court applied an objective test in its true threats analysis.[47]

[43] The aforementioned *Magleby* opinion adopts the specific intent to threaten test. See supra note 8 and accompanying text.

[44] 853 F.2d 676 (9th Cir. 1988).

[45] Id. at 677 (affirming conviction based on violations of 18 U.S.C. §§ 875(c), 876 (1982)).

[46] Id. at 679 (citing United States v. Brawner, 471 F.2d 969, 998–1002 (D.C. Cir. 1972)).

[47] 104 F.3d 76, 80–81 (5th Cir. 1997); see also United States v. Johnson, 14 F.3d 766, 771 (2d Cir. 1994) (holding that "evidence of diminished mental capacity" was prop-

The second important difference arises when a court is making a constitutional interpretation on the issue of intent. A court's constitutional determination establishes the baseline from which a legislature must operate.[48] Thus, if a court holds that the proper constitutional test for true threats is an objective one, the constitutional baseline is the objective test. Consequently, the legislature, when drafting a statute, can require the threat being regulated to meet either the objective or subjective intent test. If the legislature adopts a statute that meets the constitutional baseline of an objective test, a defendant can be prosecuted under the statute if his threatening communication passes either the objective or subjective standard. However, if a court adopts the subjective test as the constitutional baseline, any statute which does not require the specific intent to carry out the threat or specific intent for the statement to be taken as threatening (depending on which subjective test is adopted) would be unconstitutional. For instance, if a court adopts a subjective intent test, but its legislature passes a statute requiring that only the objective test be met, the statute will be found unconstitutional because it falls below the subjective test baseline. If, however, a court's interpretation is based on statutory construction, and is not one of constitutional proportion, then this issue will not arise. Under these circumstances, the legislature, not the court, will determine the meaning of true threats with regard to the respective statute.

C. Lower Courts and the Mens Rea of Subjective Tests

As mentioned earlier, the subjective test comes in two forms, both of which were almost uniformly rejected by the lower courts between the time of *Watts* and *Black*. The first version of the subjective test requires the government to prove that the speaker, in addition to knowingly making the statement, had the specific intent to carry out the threat. The Supreme Court alluded to this test in *Watts* when it cited Judge Wright's dissenting opinion from the

erly excluded because only a showing of general intent was required); United States v. Richards, 415 F. Supp. 2d 547, 551 (E.D. Pa. 2005) (applying an objective test and holding that a defendant's "evident . . . mental health problems . . . do not prevent his threats from being 'true threats'").

[48] A court's constitutional determination will also influence future courts' interpretations of existing statutes.

D.C. Circuit's *Watts* decision.[49] In his dissent, Judge Wright asserted that the government should have to prove that the defendant intended to carry out the threat.[50] This test was apparently based on the belief that "only when the maker of the threat has a subjective intention of carrying it out is there an actual danger."[51] In its *Watts* opinion, the Supreme Court seemed to agree with Judge Wright (or, at the very least, shared his disapproval of the earlier *Ragansky* approach) when it expressed "grave doubts" about the contrary interpretation espoused by the D.C. Circuit majority.[52] However, as noted earlier, the Court refused to conclusively decide the issue. It was not long before the lower courts took advantage of the Court's indecisive language and discarded the notion that the government must prove the defendant's intention to carry out the threat.

In a case decided only four months after the Supreme Court's decision in *Watts*, the Ninth Circuit addressed the issue of intent in the same context, a threat made against the President of the United States in violation of 18 U.S.C. § 871. In *Roy v. United States*, the court held that the government was not required to show that the defendant actually intended to carry out the threat.[53] The court persuasively argued that this subjective standard, requiring the specific intent to carry out the threat, unduly interfered with the purposes associated with regulating true threats, namely eliminating the fear, disruption, and costs of investigation and prevention associated with threatening speech.[54] Regardless of whether the defendant intended to carry out the threat, the court posited that "an apparently serious threat may cause the mischief

[49] See supra note 36.

[50] Watts v. United States, 402 F.2d 676, 686–89 (D.C. Cir. 1968) (Wright, J., dissenting).

[51] Roy v. United States, 416 F.2d 874, 878 n.15 (9th Cir. 1969) (characterizing Judge Wright's reasoning).

[52] See supra notes 35–36 and accompanying text.

[53] 416 F.2d at 878.

[54] Id. at 877 (If a true threat is made, "then the threat would tend to have a restrictive effect upon the free exercise of Presidential responsibilities, regardless of whether the person making the threat actually intends to assault the President."); see also id. at 878 ("Whether [the defendant] acted from an intention to assault the President or from youthful mischief, he necessarily set in motion emergency security measures that might have impeded the President's activities and movement and which certainly resulted in additional investigatory and precautionary activities.").

or evil" that the statute sought to avoid.[55] Based on this reasoning, the court adopted the reasonable speaker objective test. Like the Court in *Watts*, the circuit court in *Roy* was more concerned with proper statutory construction than constitutional interpretation.

The other circuits quickly followed suit in dismissing this version of the subjective test. For instance, in *United States v. Hart*, the Tenth Circuit noted the *Watts* citation to Judge Wright's dissenting opinion but agreed with *Roy* and held that the government did not need to prove that the "defendant actually intend[ed] to carry out the threat."[56] The only court of appeals which did not reject this subjective test outright was the Fourth Circuit. In *United States v. Patillo*, the court noted the language of *Watts* and expressly rejected the "*Raginsky* [sic] test of intention."[57] Instead, the court held that "an essential element of guilt is a present intention either to injure the President, or incite others to injure him, or to restrict his movements."[58] The court required the government to show the defendant had one of these three possible intents, but also said that the government could meet its burden if it were to prove that the speaker should have "anticipate[d] that [his statement] would be transmitted to law enforcement"—a form of an objective intent standard.[59] This interpretation, which was more statutory than constitutional, was seemingly limited only to threats made against the President in violation of 18 U.S.C. § 871. For example, two years later, in *United States v. Maisonet*, the Fourth Circuit adopted an objective test for prosecutions under Section 876.[60] Similarly, in *United States v. Darby*, the Fourth Circuit held that "in a prosecution under [S]ection 875(c), the government need not prove intent (or ability) to carry out the threat."[61] Although the specific intent to

[55] Id. at 877.

[56] 457 F.2d 1087, 1090 (10th Cir. 1972); see also, e.g., United States v. Vincent, 681 F.2d 462, 464 (6th Cir. 1982) (rejecting the subjective intent to carry out the threat test and adopting "the rule of the Ninth Circuit, set out in *Roy v. United States*"); United States v. Compton, 428 F.2d 18, 21 (2d Cir. 1970) (holding that it was "not necessary to establish an intention to carry out the threat").

[57] 438 F.2d 13, 14, 16 (4th Cir. 1971) (en banc).

[58] Id. at 16.

[59] Id.

[60] 484 F.2d 1356, 1358 (4th Cir. 1973). 18 U.S.C. § 876 (1970) prohibited the mailing of a letter containing a threat to injure the addressee.

[61] 37 F.3d 1059, 1064 n.3 (4th Cir. 1994). 18 U.S.C. § 875(c) (1988) read as follows: "Whoever transmits in interstate or foreign commerce any communication contain-

carry out the threat test was repeatedly and resoundingly rejected by nearly every court, it remained a favorite of hopeful defendants.

In *Rogers v. United States*, the Supreme Court "granted certiorari to resolve an apparent conflict among the Courts of Appeals concerning the elements of the offense proscribed by [Section] 871(a)."[62] This conflict centered on the opposing approaches of the *Roy* and *Patillo* courts regarding the intent requirement of Section 871. However, instead of resolving the mens rea question (at least with respect to this type of threat), the Court reversed the defendant's conviction based on a procedural error committed by the trial court and did not address the intent issue for which it had granted certiorari in the first place.[63] The Court held that this procedural violation was not harmless error because the judge's response was "fraught with potential prejudice";[64] notably, the violation was never raised by the defendant at any stage of the litigation.[65] It was second down, and the Court punted once again.

However, all was not lost when it came to the issue of intent. In a concurring opinion joined by Justice Douglas, Justice Marshall reached the merits question and provided a new approach to the mens rea required for threatening speech. According to Justice Marshall, only those "threats that the speaker intends to be interpreted as expressions of an intent to kill or injure" should be proscribed.[66] With this assertion, Justice Marshall introduced the second version of the subjective test: the specific intent to threaten test. In addition to proving that the defendant knowingly made the statement, the government would have to show an additional specific intent element—that the defendant intended for the statement to be threatening.

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ing . . . any threat to injure the person of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

[62] 422 U.S. 35, 36 (1975). 18 U.S.C. § 871(a) is the statutory provision that prohibits threats against the President.

[63] As Justice Marshall stated in a concurrence, "[t]he Court today seizes on [the error] to reverse the conviction, leaving unresolved the issue that we granted certiorari to consider." Id. at 42 (Marshall, J., concurring).

[64] Id. at 41 (majority opinion).

[65] Id. The issue became known after the Solicitor General "confessed error." Id. at 42 (Marshall, J., concurring).

[66] Id. at 47 ("This construction requires proof that the defendant intended to make a threatening statement.").

Although Justice Marshall, like those before him, engaged mostly in statutory construction,[67] he did express a special concern for finding an interpretation consistent with the values of the First Amendment. Worried that an objective test approach, like that adopted in *Ragansky* and *Roy*, swept too broadly, Justice Marshall explained that courts "should be particularly wary of adopting such a standard for a statute that regulates pure speech."[68] Because the negligence standard of such an objective test, which "charg[es] the defendant with responsibility for the effect of his statements on his listeners," would have a chilling effect on speech, Justice Marshall believed an objective test "impose[d] an unduly stringent standard in this sensitive area."[69]

In addition to rejecting the negligence standard of an objective approach, Justice Marshall also dismissed the other version of the subjective test (the specific intent to carry out the threat standard): "I would . . . require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out."[70] This is because "threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out."[71] Justice Marshall believed his particular subjective test struck the proper balance between regulating threatening speech and protecting the values embodied in the First Amendment. For Justice Marshall, the specific intent to carry out the threat subjective standard did not offer enough protection against the harms of threatening speech; at the same time, the objective tests went too far in regulating pure

[67] Marshall based his interpretation partly on the legislative history of § 871. See id. at 44–46.

[68] Id. at 47.

[69] Id. at 47–48. Justice Marshall also made the following observation:

> Statements deemed threatening in nature only upon "objective" consideration will be deterred only if persons criticizing the President are careful to give a wide berth to any comment that might be construed as threatening in nature. And that degree of deterrence would have substantial costs in discouraging the "uninhibited, robust, and wide-open" debate the First Amendment is intended to protect.

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

[70] *Rogers*, 422 U.S. at 48 (Marshall, J., concurring).

[71] Id. at 46–47. For instance, "[a] threat made with no present intention of carrying it out may still restrict the President's movements and require a reaction from those charged with protecting the President." Id. at 47.

speech. Although many commentators would follow Justice Marshall's lead, few courts did the same.[72]

Before *Black*, only one circuit adopted Justice Marshall's specific mens rea approach to threatening speech. In *United States v. Twine*, the Ninth Circuit held that for prosecutions under two federal threat statutes (18 U.S.C. §§ 875 and 876), the government must show that the defendant had "an intent to threaten," a specific intent element, when he made the threatening communication.[73] Like Justice Marshall, the *Twine* court rejected the subjective specific intent to carry out the threat test.[74] However, the court made clear that the application of the specific intent to threaten test did not conflict with the circuit's earlier statements in *Roy*. Because "[a] threat against the President . . . is qualitatively different from a threat against a private citizen or other public official," the court held that the objective test would continue to apply to prosecutions for threats made against the President.[75] Thus, the court's subjective test would only apply to charges under these two federal statutes. Other than this limited application, no other circuit adopted Justice Marshall's subjective test, and most either ig-

[72] See, e.g., Blakey & Murray, supra note 10, at 1065 ("Justice Marshall once advanced a compelling argument in favor of such a standard [of a subjective test for intent]. We wholeheartedly agree with it."); see also infra notes 73–78 and accompanying text.

[73] 853 F.2d 676, 680 (9th Cir. 1988). 18 U.S.C. § 875(c) (1982) prohibited communications made in interstate or foreign commerce containing a threat to kidnap or injure any person. Similarly, 18 U.S.C. § 876 (1982) prohibited communications deposited in the mail containing a threat to kidnap or injure any person.

[74] *Twine*, 853 F.2d at 681 n.4 ("Our holding that specific intent to threaten and to transmit the threat are essential elements of the crimes defined by §§ 875(c) and 876 does not conflict or disagree with the clear pronouncement of other circuits that specific intent (or ability) to carry out the threat is not an essential element under these sections.").

[75] Id. at 681 (quoting Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969)) (emphasis omitted). The Ninth Circuit is the only court to have drawn such a distinction between threats made against the President and threats made against private citizens. Every other circuit (with the narrow and limited exception of the Fourth Circuit, see supra notes 57–61) has treated the intent required for a true threat to be the same regardless of whether the threat was directed at the President or at some other person. This author agrees with the majority of circuits that have applied the same intent standard across the board. The required mens rea should be the same for threats made against private persons and threats made against the President.

nored[76] or expressly rejected it.[77] Perhaps the Seventh Circuit provided the best explanation for why the subjective test proposed by Justice Marshall never gained much traction: "Although we owe the view of a single Justice great respect, we cannot treat it as stating the governing law. Here . . . the weight of authority is to the contrary. Therefore, . . . we reaffirm . . . the objective standard as the proper standard for [punishing threatening speech]."[78] By the time Justice Marshall articulated his approach, most circuits had already committed themselves to an objective test.

D. Lower Courts and the Mens Rea of Objective Tests

Between *Watts* and *Black*, the preferred approach of the lower courts, by an overwhelming margin, was the objective test. As mentioned earlier, there are three types of objective tests: reasonable speaker, reasonable listener, and reasonable neutral.[79] The first type, the reasonable speaker test, holds that a communication is a true threat if it was made "under such circumstances wherein a reasonable person would foresee that the statement would be inter-

[76] See, e.g., United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (applying the reasonable speaker test with no mention of Justice Marshall's subjective standard); United States v. Schneider, 910 F.2d 1569, 1570 (7th Cir. 1990) (finding that "[t]he test for whether a statement *is* a threat is an objective one," with no reference to Justice Marshall's subjective standard); United States v. Orozco-Santillan, 903 F.2d 1262, 1265 n.3 (9th Cir. 1990) ("The only intent requirement is that the defendant intentionally or knowingly communicates his threat, not that he intended or was able to carry out his threat."); United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983) (applying the reasonable listener test and making no mention of Justice Marshall's subjective standard); United States v. Vincent, 681 F.2d 462, 464 (6th Cir. 1982) (adopting the reasonable speaker test set forth in *Roy* with no reference to Justice Marshall's subjective standard).

[77] See, e.g., United States v. Francis, 164 F.3d 120, 122 (2d Cir. 1999) ("[E]very circuit to have addressed the question, with the exception of the Ninth, has construed Section 875(c) as a general-intent crime.") (citing United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997)); United States v. Myers, 104 F.3d 76, 81 (5th Cir. 1997); United States v. Himelwright, 42 F.3d 777, 782–83 (3d Cir. 1994); United States v. Darby, 37 F.3d 1059, 1063–66 (4th Cir. 1994); United States v. DeAndino, 958 F.2d 146, 149 (6th Cir. 1992)). Seemingly unfazed, the Ninth Circuit reaffirmed its approach a decade later in *United States v. King*, 122 F.3d 808, 809 (9th Cir. 1997).

[78] United States v. Aman, 31 F.3d 550, 556 (7th Cir. 1994).

[79] For a more in-depth analysis of each objective test and its respective following in the circuit courts before *Black*, see G. Robert Blakey and Brian J. Murray's impressive article that thoroughly details the area. Blakey & Murray, supra note 10, at 937–1010.

preted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm."[80] In addition to the intent element common to all objective tests (knowingly making the statement), the reasonable speaker test supplies an additional general intent requirement. Under the reasonable speaker test, the speaker must have acted negligently: the government must prove that the defendant knowingly made a statement that he should have known was threatening. However, this is a much easier test for the government to satisfy than Justice Marshall's specific intent to threaten test.

Before *Black*, the reasonable speaker test was the most popular standard and was adhered to by several circuits when interpreting a variety of statutes. The first court to adopt it was the Ninth Circuit in the aforementioned *Roy* case.[81] Interestingly, the court found that, although it was regulating pure speech, "[u]nlike the situation in *Watts v. United States*, there does not appear to be a free speech issue in this case."[82] The Sixth Circuit quickly followed suit in adopting the reasonable speaker test,[83] and the Second,[84] Third,[85] Seventh,[86] and Tenth[87] Circuits were not far behind. Notably, each of these circuits traced their reasonable speaker roots back to *Roy*.[88]

[80] United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991) (quoting *Roy*) (emphasis omitted).

[81] 416 F.2d at 877–78. This approach was reaffirmed in *Orozco-Santillan*, 903 F.2d at 1265.

[82] *Roy*, 416 F.2d at 879 n.17 (internal citations omitted).

[83] United States v. Lincoln, 462 F.2d 1368, 1369 (6th Cir. 1972) ("We . . . adopt the construction of the Ninth Circuit in *Roy v. United States*."); see also United States v. Vincent, 681 F.2d 462, 464 (6th Cir. 1982) (affirming *Lincoln* and the reasonable speaker test).

[84] United States v. Johnson, 14 F.3d 766, 768 (2d Cir. 1994) ("It is well settled that [Section] 871 requires only a showing of general intent. The Ninth Circuit, in the leading case on this question, [*Roy*,] held that [the reasonable speaker test applies].").

[85] *Kosma*, 951 F.2d at 557 (adopting the reasonable speaker test of *Roy*).

[86] United States v. Hoffman, 806 F.2d 703, 707 (7th Cir. 1986) (adopting the reasonable speaker test and quoting *Roy*); see also United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990) (reaffirming *Hoffman*).

[87] United States v. Hart, 457 F.2d 1087, 1090–91 (10th Cir. 1972) (adopting the reasonable speaker test of *Roy*).

[88] The importance of this fact will be discussed shortly. See infra notes 91–93 and accompanying text.

In *United States v. Fulmer*, the First Circuit joined its peers and adopted the reasonable speaker version of the objective test.[89] In a lengthy opinion, the court explained why the reasonable speaker test, and not the reasonable listener test, was "the appropriate standard under which a defendant may be convicted for making a threat":

> This standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the "reasonable-recipient standard," namely that the jury will consider the unique sensitivity of the recipient. We find it particularly untenable that, were we to apply [the reasonable listener standard], a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant.[90]

In addition to the intent element common to all objective tests, the *Fulmer* court wanted to require a showing of negligence, an element that does not appear in the reasonable listener test.

Interestingly, for the reasonable speaker test, what started as pure statutory construction morphed into a constitutional interpretation of true threats. Although the *Roy* decision expressly stated that it found no First Amendment issue when advocating the reasonable speaker test, future courts relied on *Roy*'s objective test as a constitutional standard. For instance, in *United States v. Merrill*, the Ninth Circuit affirmed its holding in *Roy* and dismissed the defendant's constitutional claim, noting that courts "interpreting 18 U.S.C. § 871 [as in *Roy*] . . . have uniformly concluded that 'true' threats, of the type proscribed by the statute, are not constitutionally protected speech."[91] Similarly, in *United States v. Orozco-Santillan*, the court held that the reasonable person standard, as stated in *Roy*, defined the scope of "a 'true' threat" as speech that "is unprotected by the [F]irst [A]mendment."[92] In perhaps the clearest example of this transition from pure statutory construction

[89] 108 F.3d 1486, 1491 (1st Cir. 1997).

[90] Id. For a discussion of why courts such as the one in *Fulmer* adopted an objective test instead of a subjective test, see infra notes 206–12, 217, and accompanying text.

[91] 746 F.2d 458, 462 (9th Cir. 1984).

[92] 903 F.2d 1262, 1265–66 (9th Cir. 1990); see also *Fulmer*, 108 F.3d at 1492–93 (making the same assertions as the court in *Orozco-Santillan*).

to constitutional interpretation, the court in *United States v. Hanna* explained that "a statement is [a] true threat for the purposes of § 871(a) and the First Amendment if" it meets the reasonable speaker test first adopted in *Roy*.[93] Put simply, the extremely influential *Roy* standard, which was expressly decided without the First Amendment in mind, became a test of constitutional proportion. Until *Black* (and even after), it represented the majority approach to the meaning of true threats and its required intent.

The reasonable listener test, the second version of the objective test, takes a different perspective: a communication is a true threat if "an ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury."[94] Unlike the reasonable speaker test, this test serves only as a jurisdiction's definition of a true threat and does not provide an additional intent element. In reasonable listener jurisdictions, the only intent element is that the statement was knowingly made. Even though it was not as widespread as the reasonable speaker standard, this test also enjoyed a significant following. Beginning with the Fourth Circuit's articulation of it in *United States v. Maisonet*,[95] panels from the Second,[96] Seventh,[97] Eighth,[98] and Eleventh[99] Circuits all adopted versions of the reasonable listener test. For instance, in *United States v. Malik*, the Second Circuit held that the test for determining whether a communication is a threat "is an objective one" and directly quoted the language of *Maisonet*.[100] Similarly, Judge Posner, writing for the Seventh Circuit, opined that

[93] 293 F.3d 1080, 1087 (9th Cir. 2002).

[94] United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973).

[95] Id. Interestingly, the Fourth Circuit adopted a subjective test, at least partially, for threats made against the President, see United States v. Patillo, 438 F.2d 13, 16 (4th Cir. 1971), but an objective test for other forms of threatening speech. See supra notes 57–60 and accompanying text.

[96] United States v. Malik, 16 F.3d 45, 49 (2d Cir. 1994).

[97] United States v. Schneider, 910 F.2d 1569, 1570 (7th Cir. 1990); see also United States v. Aman, 31 F.3d 550, 553 (7th Cir. 1994) (affirming *Schneider*). Seemingly contradicting itself, the court in *Aman* also cited the reasonable speaker test as the definition of a threatening statement. Id. This exemplifies the confusion underlying the issue of intent and threatening speech.

[98] United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996); see also United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (affirming *Dinwiddie*).

[99] United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983).

[100] *Malik*, 16 F.3d at 49 (quoting United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973)).

"[t]he test for whether a statement *is* a threat is an objective one; it is not what the defendant intended but whether the recipient could reasonably have regarded the defendant's statement as a threat."[101] Although it was rarely (if ever) mentioned by the courts that adhered to the reasonable listener test, this version of the objective standard does have a link to the Court's pronouncement in *Watts*. Because one of the *Watts* factors was the reaction of the audience, it is plausible to construe the reasonable listener test as a particular application of this specific *Watts* factor.

Unlike *Roy* and the reasonable speaker test, the foundational opinion of the reasonable listener test did consider the First Amendment implications of its approach. In *Maisonet*, the Fourth Circuit held the following:

> Even when the defense is based on a claim of [F]irst [A]mendment rights, . . . [i]f there is substantial evidence that tends to show beyond a reasonable doubt that an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury, the court should submit the case to the jury.[102]

As time went on, the test became synonymous with the meaning of unprotected speech for these circuits. For example, in *United States v. Hart*, the Eighth Circuit held that "[t]o determine whether a true threat exists, a court must analyze the alleged threat in light of its entire factual context and determine whether the recipient of the alleged threat could reasonably conclude that it expresses a determination or intent to injure presently or in the future."[103] However, as noted above, the reasonable listener test did not require an additional showing of intent (negligence or otherwise) beyond the knowledge standard shared by all objective tests.

The third and final objective standard is the reasonable neutral test. It generally asserts that "a communication is a threat . . . if 'in its context [it] would have a reasonable tendency to create appre-

[101] *Schneider*, 910 F.2d at 1570 ("A threat is not a state of mind in the threatener; it is an appearance to the victim.") (quoting United States v. Holzer, 816 F.2d 304, 310 (7th Cir. 1987)).

[102] *Maisonet*, 484 F.2d at 1358.

[103] 212 F.3d 1067, 1071 (8th Cir. 2000) (internal quotations omitted).

hension that its originator will act according to its tenor.'"[104] Like the reasonable listener test, this standard only identifies the meaning of a true threat—the actus reus—not any additional intent standard. Consequently, the only intent the government must prove is that the speaker knowingly made the statement. This version was the least popular of the objective tests and enjoyed a devoted following only in the Fifth Circuit.[105]

To summarize, with little guidance from the Supreme Court, the circuit courts fashioned four possible intent standards for true threats; two were based on a subjective test and two were based on an objective test. The first subjective test was the specific intent to carry out the threat test. Under this standard, the government must prove two intent elements: that the defendant knowingly made the statement and that he intended to carry out the threat. The specific intent to threaten standard, articulated by Justice Marshall, also required the government to prove two intent elements: the government had to show that the defendant knowingly made the statement and intended it to be threatening. The third intent standard was embodied by the reasonable speaker test. According to this approach, the government must prove two intent elements. Namely, the defendant must have knowingly made the statement and should have known of its threatening character. The final intent approach was used by the reasonable listener and reasonable neutral standards. Here, the government only needed to prove one intent element—that the defendant knowingly made the statement.

E. The Penultimate Step: Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists

In perhaps the most important, and certainly most controversial, true threats case between *Watts* and *Black*, a sharply fractured Ninth Circuit, sitting en banc, decided *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*.[106] Four physicians and two health clinics that provided abortions "brought suit under FACE [Freedom of Access to Clinic Entrances

[104] United States v. Morales, 272 F.3d 284, 287 (5th Cir. 2001) (quoting United States v. Myers, 104 F.3d 76, 79 (5th Cir. 1997)) (alteration in original).

[105] See id.; see also supra notes 81–89, 95–101, and accompanying text.

[106] 290 F.3d 1058 (9th Cir. 2002) (en banc).

Act] claiming that they were targeted with threats by the American Coalition of Life Activists (ACLA)" and others.[107] The threats that allegedly targeted them included "GUILTY" posters which identified several doctors (including the plaintiffs) and the infamous "Nuremberg Files" website.[108] The trial court denied ACLA's summary judgment motion, and the jury returned a verdict against the defendants; the court then enjoined ACLA from publishing posters and other materials that threatened the plaintiffs.[109] A Ninth Circuit panel reversed the conviction, citing First Amendment concerns. However, the Ninth Circuit reheard the case en banc, disagreed with the earlier panel, and affirmed the jury's decision.[110]

Although this case presents a variety of important First Amendment and true threats issues, only the debate over intent will be discussed here. As the en banc court noted at the outset, "the first task is to define 'threat' for purposes of the [FACE] Act. This requires a definition that comports with the First Amendment, that is, a 'true threat.' The Supreme Court has provided benchmarks, but no definition."[111] After remarking on the lack of guidance from the Supreme Court, the majority made the following observation:

> Thus, *Watts* was the only Supreme Court case that discussed the First Amendment in relation to true threats before we first confronted the issue. Apart from holding that Watts's crack about L.B.J. was not a true threat, the Court set out no standard for determining when a statement is a true threat that is unpro-

[107] Id. at 1062.

[108] Id. The website was a "compilation about those whom the ACLA anticipated one day might be put on trial for crimes against humanity. The 'GUILTY' posters identifying specific physicians were circulated in the wake of a series of 'WANTED' and 'unWANTED' posters that had identified other doctors who performed abortions before they were murdered." Id.

[109] Id. at 1062–63 (citing Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 23 F. Supp. 2d 1182, 1995 (D. Or. 1998) (denying summary judgment); Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 41 F. Supp. 2d 1130, 1155–56 (D. Or. 1999) (issuing the injunction)).

[110] *Planned Parenthood*, 290 F.3d at 1063. Although it affirmed the jury's verdict, the Ninth Circuit did "remand for consideration of whether the punitive damages award comports with due process." Id.

[111] Id. at 1071.

> tected speech under the First Amendment. Shortly after *Watts* was rendered, we had to decide in *Roy v. United States* whether [the defendant] made a true threat . . . . We adopted a 'reasonable speaker' test . . . [and] have applied this test to threats statutes that are similar to FACE. Other circuits have, too. We see no reason not to apply the same test to FACE.[112]

Thus, the Ninth Circuit once again applied its familiar reasonable speaker standard, originally set forth in *Roy*, as the test for distinguishing protected from unprotected speech.

With regard to an additional subjective intent element, the court expressly held that "[i]t is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat."[113] Put simply, if the speaker knowingly made the statement and should have known of its threatening nature, then his speech is unprotected. According to the Ninth Circuit, this general intent standard was the best approach in light of the purposes supporting the prohibition of true threats.[114] Because the defendants knowingly made the statement and should have foreseen that it would be understood as a threat, the court held that the statement was not protected by the First Amendment and affirmed the jury's verdict.

As noted earlier, the Ninth Circuit was closely divided. The decision was 6-5, and three dissenting opinions were issued. The dissenting opinion of Judge Berzon, which three of the other dissenting judges joined in full and the other dissenter joined in part, articulated a new approach to the definition of true threats. Judge Berzon, a relative newcomer to the court (she was appointed in 2000), discarded the objective test traditionally adhered to by the

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[112] Id. at 1074–75 (internal citations omitted).

[113] Id. at 1075 (citing, inter alia, Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969)).

[114] Specifically, the court remarked:

> [The purpose of regulating threats] is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening.

Id. at 1076. The purposes are those outlined in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

Ninth Circuit and, most importantly for the purposes of this Note, proposed a subjective intent standard.

The motive behind her suggested standard was a belief that the reasonable speaker test espoused by the majority was "insufficiently cognizant of underlying First Amendment values."[115] Influenced by First Amendment libel jurisprudence, Judge Berzon wanted to devise constitutional standards that vary with the context of the communication, as opposed to the majority's unitary approach.[116] Towards this end, in the context of a public protest, where First Amendment concerns are heightened, Judge Berzon would require a showing of specific intent:

> Although this court's cases on threats have not generally set any state of mind requirements, I would . . . [require] in the public protest context the additional consideration whether the defendant subjectively intended the specific victims to understand the communication as an unequivocal threat that the speaker or his agents or coconspirators would physically harm them.[117]

This is a version of the "specific intent to threaten" subjective test; she pushed for "the inclusion of a 'specific intent' requirement with regard to the speaker's intent *to threaten*."[118] According to Judge Berzon, the negligence standard of the objective test weakens First Amendment protection "by holding speakers responsible for an impact they did not intend" and, consequently, has a chilling effect on speech.[119] By adding a specific intent element for speech made in the context of public protest, a proper balance, at least in Judge Berzon's eyes, is reached.

The split within the Ninth Circuit epitomized a larger division that existed across the lower courts over the proper intent standard for true threats.[120] As a result, the panoply of possible intent stan-

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[115] *Planned Parenthood*, 290 F.3d at 1101 (Berzon, J., dissenting).

[116] Id. at 1104.

[117] Id. at 1107.

[118] Id. at 1107 n.8.

[119] Id. at 1108 ("Unsure of whether their rough and tumble protected speech would be interpreted by a reasonable person as a threat, speakers will silence themselves rather than risk liability.").

[120] See United States v. Hoffman, 806 F.2d 703, 718–19 (7th Cir. 1986) (Will, J., dissenting) ("Following *Watts*, the courts have developed various formulations to describe the degree of mens rea the government must prove to establish a 'true

dards was causing a cacophony in the jurisprudence.[121] This confusion was symptomatic of the Supreme Court's refusal to adopt a clear definition for true threats. As Professor Gey observed at the time, "the lack of clear guidance from the Supreme Court on this subject has fostered the proliferation of eclectic and contradictory standards."[122] The pending appeal from the *Planned Parenthood* case seemed like an opportune time for the Court to clarify the jurisprudence, including the issue of intent. As one commentator openly hoped, "[w]ith luck, the Supreme Court will soon take the opportunity to clarify matters, perhaps even with the *Planned Parenthood* case."[123] Instead, the Court denied certiorari.[124] But, as "luck" would have it, less than two weeks after the Ninth Circuit's *Planned Parenthood* decision, the Court granted certiorari in a group of cross-burning cases from Virginia, providing new hope that the Court would settle, once and for all, the meaning of true threats.[125]

III. THE COURT FINALLY SPEAKS: *VIRGINIA V. BLACK*

In *Virginia v. Black*, the Court finally provided a definition of true threats. Writing for a five-Justice majority, Justice O'Connor held that "'[t]rue threats' encompass those statements where the

threat.'"); see also Gey, *Nuremberg Files*, supra note 10, at 545 ("[T]he lower courts cannot even agree on which factors should be the focal point of First Amendment cases dealing with threats, much less on how much protection the Constitution offers such speech.").

[121] See, e.g., United States v. Aman, 31 F.3d 550, 553 (7th Cir. 1994) (defining a "threat" using the reasonable listener standard but defining a threatening "statement" using the reasonable speaker test).

[122] Gey, *Nuremberg Files*, supra note 10, at 545; see also Strauss, supra note 10, at 232 ("Despite numerous opportunities to update the common law rule for threat speech, the Supreme Court has demonstrated an unfounded refusal to act. In light of this, several circuit courts of appeal and at least two state supreme courts have developed their own legal rules for dealing with threat speech. . . . An unclear and disparate approach to threat speech risks contradictory outcomes and exposes citizens to potentially unfair penalties for a simple slip of the tongue.").

[123] Strauss, supra note 10, at 273.

[124] Am. Coalition of Life Activists v. Planned Parenthood of the Columbia/Willamette, Inc., 539 U.S. 958 (2003). The petition for writ of certiorari was denied on June 27, 2003.

[125] Virginia v. Black, 535 U.S. 1094 (2002) (granting certiorari). The petition for writ of certiorari was granted on May 28, 2002; the Ninth Circuit's *Planned Parenthood* opinion was filed on May 16, 2002.

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. The speaker need not actually intend to carry out the threat."[126] She also explained that "[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."[127]

The Supreme Court's *Black* decision was based on three separate criminal prosecutions. Each defendant was charged with, and later convicted of, violating Virginia's cross-burning law. The statute, Section 18.2-423 of the Virginia Code, prohibited the burning of a cross "with the intent of intimidating any person or group of persons."[128] It also had a provision which stated that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate."[129] The namesake of the decision, Barry Black, was convicted under the statute for burning a cross at a Ku Klux Klan rally that he led. The cross was burned on private property with the owner's permission but could be seen from a public highway nearby. The two other defendants, Richard Elliott and Jonathan O'Mara, were convicted for attempting to burn a cross in the yard of an African American neighbor.[130] All three defendants appealed to the Supreme Court of Virginia, arguing that the cross-burning statute was unconstitutional under the First and Fourteenth Amendments. The Supreme Court of Virginia consolidated the cases for the purposes of appeal.

Relying on the Supreme Court's prior decision in *R.A.V. v. City of St. Paul*, the Supreme Court of Virginia declared the Virginia

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[126] *Black*, 538 U.S. at 359–60 (internal citations omitted).

[127] Id. at 360 (emphasis added).

[128] The statute read in full:

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

Va. Code Ann. § 18.2-423 (1996); see also *Black*, 538 U.S. at 348 (internal quotations omitted).

[129] Va. Code Ann. § 18.2-423 (1996); see also *Black*, 538 U.S. at 348.

[130] *Black*, 538 U.S. at 348, 350.

statute "analytically indistinguishable from the ordinance found unconstitutional in *R.A.V.*" and held that it discriminated on the basis of content since it "selectively chooses only cross burning because of its distinctive message."[131] In addition, the court found the prima facie clause overbroad.[132] Consequently, the court held the statute facially unconstitutional. Three justices dissented from the majority opinion and asserted that the statute was constitutionally permissible because it only proscribed true threats.[133] The dissenters also distinguished the Virginia statute from the ordinance of *R.A.V.* and had no problem with the prima facie provision because the burden of proof remained on the state.[134] The Commonwealth of Virginia petitioned the U.S. Supreme Court, which granted certiorari for the consolidated appeal.

As can be gleaned from the briefs and oral argument, the scope and contours of the true threats doctrine was not the focus of the parties or Justices involved.[135] Instead, the viewpoint and content discrimination analysis of *R.A.V.* and the statute's prima facie provision consumed much of the ink and spoken word of the appellate process. Thus, it is not surprising that the Court's definition of "true threats" consisted of only two sentences and the definition of "intimidation" a single sentence. In the briefs, during oral argu-

[131] Black v. Commonwealth, 553 S.E.2d 738, 742, 744 (Va. 2001); see R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

[132] *Black*, 553 S.E.2d at 738.

[133] Id. at 751 (Hassell, J., dissenting) ("Thus, applying the clear and unambiguous language in Code § 18.2-423 in conjunction with our established definition of intimidation, which the majority ignores, I conclude that Code § 18.2-423 only proscribes conduct which constitutes 'true threats.' . . . It is well established that true threats of violence can be proscribed by statute without infringing upon the First Amendment.").

[134] Id. at 753–56.

[135] For instance, the term "true threats" appeared only once in the Commonwealth of Virginia's appellate brief. Brief of Petitioner at 26, *Black*, 538 U.S. 343 (2003) (No. 01-1107). Similarly, it was substantively used only once in the amicus curiae brief filed by the United States. Brief for the United States as Amicus Curiae at 18–19, *Black*, 538 U.S. 343 (2003) (No. 01-1107). Although true threats received more attention in the respondent's appellate brief and the petitioner's reply brief, the true threats doctrine was completely overshadowed by the debate over viewpoint discrimination and *R.A.V.* See generally Brief on Merits for Respondents, *Black*, 583 U.S. 343 (2003) (No. 01-1107); Reply Brief of Petitioner, *Black*, 583 U.S. 343 (2003) (No. 01-1107). Similarly, at oral argument, the focus was on *R.A.V.* and the essence of viewpoint discrimination, not on the meaning of true threats. See generally Oral Argument Transcript, *Black*, 583 U.S. 343 (2003) (No. 01-1107).

ments, and in the Court's opinion, the discussion of the true threats doctrine served an ancillary purpose—providing the foundation from which the content discrimination analysis of *R.A.V.* could begin.

In *R.A.V.*, the Court posited that "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."[136] In order to apply this exception to the general prohibition on content discrimination, the Court in *Black* first needed to define true threats (and intimidation); then, it could determine whether the present statute successfully proscribed only those threats which are "a particularly virulent form of intimidation."[137] The Court held that:

> The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence.[138]

Although the Court held that Virginia could constitutionally prohibit cross burning done with the intent to intimidate, a plurality found the statute unconstitutional because of its prima facie clause.[139] Interestingly, the Court affirmed the Virginia Supreme

[136] *R.A.V.*, 505 U.S. at 388. For instance, "the Federal Government can criminalize only those threats of violence that are directed against the President . . . since the reasons why threats of violence are outside the First Amendment . . . have special force when applied to the person of the President." Id.

[137] *Black*, 538 U.S. at 363.

[138] Id.

[139] Id. at 364 ("The prima facie evidence provision, as interpreted by the jury instruction [in Barry Black's trial], renders the statute unconstitutional."). Justice Scalia, a member of the five justice majority in Parts I–III of Justice O'Connor's opinion of the Court, dissented from this part of the decision regarding the prima facie provision. He preferred remanding the judgment to the Virginia Supreme Court and allowing that court to construe the prima facie provision; he believed that "there is no justification for the plurality's apparent decision to invalidate that provision." *Black*, 538 U.S. at 368 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part). Three Justices who concurred in the judgment in part and dissented in part—in an opinion written by Justice Souter—agreed that the prima facie provision was problematic, but they would have held the statute unconstitutional regardless of how the prima facie provision was construed. They believed the statute clearly violated *R.A.V.*

Court's dismissal of Barry Black's conviction but only vacated the judgments of Elliott and O'Mara and remanded their cases for further proceedings.[140]

Because the Court's focus was not on carefully defining true threats, but on providing a basis for its content discrimination analysis,[141] the Court left a variety of viable interpretations in its wake. Most importantly, at least for the purpose of this Note, the Court's language failed to clearly settle the issue of intent. Although the Court did hold that the specific intent to carry out the threat was not required for the communication to constitute a true threat, little else with respect to intent was conclusively resolved.[142] There are three plausible interpretations of the Court's language regarding the constitutionally required intent for true threats; this Note will articulate each in turn.[143]

First, the Court could have been adopting one of the objective test approaches, which only require the defendant to have knowingly made the statement (and, for the reasonable speaker test, that the defendant should have known of its threatening nature). According to this interpretation, the phrase "means to communicate" used by the Court in *Black* is synonymous with the "knowingly" intent standard, which simply requires that the "statement

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and did not meet any of its exceptions. *Black*, 538 U.S. at 380–82 (Souter, J., concurring in the judgment in part and dissenting in part).

[140] Further proceedings included the determination of whether the prima facie clause was severable from the rest of the statute and whether two of the defendants, Elliott and O'Mara, could be retried. *Black*, 538 U.S. at 367–68.

[141] See also Gey, A Few Questions, supra note 3, at 1294–95 ("Having found a First Amendment pigeonhole into which she could shove the speech at issue in the Virginia statute, Justice O'Connor chose not to investigate the nature of that pigeonhole or to analyze whether cross burning is analogous to other forms of speech already lodged in the 'true threats' slot.").

[142] *Black*, 538 U.S. at 359–60 ("The speaker need not actually intend to carry out the threat.").

[143] For the convenience of the reader, the Court's definitions of true threats and intimidation are reprinted here:

> "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. The speaker need not actually intend to carry out the threat. . . . Intimidation 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.

Id. at 359–60 (internal citations omitted) (emphasis added).

was not the result of mistake, duress, or coercion."[144] The definition's second clause, "a serious expression of an intent to commit an act of unlawful violence," could be interpreted as only necessitating a showing that the statement was objectively a "serious expression of an intent to commit an act of unlawful violence" (for instance, as understood by a reasonable person).[145] Furthermore, as noted above, the Court clearly rejected one of the two subjective tests—the specific intent to carry out the threat standard. This has led at least one commentator to assert that "the *Black* majority indicates that the relevant intent [for true threats] is merely the intent to utter whatever words are found to be threatening. . . . Thus, it is sufficient to satisfy the Constitution if the speaker intended to say the thing that created fear in a listener," even if he did not intend to create the fear.[146]

Although the constitutional concept of intimidation does include the specific intent to threaten standard, the Court stated that intimidation is merely a "*type* of true threat."[147] Thus, an objective test interpretation would posit that because intimidation is merely a type of true threat, the specific intent to threaten requirement does not necessarily apply to all true threats but only to all proscribable intimidation speech. Moreover, the Court was certainly aware of this subjective test and knew how to include it as a requirement (since it did so for intimidation). Consequently, if the Court wanted such a specific intent showing for all true threats, it could have easily said so. Instead, the Court provided no such requirement when it came to the definition of true threats. Finally, as was discussed earlier, the objective test approach (in one of its forms) was the predominant standard in *all* of the federal circuit courts. If the Court wanted to change the landscape of the juris-

[144] *Black*, 538 U.S. at 359; United States v. Hart, 457 F.2d 1087, 1090–91 (10th Cir. 1972) (emphasis omitted); see also supra notes 41–42 and accompanying text.

[145] *Black*, 538 U.S. at 359. For instance, a pre-*Black* court that adopted an objective test approach used strikingly similar language when articulating its own standard: "[a]ll the courts to have reached the issue [of the meaning of true threats] have consistently adopted an *objective test that focuses on whether a reasonable person would interpret the purported threat as a serious expression of an intent to cause a present or future harm*." Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (emphasis added).

[146] Gey, A Few Questions, supra note 3, at 1346.

[147] *Black*, 438 U.S. at 360 (emphasis added).

prudence so dramatically, and adopt a specific intent to threaten requirement, it would have done so in a more straightforward fashion. It is unlikely, according to this interpretation, that the Court would reject every circuit court's position in two sentences of fairly ambiguous language. For all these reasons, the Court's definition could be interpreted as espousing an objective test approach.[148]

Second, the Court could have been adopting the subjective "specific intent to threaten" standard for the entire category of true threats. This interpretation is based on a different understanding of the Court's use of the words "means to."[149] Instead of modifying only "communicate," it applies to the entire phrase "communicate a serious expression of an intent to commit an act of unlawful violence."[150] The defendant must intend to (mean to) communicate an expression which is threatening. In other words, he must have the specific intent to place the victim in fear of bodily harm or death. The constitutional meaning of "intimidation" requires such a showing of intent. As the Court explained, for speech to be proscribed as intimidating, the speaker must "direct[] a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm."[151] The Court also noted that intimidation is a "type of true threat."[152] From the perspective of the subjective test interpretation, this could mean that intimidation is a type of true threat *because* it requires the specific intent to threaten. According to this

[148] Even proponents of this interpretation, however, would be hard-pressed to determine the objective test, if any, for which the Court expressed a preference.

[149] The phrase "means to communicate" had only appeared in a Supreme Court reporter three times prior to *Black*. Notably, none of these instances were opinions of the Court. The phrase was used twice in dissenting opinions. See Metromedia v. San Diego, 453 U.S. 490, 555–56 (1981) (Burger, C.J., dissenting) ("Relying on simplistic platitudes about content, subject matter, and the dearth of other means to communicate, the billboard industry attempts to escape the real and growing problems . . . in protecting safety and preserving the environment in an urban area."); Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (1972) (Marshall, J., dissenting) ("It becomes harder and harder for citizens to find means to communicate with other citizens."). The third time the phrase appears in the reporter is during the description of defense counsel's oral argument. Smith v. Turner, 48 U.S. (7 How.) 283, 338 (1849). The opinion in *Black* was the only time the term "means" has referred to intent instead of capability or availability. Thus, prior Supreme Court usage provides no additional guidance as to the potential meaning of "means to communicate."

[150] *Black*, 538 U.S. at 359.

[151] Id. at 360.

[152] Id.

understanding, the unifying theme of true threats, in all its forms, would be the specific intent to threaten. For instance, harassment may be considered another form of a true threat, different from intimidation, but similar in that the speaker must have the specific intent to cause fear.[153] Furthermore, the Court clearly held that the other form of subjective intent, the specific intent to carry out the threat, was not required. If the Court wanted to make the same statement regarding the specific intent to threaten as it relates to true threats generally, it could have easily done so. Instead, the Court only rejected the specific intent "to carry out the threat" standard and included the specific intent to threaten standard for intimidation, a type of true threat.

Finally, the Court's distaste for the prima facie provision also suggests its preference for a specific intent standard that requires the showing of an intent to threaten for true threats. Although the prima facie clause was discussed in light of the Court's definition of intimidation, which clearly requires the intent to threaten, the language and tone of the opinion suggests a more expansive vision of Justice Marshall's subjective test. The plurality explains that its problem with the prima facie provision is that it fails to distinguish constitutionally protected speech from unprotected speech.[154] Accordingly, "the provision chills constitutionally protected political speech because of the possibility that the Commonwealth will prosecute—and potentially convict—somebody engaging only in lawful political speech at the core of what the First Amendment is designed to protect. . . . The First Amendment does not permit such a shortcut."[155] Even though such statements were made in the context of intimidation, the language certainly suggests a more expansive interpretation—one that requires that the specific intent to threaten be an element for all true threats, not just intimidation. Such inferences have convinced one commentator that "*Black* now

[153] The author is not aware of any such example of harassing speech being proscribed as a true threat; it is merely a hypothetical example.

[154] *Black*, 538 U.S. at 366 ("The prima facie provision makes no effort to distinguish . . . between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of *threatening* or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn.") (emphasis added). Here, the Court is clearly contrasting the case of Barry Black with that of Elliott and O'Mara.

[155] Id. at 365, 367.

confirms that proof of specific intent (aim) must be proved also in threat cases."[156]

The third possible interpretation of the true threats language in *Black* is basically no interpretation at all. This understanding suggests that the *Black* opinion has little application outside the context of cross-burning, intimidation, and content discrimination. The Court's opinion takes up six United States Reports pages discussing the history of cross burning,[157] four pages analyzing the statute in light of *R.A.V.* and its statements on content discrimination,[158] five pages scrutinizing the constitutionality of the prima facie provision,[159] and a single paragraph examining the meaning of true threats.[160] Because the decision did not require an in-depth analysis of true threats or a more thorough discussion of the doctrine's scope and content, the Court may not have been attempting to provide a complete definition of true threats, including what, if any, intent standard is constitutionally required. In order to decide the constitutionality of the statute, the Court needed only to decide the meaning of intimidation and whether the statute's selection of cross burning constituted impermissible content discrimination. In fact, any discussion of an intent standard for true threats could technically be classified as dictum. Thus, proponents of this interpretation believe that the Court was not trying to or did not definitively decide the issue of intent for true threats. As one observer, who would likely endorse this understanding, explained: "although the Supreme Court's decision in *Virginia v. Black* represents an expansion and enrichment in First Amendment analysis, this case should, and likely will, be restricted to its facts."[161] Given the prevalence of the objective intent standard before *Black*, this interpretation would not affect its pervasiveness.

Provided with a third opportunity to define the meaning of true threats and to establish a constitutionally required intent standard, the Court did not punt. However, this time it threw an incomplete

[156] Hartley, supra note 10, at 33.
[157] *Black*, 538 U.S. at 352–57.
[158] Id. at 360–63.
[159] Id. at 363–67.
[160] Id. at 359–60.
[161] Eric John Nies, Note, The Fiery Cross: *Virginia v. Black*, History, and the First Amendment, 50 S.D. L. Rev. 182, 217 (2005).

pass, failing to advance the issue beyond the original line of scrimmage.

IV. SO THE COURT SPOKE, BUT WHAT DID THE LOWER COURTS HEAR?

As discussed above, the lower courts charged with the task of interpreting *Black* had three viable options when it came to the constitutional intent standard for true threats. Each approach has found its adherents.

A. The Objective Test Interpretations

Following *Black*, the vast majority of courts continued to use one of the objective intent standards that saturated the pre-*Black* landscape. For some, the language in *Black* expressly sanctioned their traditional objective test approach. In *United States v. Ellis*, the defendant, who was charged with making a threat against the President, requested that the court interpret *Black* as establishing a subjective intent standard for true threats.[162] The court rejected the motion and held that the definition in *Black* was not inconsistent with the reasonable speaker test adopted by the Third Circuit a decade earlier in *United States v. Kosma*:

> While *Black* does appear to provide a definition of a "true threat," we do not agree with Defendant's interpretation of that definition. . . . The language [of the definition in *Black*] merely restates the Third Circuit's requirement that the speaker must have some intent to communicate the statement, meaning that the statement may not be a product of accident, coercion or duress.[163]

[162] No. CR. 02-687-1, 2003 WL 22271671, at *1 (E.D. Pa. July 15, 2003). The defendant claimed that "his actual intent was not to threaten, rather it was to communicate the symptoms of his mental illness for the purposes of getting treatment." Id.

[163] Id. at *4; see also United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991). The court in *Ellis* also made the following observations:

> In addition, the *Black* court specifically recognized that the speaker need not actually intend to carry out the threat. . . . As the Supreme Court pointed out, intimidating speech is only one type of "true threat." Obviously, the concerns when dealing with a statute that prohibits threats against the President of the

According to this court, *Black* was consistent with the reasonable speaker standard.

In *Porter v. Ascension Parish School Board*,[164] another court reached a similar conclusion. One of the issues was whether a student's drawing constituted a true threat or was protected speech. After holding that speech is unprotected as a true threat "if an objectively reasonable person would interpret the speech as a serious expression of an intent to cause a present or future harm," the court asserted that the speech must first be "knowingly communicated to either the object of the threat or a third person."[165] Thus, the court understood the language in *Black* to stand solely for the proposition that the speaker must have knowingly made the statement. After finding that the student did not knowingly communicate the drawing, the court held the speech to be protected by the First Amendment.[166]

This interpretation of *Black* has not been limited to federal courts. In *Citizen Publishing Co. v. Miller*, the Supreme Court of Arizona, in deciding whether a letter to the editor of a newspaper constituted a true threat, observed that an Arizona appellate court "has adopted a substantially similar test for determining a 'true threat' under the First Amendment" as the standard adopted in *Black*.[167] That approach was the reasonable speaker test. The court found that the letter was protected speech because it did "not believe that a reasonable person could view that letter as 'a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'"[168] The court simply

United States are quite different than the concerns when dealing with a cross burning statute.

Ellis, 2003 WL 22271671, at *4 (internal quotations omitted).

[164] 393 F.3d 608 (5th Cir. 2004).

[165] Id. at 616 (citing, inter alia, *Black*, 538 U.S. at 359) (emphasis and internal quotations omitted).

[166] Id. at 618.

[167] Citizen Publ'g Co. v. Miller, 115 P.3d 107, 114 (Ariz. 2005) (holding that "'true threats' are those statements made 'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or to take the life of [a person]'") (alteration in original) (quoting In re Kyle M., 27 P.3d 804, 808 (Ariz. Ct. App. 2001)).

[168] *Miller*, 115 P.3d at 115 (quoting *Black*, 538 U.S. at 359); see also Austad v. S.D. Bd. of Pardons & Paroles, No. 23914, 2006 WL 2036166, at *5 (S.D. July 19, 2006)

substituted the phrase "a reasonable person could view" in place of *Black*'s "means to communicate" and applied an objective intent standard.

Finally, the court in *United States v. Bly* recently opined that the language in *Black* not only supported an objective test but also explicitly rejected any specific intent requirement.[169] The court held that the Fourth Circuit's reasonable listener test was still the guiding precedent for determining whether speech constituted a true threat.[170] Responding to the defendant's motion that the definition in *Black* required a showing of specific intent, the court posited that such an interpretation was clearly incorrect. The court held that the government was not required "to allege an intent to intimidate or injure," adding, "*Black* could not be clearer on this point."[171] Notably, the court cites the *Black* opinion's rejection of *one* subjective intent standard, the intent to carry out the threat, as a signal that the Court rejected *both* specific intent tests—the intent to carry out the threat and the intent to threaten.[172]

In addition to these courts, which held that the *Black* definition affirmatively supported an objective intent standard, some courts have continued to apply the objective test by ignoring or minimizing the application of *Black* in their true threats analyses. Amazingly, the *Black* opinion is frequently left out of the true threats discussion. For instance, in *United States v. Fuller*, the Seventh Circuit extolled the virtues of an objective test for true threats in a case involving threats made against the President.[173] Although the court discussed *Watts*, it failed to even mention or cite the more re-

(quoting *Black* and applying the reasonable recipient objective test based on pre-*Black* Eighth Circuit precedent).

[169] No. CRIM. 3:04CR00011, 2005 WL 2621996, at *2 (W.D. Va. Oct. 14, 2005); see supra notes 4–7, 9 and accompanying text.

[170] *Bly*, 2005 WL 2621996, at *1.

[171] Id. at *2.

[172] Id. Another court has made the same assumption. In *Sheehan v. Gregoire*, the court held that "a true threat does not turn on the subjective intent of the speaker." 272 F. Supp. 2d 1135, 1141 (W.D. Wash. 2003) (citing *Black*, 538 U.S. at 359–60; Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1075–76 (9th Cir. 2002) ("It is not necessary that the defendant intend to, or be able to carry out his threat, the *only intent requirement* for a true threat is that the defendant intentionally or knowingly communicate the threat.")) (emphasis added).

[173] 387 F.3d 643, 646–48 (7th Cir. 2004).

cent *Black* opinion; it simply adopted the reasonable person standard, based on *Roy*, and upheld the conviction.[174] Opinions by the First,[175] Fourth,[176] and Eleventh[177] Circuits have all discussed the meaning of true threats without a single citation to *Black*. The same has occurred at the district court level as well.[178] Perhaps it is because these courts cannot confidently assert the meaning of the language in *Black* that they have instead relied on their respective jurisdiction's entrenched objective intent standard for guidance. Maybe these courts believe that *Black* only applies to cross burning or content discrimination and is not relevant in the context of threats against the President or other threatening speech. Perhaps they think the *Black* decision merely affirmed the use of an objective test and thus discussion or citation of it is unnecessary. Whatever the reason, a surprising number of courts have paid little, if any, attention to *Black* when discussing the meaning of true threats.

B. The Subjective Test Interpretation

In upholding its continued use of an objective intent standard, the aforementioned *Ellis* court asserted that there was "nothing in the *Black* opinion to indicate that the Supreme Court intended to overrule a majority of the circuits by adopting a subjective test when dealing with 'true threats.'"[179] Put another way, absent a clearer statement from the Court, the circuit courts will not change the firmly established precedent of their true threat jurisprudence,

[174] Id. at 646–48.

[175] See generally United States v. Nishnianidze, 342 F.3d 6, 15–17 (1st Cir. 2003) (applying the reasonable speaker objective test).

[176] See generally United States v. Lockhart, 382 F.3d 447, 451–52 (4th Cir. 2004) (comparing the *Watts* factors to the present circumstances in a prosecution for making threats against the President).

[177] See generally United States v. Alaboud, 347 F.3d 1293, 1297–98 (11th Cir. 2003) (applying the reasonable neutral test).

[178] See generally, e.g., United States v. Richards, 415 F. Supp. 2d 547 (E.D. Pa. 2005); United States v. Veliz, No. 03 CR. 1473, 2004 WL 964005 (S.D.N.Y. May 5, 2004); United States v. Oakley, No. CR. 02-123-01, 2003 WL 22425035 (E.D. Pa. May 30, 2003). Interestingly, Judge Surrick from the Eastern District of Pennsylvania wrote the opinion in both *Oakley* and *Richards*. He also authored the aforementioned *Ellis* decision. See supra notes 162–63 and accompanying text.

[179] United States v. Ellis, No. CR. 02-687-1, 2003 WL 22271671, at *4 (E.D. Pa. July 15, 2003).

namely the use of an objective intent standard. However, the Tenth Circuit did find that the Court clearly adopted a subjective intent standard in *Black* and changed its own approach accordingly. In *United States v. Magleby*, a decision that was briefly discussed at the outset of this Note, the court adopted Justice Marshall's specific intent test for true threats. The court stated that true threats, "[u]nprotected by the Constitution[,] . . . must be made 'with the intent of placing the victim in fear of bodily harm or death.' An intent to threaten is enough; the further intent to carry out the threat is unnecessary."[180] While the *Bly* court quoted from the language of *Black* that said the intent to carry out the threat was unnecessary, the *Magleby* court quoted from the intimidation definition that required the specific intent to place the victim in fear. Both courts extrapolated their respective definition of true threats from these different parts of the *Black* definition.[181]

C. The Ninth Circuit: A Locus for (and Microcosm of) Controversy

By this point, it seems cliché to use the Ninth Circuit as the premier example of the judicial split over the proper intent standard for true threats. Remember, it was the Ninth Circuit that produced both *Roy* (the foundational opinion for the reasonable speaker test)[182] and *Twine* (the lone pre-*Black* opinion to adopt Justice Marshall's specific intent to threaten standard);[183] the Ninth Circuit was also home to the sharply contested *Planned Parenthood* decision, which produced majority and dissenting opinions with starkly different approaches to the intent question.[184] Nevertheless, the Ninth Circuit's response to *Black* epitomizes the ambiguity of the

[180] United States v. Magleby, 420 F.3d 1136, 1139 (10th Cir. 2005) (quoting and citing *Black*, 538 U.S. at 359–60) (internal citations omitted); see also supra notes 8–9 and accompanying text.

[181] See id. at 1139; United States v. Bly, No. CRIM. 3:04CR00011, 2005 WL 2621996, at *2 (W.D. Va. Oct. 14, 2005); see also *Black*, 538 U.S. at 359–60.

[182] Roy v. United States, 416 F.2d 874 (9th Cir. 1969); see supra notes 53–56, 81–88 and accompanying text.

[183] United States v. Twine, 853 F.2d 676 (9th Cir. 1988); see supra notes 44–46, 73–77 and accompanying text.

[184] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002); see supra notes 106–20 and accompanying text.

Court's attempted definition and demonstrates how this lack of clarity continues to trouble the jurisprudence.

In *United States v. Lincoln*, the Ninth Circuit applied its deeply-rooted reasonable speaker test in a prosecution for a threat made against the President.[185] Like some of the courts mentioned above, the court in *Lincoln* did not refer to the *Black* decision when discussing the meaning of "true threats."[186] Instead, it applied an objective intent standard and held that the letter in question did not constitute a true threat.[187] Interestingly, the author of the *Lincoln* opinion was Judge Rawlinson. She was the only judge on the panel who participated in the *Planned Parenthood* en banc decision. In that case, she joined the majority opinion, which adopted an objective intent approach.[188]

The Ninth Circuit panel that decided *United States v. Cassel* also had a single alumnus from the *Planned Parenthood* decision, Judge O'Scannlain.[189] Unlike Judge Rawlinson, Judge O'Scannlain dissented in *Planned Parenthood*.[190] Filed less than two months after *Lincoln*, the *Cassel* opinion, written by Judge O'Scannlain, adopted an entirely new approach to the meaning of true threats. After acknowledging that true threats are unprotected by the First Amendment, the court made the following observations:

> We are . . . faced with the question whether intent to threaten the victim is required in order for speech to fall within the First Amendment exception for threats. . . . [T]he disputed question is whether the government must prove that the defendant intended his words or conduct to be understood by the victim as a threat. [Defendant] argues that it must. The government's position is that mere negligence with regard to the victim's understanding is enough: in other words, speech is punishable if a reasonable person would understand it as a threat, whether or not the speaker meant for it to be so understood.[191]

[185] 403 F.3d 703, 706 (9th Cir. 2005) (relying on *United States v. Hanna*, 293 F.3d 1080, 1084 (9th Cir. 2002)).

[186] The court did mention *Watts*, however. Id. at 706–07.

[187] Id. at 706–08.

[188] *Planned Parenthood*, 290 F.3d at 1062.

[189] United States v. Cassel, 408 F.3d 622, 624 (9th Cir. 2005).

[190] *Planned Parenthood*, 290 F.3d at 1089, 1101.

[191] *Cassel*, 408 F.3d at 627–28.

Thus, the court signaled its intention to address the constitutional issue which has consumed this Note—a question the Ninth Circuit evaded when it first decided the issue in *Roy*.[192]

Although it recognized that, with the exception of *Twine* and its progeny, the Ninth Circuit had traditionally applied the reasonable speaker test, the *Cassel* panel asserted that *Black* was now the guiding precedent. After quoting *Black*'s definition of true threats and intimidation, the panel interpreted the Court's language to mean that "only *intentional* threats are criminally punishable consistently with the First Amendment. . . . A natural reading of [the Court's] language embraces not only the requirement that the communication itself be intentional, but also the requirement that the speaker intend for his language to *threaten* the victim."[193] Noting that the "Court laid great weight on the intent requirement" in *Black*, the *Cassel* panel held that it must "conclude that the same principle governs in the case before us."[194] Recognizing that the adoption of a specific intent to threaten subjective test conflicted with some of the circuit's previous decisions, the court simply observed that the Supreme Court's "definition of a constitutionally proscribable threat is, of course, binding," and therefore the court was "bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."[195]

In a span of forty-five days (the length of time between the *Lincoln* and *Cassel* decisions), the Ninth Circuit had seemingly made a

[192] See supra note 82 and accompanying text.

[193] *Cassel*, 408 F.3d at 631 ("The Court's insistence on intent to threaten as the *sine qua non* of a constitutionally punishable threat is especially clear from its ultimate holding that the Virginia statute was unconstitutional precisely because the element of intent was effectively eliminated by the statute's provision rendering *any* burning of a cross on the property of another prima facie evidence of an intent to intimidate.") (internal quotations omitted).

[194] Id. at 631–33.

[195] Id. at 633. The court attempted to reconcile its holding with the *Lincoln* decision, which was decided only weeks earlier, in a footnote: "Because *Lincoln* merely applied longstanding precedent and did not raise or consider the implications of *Virginia v. Black*, it does not constrain our analysis in this case." Id. at 633 n.9. Similarly, the court reconciled its opinion with some of those discussed earlier, which held that *Black* affirmed the use of an objective test, by stating that "it appears that no other circuit has *squarely addressed* the question whether *Black* requires the government to prove the defendant's intent." Id. at 633 n.10 (emphasis added).

180-degree turn on the issue of intent. Forty-two days later, the Ninth Circuit made another about-face. In *United States v. Romo*, a case involving a conviction for threats made against the President, the court revisited the meaning of true threats.[196] Instead of applying the specific intent standard seemingly required by *Cassel*, the court applied its familiar reasonable speaker objective test and explained the limited reach of *Cassel* in a footnote:

> The recent decision in *United States v. Cassel* does not change our view. *Cassel* leaves untouched the reasonable person analysis for presidential threats because it did not address whether statutes like 18 U.S.C. § 871(a) require intent. Because [the defendant] has not raised First Amendment issues and *Cassel* does not alter the analysis of presidential threats, we employ the decades-old [*Roy*] approach to analyzing threats under 18 U.S.C. § 871(a).[197]

But the Ninth Circuit did not rest with its decision in *Romo*. In *United States v. Stewart*, a case heard by the same panel which decided *Cassel*, the court attempted to reconcile the circuit's most recent true threat opinions.[198] The defendant was convicted for making a threat against a federal judge, and one of the issues before the court was whether his speech was constitutionally protected.[199] The court compared the contradictory holdings in *Cassel* and *Romo* and, as would be expected given the panel's membership, had doubts about "*Romo*'s continued use of the objective 'true threat' definition" in light of "*Black*'s subjective 'true threat' definition."[200] Instead of resolving the conflicting approaches, the court took a page from the Supreme Court's playbook and punted: "Nonetheless, we need not decide whether the objective or subjective 'true threat' definition should apply here. That is because the evidence establishes that [the defendant's] statement was a 'true threat' under either definition and thus is not protected by the First

[196] 413 F.3d 1044, 1051 (9th Cir. 2005). This panel had no members from the en banc *Planned Parenthood* decision.

[197] Id. at 1051 n.6 (internal citations omitted).

[198] 420 F.3d 1007, 1016–19 (9th Cir. 2005).

[199] Id.

[200] Id. at 1018.

Amendment."[201] Put simply, the court threw up its hands and declared, at least temporarily, an intra-circuit truce.

V. WHAT SHOULD THE INTENT STANDARD BE?: A NORMATIVE ANALYSIS

As evidenced by the back-and-forth of the Ninth Circuit, there is still a need, even after *Black*, for a clear and consistent approach to the intent standard of true threats. While the best interpretation of *Black* seems to be that the specific intent to threaten is required for all true threats, not just intimidation, the Court's inability to clearly articulate an intent standard has allowed a potpourri of mens rea approaches to persist in the lower courts.[202] Regardless of what the Court's aims in *Black* truly were, the disparate treatments (and interpretations) by the lower courts indicate that the Court must revisit the meaning of true threats, and the question of intent, sometime soon. When that time arrives, what intent standard should the Court adopt? This Part will examine the normative arguments of each approach and argue that for all true threats the Court should require the same subjective intent standard it adopted for intimidation—the specific intent to threaten the recipient or victim.

True threats, like any of the "*Chaplinsky* exceptions" to the First Amendment, should be defined with both the values underlying free speech and the reasons for proscribing the category in mind. This much is not controversial. As the Court noted in *Black*, "[t]he 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 discomforting."[203] These principles must be bal-

[201] Id.

[202] Some commentators have been even more critical of the Court's failure to clearly define the meaning of true threats. For example, in a sharp critique, Professor Gey states that "we have no way of knowing exactly what *Black* portends for free speech because (to put the matter unkindly) Justice O'Connor's opinion in the cross burning case borders on the incoherent. The Court sends several different messages about free speech in *Black*, many of which contradict each other." Gey, A Few Questions, supra note 3, at 1287–88; see also Martin, supra note 10, at 290–91 ("Unfortunately, the Court [in *Black*] did not delineate the border between true threats and protected speech . . . [and thus] avoided the precarious task of defining the outer reaches of the true threats doctrine.").

[203] *Black*, 538 U.S. at 358; 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

anced against the motives for prohibiting threatening speech: "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[204] It was an attempt to achieve such a balance that originally animated the conception of the term "true threats."[205] For reasons that will be elaborated further, the subjective test that requires the specific intent to threaten achieves the optimal balance.

Since the Ninth Circuit's 1969 decision in *Roy*, the objective intent test has been the prevailing standard.[206] In *United States v. Kosma*, the Third Circuit provided a particularly thorough, and fairly representative, justification for the objective intent approach to true threats. "[M]indful of the potential difficulties in distinguishing between constitutionally protected political speech and unprotected threats,"[207] the court offered two generally accepted reasons for why the objective intent approach is superior. First, the objective intent test "best satisfies the purposes" of punishing threatening speech "since it recognizes the power of a threat to hinder . . . even when the threatmaker has no intention of carrying

itself offensive or disagreeable."); see generally N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (extolling the importance of protecting speech even if it contains factual errors or defamatory content because of the need for promoting vigorous and open debate in public discourse).

[204] R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992); see also *Black*, 538 U.S. at 360; supra notes 21–24 and accompanying text.

[205] See Watts v. United States, 394 U.S. 705, 708 (1969) (noting that "we must interpret the language Congress chose against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" and that political language "is often vituperative, abusive, and inexact") (internal quotations and citations omitted).

[206] See supra notes 81–88 and accompanying text.

[207] United States v. Kosma, 951 F.2d 549, 553 (3d Cir. 1991). While *Kosma* deals with a prosecution under 18 U.S.C. § 871 for threats made against the President, and thus its rationales are tailored to such a prosecution, its reasoning for the superiority of an objective intent approach is consistent with the justifications courts and commentators give for objective intent tests generally, regardless of who the victim or recipient of the alleged threat is. Furthermore, as noted earlier, with the exception of the Ninth Circuit, every circuit that has adopted an objective intent approach has applied that standard across-the-board to all contexts of threatening statements. See supra note 75. Because this author agrees that the same intent standard should be used for all true threats, the respective merits of the objective and subjective intent approaches will be analyzed regardless of whether the victim is the President or a private person.

out the threat and there is no actual danger."[208] Because "[t]he *threat alone* is disruptive of the recipient's sense of personal safety and well-being," the court argued that one subjective intent standard, the specific intent to carry out the threat test, was inappropriate.[209]

Having dismissed the requirement of a specific intent to carry out the threat, the court in *Kosma* addressed the second subjective standard, the specific intent to threaten test, and supplied another popular reason for preferring an objective intent approach. The court considered and rejected the specific intent to threaten standard, first articulated by Justice Marshall in *Rogers*, because this "subjective test makes it considerably more difficult for the government to prosecute threats."[210] Moreover, "any subjective test potentially frustrates the purposes" of preventing true threats because it "make[s] prosecution of these threats significantly more difficult."[211] Thus, according to *Kosma* and other objective intent opinions, the specific intent to threaten should not be required.

Supporters of an objective intent standard correctly reject the subjective test which requires the defendant to have intended to carry out the threat. As noted in *Kosma*, such a standard ignores the harms associated with threatening speech, such as fear and disruption. The speaker need not intend to carry out his threat in order for his words to have a deleterious effect. Put simply, threats are not, and should not, be considered inchoate crimes. Thus, most courts, including the Supreme Court, have rightly held that "[t]he speaker need not actually intend to carry out the threat" in order for the communication to constitute a true threat.[212]

When it comes to the specific intent to threaten subjective test, however, the majority of courts have missed the mark. Although

[208] *Kosma*, 951 F.2d. at 557.

[209] Id. (internal quotations omitted) (alteration in original); see also United States v. Aman, 31 F.3d 550, 555 (7th Cir. 1994) (stating that the objective standard best accomplishes the aim of preserving the recipient's sense of personal safety).

[210] *Kosma*, 951 F.2d at 556–58 (citing Rogers v. United States, 422 U.S. 35, 48 (1975) (Marshall, J., concurring)).

[211] Id. at 558. As one commentator stated, concurring with this justification for rejecting the specific intent to threaten, "a subjective speaker-based test could overburden prosecutors by requiring an extremely high standard of proof." Strauss, supra note 10, at 263–64.

[212] *Black*, 538 U.S. at 359–60.

an objective test secures the purposes of regulating threats, it does not properly balance those concerns with the values of the First Amendment. In fact, the foundational opinion for the reasonable speaker test, the Ninth Circuit's decision in *Roy*, did not even consider the First Amendment implications of its interpretation.[213] Because it undervalues the tenet that language which is "vituperative, abusive, and inexact" may still be protected under the First Amendment,[214] the objective intent standard, in each of its forms, is over-inclusive when it comes to prohibiting threatening speech. By focusing on how a reasonable person may react, the objective approach severely discounts the speaker's general First Amendment right to communicate freely, even if that means using language which a reasonable person might find disagreeable. The Court clearly stated this principle in *Black* when it opined, "[t]he 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 discomforting."[215] By ignoring the intent of the speaker, an objective test runs the risk of punishing crudely worded ideas; conversely, a subjective test provides a better line of demarcation between ideas and threats. If the speaker did not intend for his communication to be threatening, it is much more likely that he intended to communicate an idea, even if he did so using what a reasonable person would consider abrasive or offensive language.

As Justice Marshall explained in his concurrence in *Rogers*, "[i]n essence, the objective interpretation embodies a negligence standard, charging the defendant with 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" because it "would have substantial costs in discouraging the uninhibited, robust, and wide-open debate that the First Amendment is intended to protect."[216] Because an objective test makes the intent of the speaker irrelevant, a speaker who does not intend for his communication to be threatening, but fears that some may interpret it as so, will not engage in such expression. Consequently,

[213] See supra notes 81–93 and accompanying text.
[214] Watts v. United States, 394 U.S. 705, 708 (1969).
[215] *Black*, 538 U.S. at 358.
[216] Rogers v. United States, 422 U.S. 35, 47–48 (1975) (Marshall, J., concurring) (internal citations and quotations omitted).

speakers who do not intend for their speech to be threatening will still censor themselves, fearful that a reasonable person may construe the communication as threatening. Put simply, an objective standard chills speech.

Like an objective intent standard, Justice Marshall's subjective test protects against the harms caused by threatening speech. Unlike the objective intent approach, however, it properly balances this goal against the values of free expression. Instead of simply prohibiting speech based on the reaction it incurs, this subjective intent standard punishes the speaker who intends to create the harms of threatening speech, be it fear, disruption, or the threat of violence. Under the First Amendment, this is a much better approach. By requiring a specific intent to threaten, a speaker who wishes to bring about the harms associated with threatening speech will be punished; at the same time, the speaker who had no such intention will be given the necessary "breathing space" to speak freely and openly.

There are two common and related criticisms to this subjective intent approach. First, objective intent proponents, such as the court in *Kosma*, claim that a subjective intent test will increase the prosecutor's burden. This, however, is not a legitimate reason for rejecting a subjective standard. If anything, the burden on the prosecutor should be heightened when the regulation of pure speech is involved. Furthermore, the purpose of criminalizing any form of conduct, including speech, is not to ease the prosecutor's burden but to prohibit conduct society finds worthy of punishment.

Second, critics of the specific intent to threaten standard have argued that such an approach should not be adopted because it "would allow carefully crafted statements by speakers who actually intend to threaten to go unpunished."[217] Even if this were true, such criticism does not merit the rejection of this subjective intent test. In the vast majority of cases, if a statement seems clearly threatening, it will be difficult for the defendant to plausibly explain how his communication was not intended to be threatening. For instance, in *United States v. Bly*, the defendant sent several threatening letters and emails to University of Virginia employees follow-

[217] Strauss, supra note 10, at 263.

ing his termination from a graduate program. One such communication said the following:

> It would be a damn shame if the only way I could obtain justice in this element of class warfare is to kill Dr. Rydin. This is not venting. I promise you, this is DEADLY SERIOUS. Please get your ass in gear so I am not left with retribution, retaliation, and vigilante justice as the only justice available to me. NO JOKE. . . . Remember my belief in bullets as the ultimate backup for futile dialogue.[218]

In cases such as this, any attempt by the defendant to explain the intent of his communication as non-threatening would most likely be laughable and unbelievable. Only in cases at the proverbial margin, where the line between protected idea and punishable threat is more thinly sliced, will the application of the specific intent to threaten standard potentially lead to a different outcome than if an objective test were applied.

For example, in *United States v. Rogers*, the case in which Justice Marshall introduced the specific intent to threaten standard in a concurring opinion (the Court reversed the conviction on other grounds), the defendant was prosecuted for making threats against President Nixon. After walking into a coffee shop, the defendant "accosted several customers and waitresses, telling them, among other things, that he was Jesus Christ and that he was opposed to President Nixon's visiting China because the Chinese had a bomb that only he knew about, which might be used against the people of this country."[219] During these outbursts, the defendant "announced that he was going to go to Washington to 'whip Nixon's ass,' or to 'kill him in order to save the United States.'"[220] After local police were notified of the disturbance and threatening remarks, the defendant was questioned about his behavior. Asked if he had threatened the President, the defendant "replied that he didn't like the idea of the President's going to China and making friends with the Chinese." He then said, "'I'm going to Washington and I'm going

[218] United States v. Bly, No. CRIM. 3:04CR00011, 2005 WL 2621996, at *1 n.1 (W.D. Va. Oct. 14, 2005) (alteration in original).

[219] *Rogers*, 422 U.S. at 41–42 (Marshall, J., concurring).

[220] Id. at 42.

to beat his ass off. Better yet, I will go kill him.'"[221] Rogers was prosecuted for making threatening statements against the President and was later convicted after a jury trial; the circuit court affirmed the conviction. At his trial, the judge instructed the jury that it should convict if the reasonable speaker objective test was met.[222]

It is hard to know whether Rogers would still have been convicted if the specific intent to threaten subjective test was used instead of the reasonable speaker standard. However, it seems at least plausible that given the context of his threatening statements (his disapproval of President Nixon's visit to China), his remarks were nothing more than crude political statements of the sort that were protected in *Watts*. However, it is also possible that he actually intended to threaten the President. The point is that an objective intent test fails to distinguish between these two situations, rendering the speaker's actual intent immaterial. All that matters under an objective standard is whether a reasonable person would have construed the statement as threatening. Conversely, the specific intent to threaten standard inquires into the speaker's motive, distinguishing between these two possible explanations of the speaker's intent.

It must be emphasized that the use of a subjective intent test does not mean the defendant will automatically go free; instead, it will simply permit the speaker an opportunity to explain his statement—an explanation that may shed light on the question of whether this communication was articulating an idea or expressing a threat.[223]

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[221] Id.

[222] Id. at 43–44 ("[T]he jury was permitted to convict on a showing merely that a reasonable man in petitioner's place would have foreseen that the statements he made would be understood as indicating a serious intention to commit the act.").

[223] Another way the use of a subjective intent standard could potentially lead to a different result than an objective intent test is that defenses based on mental incompetence (or voluntary intoxication) would be permissible. For instance, in *United States v. Richards*, 415 F. Supp. 2d. 547, 551 (E.D. Pa. 2005), a defendant with "evident" mental health problems was prosecuted for making threatening statements against an immediate family member of a former President (former First Lady and current Senator Hillary Clinton). In line for dinner at a homeless shelter, the defendant said, apparently to no one in particular but loud enough for most in the room to hear, "I'm gonna [sic] put two bullets in her, gonna [sic] put two bullets into Hillary Clinton." Id. at 549. The defendant was later involuntarily committed to a mental health clinic. However, as the court implicitly recognized, a defense based on mental defect would

Any time the government must prove a specific intent element, society runs the risk of its craftiest criminals escaping conviction. This risk does not mean, however, that we should limit our mens rea options to general intent (negligence and recklessness, for example). Instead, the legal system, as it always does, must rely on the jury (or judge in a bench trial) to make judgments as to whether the defendant is telling the truth about his intent. By requiring a subjective intent, the government can still secure a conviction for blatant threats. The only significant difference is that under a subjective test, the defendant can legitimately argue that he did not mean to threaten the recipient; under an objective test, he is limited to arguing how a reasonable person should have understood his communication. When pure speech is punished, the speaker's intent should matter.[224] Moreover, the results in the easy cases would not change. As even the court in *Kosma* admitted, the adoption of a "subjective 'knowingly' standard would probably not open the floodgates to threats" going unpunished.[225] The only area that would likely see a difference is at the edge. In those close-call situations, however, it is much better to let the "crafty criminal" go free than to imprison the innocent speaker whose words unintentionally seemed threatening to a "reasonable person." Otherwise, speech, especially at the fringe, will be unnecessarily chilled.[226]

only be permissible under a subjective intent test. Id. at 551; see also supra notes 44–47 and accompanying text.

[224] The First Amendment's incitement exception provides an apt analogy. In that context, the Court has 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." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasis added). *Brandenburg* was decided less than two months after *Watts*.

[225] United States v. Kosma, 951 F.2d 549, 558 (3d Cir. 1991).

[226] The Court has taken a similar approach when it comes to the First Amendment overbreadth doctrine. Fearful that overbroad statutes would inappropriately chill speech, the Court has allowed defendants, whose conduct is not necessarily constitutionally protected, to make facial challenges to statutes which may chill the speech of others, even if not their own. In effect, the Court has let the "uncrafty criminal" go free in order to secure sufficient free speech protection for others whose speech may be chilled as a result of an otherwise permissible prosecution. For a discussion of the First Amendment overbreadth doctrine, see Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 184–99 (5th ed. 2003).

Instead of letting the reasonable person decide what constitutes a true threat, only those speakers who intended for their communication to be threatening should be punished for their speech. As the Court famously explained, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process."[227] A speaker should not become a criminal simply because of the effect of his words; only when the speaker has the specific intent to threaten should he be punished for making a true threat.

CONCLUSION

For now, the *Black* opinion has had a limited influence on the jurisprudence of true threats and the issue of intent. After quoting the definition provided in *Black*, the district court in *United States v. Carmichael* explained that "[t]he Supreme Court has not settled on a definition of a 'true threat.'"[228] If anything, the *Black* decision further muddied the area by suggesting, at least to some, that the specific intent to threaten was constitutionally required—a requirement that enjoyed little support in the jurisprudence before April 2003.

At this point, only two things seem clear. First, absent a stronger statement from the Court in support of a subjective standard, the objective intent approach will continue to reign supreme. This, unfortunately, means speech will continue to be chilled in the name of precedent and prosecutorial burden. Second, given the range of reactions to *Black*, the Court will have to revisit the meaning of true threats and the issue of intent. When it does, we can only hope it is more successful at clearly defining the doctrine than it has been in the past. Until then, it will be fourth down and goal to go.

[227] Cohen v. California, 403 U.S. 15, 26 (1971).

[228] United States v. Carmichael, 326 F. Supp. 2d 1267, 1280 (M.D. Ala. 2004) (applying the reasonable neutral test for the meaning of true threats).