The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment Rights in the New Era of Communication

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ELONIS v. UNITED STATES

THE DOCTRINE OF TRUE THREATS: PROTECTING OUR EVER-SHRINKING FIRST AMENDMENT RIGHTS IN THE NEW ERA OF COMMUNICATION

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

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

A. **HYPOTHETICAL THREAT PROSECUTION**

Picture the following scenario. Your wife has cheated on you, and tensions have been running high since you have split. Several times she has called law enforcement on you and has obtained a restraining order. You’re angry. You have always expressed your emotions through writing song lyrics. In fact, you have a Facebook page on which you often post these lyrics. In your frustrated mindset, you feel that you could channel this emotion into some lyrics. After you’ve completed your post, you click enter and post the words to your Facebook wall.

Weeks later, you receive notice that you are being sued under 33 U.S.C. § 875(c) for transmitting through interstate commerce communication containing a

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\(^1\) U.S. Const. amend. I.

\(^2\) *Virginia v. Black*, 538 U.S. 343, 358 (2003) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)); see also *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).


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

### B. The True Threat Doctrine

In *Elonis v. United States*, the Supreme Court granted certiorari to address whether the “conviction of threatening another person under 18 U.S.C. § 875(c) requires proof of the defendant’s subjective intent to threaten.”\(^7\) Though the Court is examining the issue under a particular statute, it is likely that the decision will be uniformly applied to other statutory prohibits on threats by way of the “true threat” doctrine.\(^8\)

But what is a "true threat"? A “true threat” is a statement “where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”\(^9\) A speaker need not actually intend to carry out the threat for it to be a “true threat.”\(^10\) Additionally, “[i]ntimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”\(^11\)

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

\(^6\) 134 S.Ct. 2819 (2014).

\(^7\) Id.

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

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

\(^10\) Id. at 360.

\(^11\) Id.
What was once a seemingly straight-forward principle has now been muddled by Supreme Court opinions and lower courts' interpretations of those opinions. The freedom of speech is the foundational threshold of our constitutional rights; however, that foundational right has been chipped away throughout the years by various exceptions limiting what speech is protected.

The confusion surrounding “true threats” arises when we look to determine what intent is necessary for a true threats conviction. Is a subjective test to be used, in which the court examines whether the speaker intended to threaten? Or should an objective test be used, in which a person may be found guilty regardless of his intent if a person is reasonable in perceiving the communication as a threat? The Supreme Court should correctly clarify the issue in its holding when it decides Elonis v. United States. Requiring courts to consider subjective intent in the true threat analysis is necessary to protect the many First Amendment infringements that would occur otherwise.

C. UNITED STATES V. ELonis

In United States v. Elonis, the Third Circuit analyzed a series of behaviors leading to the arrest of Mr. Elonis.12 Mr. Elonis was fired from his job following sexual harassment complaints and an altercation at the Halloween party.13 Following his job termination, he posted an alleged threat on his Facebook page.14 Numerous posts were also made about his wife, namely stating “someone out there should kill my wife,” “hurry up and die,” and “fold up you PFA and put it in your pocket [i]s it thick enough to stop a bullet?” Mr. Elonis also made a post alluding to the fact that he may be planning to target an elementary school stating, “hell hath no fury like a crazy man in a kindergarten class.”16 Lastly, he posted a threat to FBI after they visited his home for questioning.17 These posts were the basis for Mr. Elonis’s arrest.18

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13 Id. at 324.
14 Id.
15 Id. at 324-26.
16 Id. at 326.
17 Id.
18 Id. (“Count 1 threats to patrons and employees of Dorney Park & Wildwater Kingdom, Count 2 threats to his wife, Count 3 threats to employees of the Pennsylvania State Police and Berks County Sheriff’s Department, Count 4 threats to a kindergarten class, and Count 5 threats to an FBI agent.”); See Appendix (full text available of all threats).
The Third Circuit, in examining whether to convict Mr. Elonis, cited precedent which stated that a true threat is one in which “a reasonable speaker would foresee the statement would be interpreted as a threat.”\textsuperscript{19} However, the court reevaluated its decision in light of the Supreme Court’s holding in \textit{Virginia v. Black}.\textsuperscript{20} After evaluating the \textit{Black} opinion, the Third Circuit held that the Court did not intend to make a holding broad enough to require a court to find subjective intent for a true threat conviction.\textsuperscript{21} To read it as such “would require adding language the Court did not write to read the passage as ‘statements where the speaker means to communicate [and intends the statement to be understood as] a serious expression of an intent to commit an act of unlawful violence.’”\textsuperscript{22} The Third Circuit further stated that the communications could be considered threats even though some of them were not expressly threatening and some of them were conditional.\textsuperscript{23}

Mr. Elonis’s case is one of many cases surfacing in courts across the nation involving a person whose communication is misinterpreted, leading a conviction of transmitting a threat. Mr. Elonis, along with other defendants like him, are calling for courts to require a subjective intent in order to convict a person of transmitting a true threat. The Supreme Court now has a chance to give such defendants the definitive answer they desire.

\textbf{II. True Threat Doctrine Jurisprudence}

Arguments regarding the standard to be used in analyzing threats can be traced as far back as the early twentieth century.\textsuperscript{24} Judge Learned Hand advocated that only an objective test focusing on the actual content of the speech should be employed.\textsuperscript{25} Conversely, Justice Holmes believed the subjective intent of the

\begin{itemize}
  \item \textsuperscript{19} \textit{Elonis}, 730 F.3d at 323 (citing \textit{United States v. Kosma}, 951 F.2d 549, 557 (3d Cir. 1991).
  \item \textsuperscript{20} 538 U.S. at 359 (“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.).
  \item \textsuperscript{21} \textit{Elonis}, 730 F.3d at 329.
  \item \textsuperscript{22} \textit{Id.} (quoting \textit{Black}, 538 U.S. at 359).
  \item \textsuperscript{23} \textit{Id.} at 334.
  \item \textsuperscript{24} Scott Hammack, \textit{The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts’ Approach to True Threats and Incitement}, 36 Colum. J.L. & Soc. Probs. 65, 66 (Fall 2002).
  \item \textsuperscript{25} Hammack, \textit{supra} note 24, at 69 (citing \textit{Masses Publ’g Co. v. Patten}, 244 F. 535 (S.D.N.Y. 1917)).
\end{itemize}
speaker should also hold a role in determining whether speech is a threat. Justice Holmes announced the clear and present danger test in *Schenck v. United States*, which protected political advocacy unless the advocacy produced a “clear and present danger of bringing about a substantive harm.”

This test governed for nearly half a century, until the true threats doctrine was articulated by the Supreme Court.28

A. Supreme Court of the United States

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

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

The Court also ruled on another seminal case the same year as *Watts*. In *Brandenburg v. Ohio*, the Court examined free speech in the context of “incitement.” The Court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or

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26 Hammack, *supra* note 24, at 69 (citing *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting)).
27 Hammack, *supra* note 24, at 69 (citing *Schenck*, 249 U.S. 47, 52 (1919)).
30 *Id.* at 706.
31 *Id.*
32 *Id.* at 705, 707.
33 *Id.* at 708.
34 315 U.S. 568, 573 (1942).
producing imminent lawless action and is likely to incite or produce such action."36 "[T]he mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."37

The Court later reiterated the broad protection afforded by the First Amendment in *NAACP v. Claiborne Hardware Co.*38 There, the Court held that abrasive and violent words spoken at a rally were protected under the First Amendment. The "mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment."39 The Court further emphasized the important policy behind protecting such speech.

Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."40

For years after the *Watts* decision, courts seemed to almost unanimously hold that an objective test was required under the true threat analysis, which would ask if a reasonable person would perceive the communication as a threat.41

36 *Id.* at 447.
37 *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-298 (1961)).
39 *Id.* at 921 (citing *Brandenburg*, 395 U.S. at 447).
40 *Id.* at 928 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).
41 See e.g. *United States v. Kosma*, 951 F.2d 549, 557 (3d Cir. 1991) (would an objective reasonable person perceive the communication as a threat); *United States v. Darby*, 37 F.3d 1059, 1066 (4th Cir. 1994) ("Whether a communication in fact contains a true threat is determined by the interpretation of a reasonable recipient familiar with the context of the communication."); *United States v. Miller*, 115 F.3d 361, 363 (6th Cir. 1997) ("if a reasonable person would foresee that an objective rational recipient of the statement would interpret its language to constitute a serious expression of intent to harm"); *United States v. Berrichard*, 994 F.2d 1318, 1323 (8th Cir. 1993) ("If a reasonable recipient, familiar with the context of the communication, would interpret it as a threat, the issue should go to the jury."); *United States v. Sovie*, 122 F.3d 122, 125 (2d Cir. 1997) (whether an ordinary, reasonable recipient who is familiar with context of threat would interpret it as threat of injury); *United States v. Viehau", 168 F.3d 392, 396 (10th
They differed only in their nuances of how to apply the objective test. One court found that the focus should be on the speaker, and the court should analyze whether a reasonable speaker would perceive that a listener would perceive the communication as a threat. However, the remainder typically only asked whether the recipient was reasonable in perceiving the speech as a true threat. As a result, the speaker was at the mercy of the listeners and their interpretation of his speech.

The issue of true threats again caught the Supreme Court’s attention in 2003. Two cases regarding similar situations were before the Supreme Court on petition for certiorari. One case involved communication in an anti-abortion campaign, which allegedly constituted a true threat. Another involved two consolidated cases in which two men had been convicted under a Virginia statute proscribing the burning of crosses because they conveyed intent to intimidate.

The anti-abortion campaign case, Planned Parenthood of the Columbia/Willamette, Inc, v. Am. Coalition of Life Activists (Planned Parenthood), presented an ideal set of facts for the Court to address the issue; however, the Court declined to hear the case.

In Planned Parenthood, the American Coalition of Life Activists (ACLA) posted several anti-abortion campaigns, two of which were particularly shocking. The “Deadly Dozen” posted thirteen doctors and their private information along with a heading of “GUILTY.” The “Nuremberg Files” posted about 200 names of people associated with abortions, and they were color coded as follows: black font meant they were still working, grey font meant they were wounded, and a strikethrough meant they were deceased. The court noted that “while advocating violence is protected, threatening a person with violence is

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42 United States v. Merrill, 746 F.2d 458, 462 (9th Cir. 1984).
46 Planned Parenthood, 290 F.3d at 1064.
47 Id. at 1064-65.
48 Id. at 1065.
not."

49 If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected. 50

In deciding the issue, the court cited its own precedent and applied the reasonable speaker test: “Whether a particular statement may properly be considered to be a threat is governed by an objective standard -- whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.” 51 The court further included in its analysis the subjective intent to intimidate, which was required by the statue at issue. 52

This case presented an opportunity for the Supreme Court to clarify its position on what analysis courts should use in determining whether communication is a true threat; however, the Court denied certiorari. 53 Rather, the Supreme Court chose to address the issue of intent and true threats under the context of Virginia v. Black. 54 The problem that developed after this holding was that the issue at hand did not truly turn on whether subjective or objective intent was required in analyzing true threats. Rather the court examined the constitutionality of a Virginia statute, which criminalized the act of burning a cross and found that burning a cross would be prima facie evidence of intent to intimidate. 55

The Virginia statute at issue was as follows: “It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross . . . . Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” 56

In Black, the Court stated, “Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate.” 57 The Court stated that the doctrine of true threats will “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” 58 The purpose of the prohibition is to protect individuals from fear of violence and the associated disruption; therefore, there is no requirement that

49 Id. at 1071 (citing Brandenburg, 395 U.S. at 447).
50 Id. at 1071.
51 Id. at 1074 (quoting United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990)).
52 Id. at 1080.
55 Black, 538 U.S. at 348.
56 Id. at 348.
57 Id. at 362.
58 Id. at 359.
the speaker actually intend to carry out the threat.\textsuperscript{59} Intimidation is constitutionally proscribable “where a speaker directs a threat to a person or group of persons \textit{with the intent} of placing the victim in fear of bodily harm or death.”\textsuperscript{60} Furthermore, the Court found that the Virginia statute would not violate the First Amendment “insofar as it bans cross burning \textit{with intent to intimidate}.”\textsuperscript{61} These statements and more in the opinion draw emphasis to the speaker’s purpose or intent behind the action. However, opponents argue that the discussion of the person’s subjective intent was only discussed by the Court because the Virginia statute required an “intent to intimidate.”\textsuperscript{62}

The result of this less than clear opinion is that circuits are in confusion as to what test to apply. The cases below illustrate the variety of factual scenarios and the courts’ analyses of them in light of the \textit{Black} holding.

\textbf{B. Circuit Courts of Appeal}

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

In \textit{United States v. White}, the Fourth Circuit thoroughly analyzed the \textit{Black} holding but chose to reaffirm its objective analysis, stating that the correct analysis is whether a person aware of the context would perceive the communication to be a threat.\textsuperscript{63} The court examined the \textit{Black} sentence that stated that true threats “encompass those statements where the speaker \textit{means to communicate} a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”\textsuperscript{64} The court found this only means that the speaker intended to communicate, not that he intended to threaten.\textsuperscript{65} The court upheld its objective analysis noting that the Supreme Court gave no indication that it was redefining the crime to require specific intent.\textsuperscript{66}

\textsuperscript{59} \textit{Id.} at 360.
\textsuperscript{60} \textit{Id.} (emphasis added).
\textsuperscript{61} \textit{Id.} at 362 (emphasis added).
\textsuperscript{62} \textit{Elonis}, 730 F.3d at 328-29; \textit{Clemens}, 738 F.3d at 10.

\textsuperscript{63} \textit{United States v. White}, 670 F.3d 498, 509 (4th Cir. 2012).
\textsuperscript{64} \textit{Id.} at 508 (citing \textit{Black}, 538 U.S. at 359).
\textsuperscript{65} \textit{Id.} at 509.
\textsuperscript{66} \textit{Id.}
The Eighth and Eleventh Circuits have reached the same conclusion. In citing the majority of circuits who analyzed the true threat doctrine after Black, the Eighth Circuit reaffirmed its test of analyzing whether a reasonable person would interpret the communication as a threat. The Eleventh Circuit also held that Black did not disrupt the objective analysis, which had been accepted by courts prior to the Black decision. The Eleventh Circuit reaffirmed its objective analysis stating, “Knowingly transmitting the threat makes the act criminal—not the specific intent to carry it out or the specific intent to cause fear in another.”

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

The Sixth Circuit, in United States v. Jeffries, stated that its precedent established the test of whether a reasonable observer would perceive the communication as a threat. However the court also noted the Ninth Circuit rejection of the objective test, stating that it may represent the best reading of the

67 United States v. Nicklas, 713 F.3d 435, 440 (8th Cir. 2013); United States v. Martinez, 736 F.3d 981, 986 (11th Cir. 2013) (upholding its test as to whether a reasonable person would interpret the communication as a threat).
68 Nicklas, 713 F.3d at 439-40.
69 Martinez, 736 F.3d at 998.
70 Id.
71 United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013) (citing United States v. Davila, 461 F.3d 298, 305 (2d Cir. 2006)).
72 Id.
73 Id.
74 Id. at 423.
75 Id.
statute at hand. Judge Sutton wrote a dubitante opinion in *Jeffries* in which he stated that subjective intent is “part and parcel of the meaning of a communicated ‘threat’ to injure another.” Furthermore, Judge Sutton in examining the history of the federal threat statute, 33 U.S.C. § 875(c), notes that it was initially written to prevent extortion. In doing so, Congress required the person have intent to extort; however, when they later added the prevention of threats, no such intent was written into the statute. Judge Sutton argues that Congress intended that intent in the extortion subsection be read throughout 33 U.S.C. § 875, which would require intent to threaten. Furthermore, he noted that “[e]very relevant definition of the noun ‘threat’ or the verb ‘threaten’ . . . includes an intent component” and do not recognize any objective component. However, the court stated that it would not depart from precedent without a more clear direction to do so.

The Seventh Circuit, in *United States v. Parr*, spoke approvingly of the subjective approach. “It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*; the plurality’s discussion of threat doctrine was very brief. It is more likely, however, that an entirely objective definition is no longer tenable.” Ultimately, the court failed to resolve the issue and decided the case on other grounds.

One circuit has kept the reasonable speaker test. The First Circuit in *United States v. Clemens* addressed whether it was required to change its previous true threats analysis based upon the *Black* holding. The court decided to follow its precedent in only requiring that a person reasonably interpret the

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77 *Id.* at 481.
78 *Id.* at 484.
79 *Id.*
80 *Id.*
83 *Jeffries*, 692 F.3d at 481.
84 545 F. 3d 491, 500 (7th Cir. 2008).
85 *Id.*
86 *Id.*
87 738 F.3d 1, 10 (1st Cir. 2013).
communication as a threat.\footnote{Id. at 12.} In reaching this conclusion, the court cited other circuits that have reaffirmed their objective listener test following the \textit{Black} holding.\footnote{Id.} However, the First Circuit did not make an explicit rule on the issue; rather, it decided the issue on a plain error standard of review because Clemens did not raise the issue at the lower court.\footnote{Id.} The court found that even if there were error as to the standard, it was not plain, and that the defendant likely would have been convicted even if they had imposed the subjective analysis.\footnote{Id.}

For years after \textit{Black}, only the Ninth Circuit had unequivocally embraced a subjective intent analysis for true threats, stating that it is “not sufficient that objective observers would reasonably perceive such speech as a threat of injury or death.”\footnote{United States v. Bagdasarian, 652 F.3d 1113, 1116 (9th Cir. 2011).} In \textit{United States v. Bagdasarian}, the court examined that “[b]ecause the true threat requirement is imposed by the Constitution, the subjective test set forth in \textit{Black} must be read into all threat statute that criminalize pure speech.”\footnote{Id. at 1117.}

The Ninth Circuit was joined in 2014 by the Tenth Circuit, which also explicitly adopted the subjective analysis. In \textit{United States v. Heineman}, the court analyzed the \textit{Black} holding in depth and also weighed First Amendment concerns with the concern for protecting the public from fear of violence.\footnote{767 F.3d 970, 982 (10th Cir. 2014).} The court noted that with statutes that criminalize speech, the statute “must be interpreted with the commands of the First Amendment clearly in mind.”\footnote{Id. at 973.} In resolving the two conflicting concerns, the court stated, “When the speaker does not intend to instill fear, concern for the effect on the listener must yield.”\footnote{Id. at 982.}

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

\section*{III. Practical Implications: Advocating for the Subjective Approach}

Many courts have construed the true threat analysis as requiring only that the person hearing the communication is reasonable in interpreting it as a threat. In their reasoning courts usually cite, among others, a concern in preventing “fear,
disruption, and . . . risk of violence.”\textsuperscript{97} However, equally if not more important is the protection of our individual right to free speech. Furthermore, the objective test, when put into practice, seems to unduly limit one’s speech content for fear that it may be interpreted by someone as a threat. Below are examinations of First Amendment concerns, which arise when a defendant is convicted of communicating a true threat without regard as to his subjective intent. Requiring a finding of subjective intent to threaten will still serve the purpose of the true threat doctrine while simultaneously protecting speech that falls within the bounds of the First Amendment.

A. PROTECTING MINORITY OPINIONS

The objective test places all power solely in the hands of the listener. He or she only need to act reasonably in interpreting communication, and the jury may convict the speaker of threatening the person. “The purely objective approach allows speakers to be convicted for negligently making a threatening statement— that is, for making a statement the speaker did not intend to be threatening, but that a reasonable person would perceive as such. This potential chills core political speech.”\textsuperscript{98} There is no requirement that the communication reach the person to whom it is addressed or that the person even be physically capable of completing the threat.\textsuperscript{99} As a result, the true threat standard is met if any person reasonably perceives the communication as a threat.\textsuperscript{100} The effect is that a person may feel threatened merely because the speech is violent or socially unacceptable, which is constitutionally improper.\textsuperscript{101} “A statute that proscribes speech without regard to the speaker’s intended meaning runs the risk of punishing protected First

\textsuperscript{97} Thomas DeBauche, supra note 81, at 993.
\textsuperscript{98} White, 670 F.3d at 524 (Floyd, J., dissenting in part and concurring in part).
\textsuperscript{99} Jeffries, 692 F.3d at 483 (holding that conviction under 33 U.S.C. § 875(c) “does not require a threat to be communicated to its target”); United States v. Miller, 115 F.3d 361 , 363 (6th Cir. 1997) (holding a “prosecutable threatening communication need not be supported either by evidence of the author’s actual ability to carry out his threat”); see also United States v. Parr, 545 F.3d 491, 498 (7th Cir. 2008) (“It is well-established that the government is not required to prove that the defendant in a threat case intended or was able to carry out his threats.”).
\textsuperscript{100} DeBauche, supra note 81, at 998.
\textsuperscript{101} Texas v. Johnson, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).
Amendment expression simply because it is crudely or zealously expressed.\textsuperscript{102} Therefore, the objective test can have the effect of allowing a jury to convict a person for a threat, when in fact the communication was merely socially unacceptable or outside the norm.

Justice Marshall cautioned against an objective approach in his concurrence in Rogers v. United States, stating that in an objective approach “the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker’s intention . . . charging the defendant with the responsibility for the effect of his statements on his listeners . . . [W]e should be particularly wary of adopting such a standard for a statute that regulates pure speech.”\textsuperscript{103} As a general matter, the fact that society may find speech offensive is not a sufficient reason for suppressing it. Speech that is called hateful, or speech that is unpopular, or speech with which you strongly disagree, may still be protected speech.\textsuperscript{104}

The Supreme Court has recognized that such publicly unpopular speech is still entitled to protection. In R.A.V. v. City of St. Paul, the Court stated, “Essential to the formulation is the prepositional clause after ‘fear;’ ‘fear’ and ‘fear of violence’ are two very different things.”\textsuperscript{105} The Court again articulated this principle in Black saying, “It should be clear, then, that true threats are only excepted from the First Amendment protection due to their capacity to intimidate, not due to their potential to create fear in a recipient listener.”\textsuperscript{106} In short, speech can invoke fear and still be protected. Nonetheless, an objective analysis may allow such protected speech to be quieted if a jury finds that the listener was reasonable in interpreting the speech as a threat. When courts do not require a jury to consider subjective intent, speakers may only protect themselves from liability by quieting their opinions.

\section*{B. Reducing the Chilling Effect}

Requiring subjective intent reduces the potential chilling effect of § 875(c) by ensuring that only threats directed at specific individuals or groups are subject to liability.\textsuperscript{107} Most courts state that they are hesitant to require a subjective intent because courts have found that there is no need to find the speaker intended to

\textsuperscript{103} Rogers v. United States, 422 U.S. 35 (1975) (J. Marshall, concurring).
\textsuperscript{104} Snyder v. Phelps, 580 F.3d 206, 214 (4th Cir. 2009).
\textsuperscript{106} Black, 538 U.S. at 365.
carry out his threat. However, courts have repeatedly held that there is no requirement that the speaker intend to carry out his threat. Nor is there a requirement that there be a precise time in which the threat will be carried out or that the speech even be communicated to the victim.

Opponents of the subjective approach say that requiring a subjective intent to threaten would be too high a standard, resulting in allowing violators to walk free. It is of particular importance to remember that subjective intent can be established through any number of evidentiary findings. A full-blown confession of the speaker's true intention is not necessary. The jury only need find that they believe the speaker intended that the communication be a threat. “Requiring the government to demonstrate subjective intent to threaten as part of any true threat prosecution strikes the constitutionally appropriate balance between the government’s interest in protecting against the harms caused by threats and the country’s constitutional tradition of encouraging the free and uninhibited exchange of ideas.”

One might argue that rather than impose a subjective approach to threats, speakers should bear the burden and be more careful with their word choices. However, courts have found that even where there is not an explicit threat, a jury’s finding that the person reasonably interpreted it as a threat is sufficient to convict. The purely objective approach allows speakers to be convicted for negligently making a threatening statement - that is, for making a statement the

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108 See e.g. Jeffries, 692 F.3d at 478; United States v. Lincoln, 589 F.2d 379, 381 (8th Cir. 1979); United States v. Chatman, 584 F.2d 1358, 1361 (4th Cir. 1978).
109 United States v. Parr, 545 F.3d 491, 497. But see Porter v. Ascension Parish Sch. Bd., 393 F.3d 608, 616-17 (threat must be “communicated to either the object of the threat or a third person”).
110 United States v. Martinez, 736 F.3d 981, 987-88 (11th Cir. 2013) (Particularly noteworthy is the Third Circuit’s insight that “[i]mposing the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from the fear of violence and the disruption that fear engenders, because it would protect speech that a reasonable speaker would understand to be threatening.”) (quoting Elonis, 730 F.3d at 330).
111 See e.g. Celis, supra note 106 (“Subjective intent to threaten [can be] demonstrated by evidence that the [communication] was disseminated to the threatened individual or that the threat was made to further a purpose through intimidation.”).
113 Elonis, 730 F.3d at 334 (“there is no rule that a conditional statement cannot be a true threat”); Clemens, 738 F.3d at 8 (“We have rejected any requirement that threats be “unequivocal, unconditional, and specific.”).
speaker did not intend to be threatening, but that a reasonable person would perceive as such. This potential chills core political speech.”

For example, in United States v. Clemens, the First Circuit upheld a jury conviction in which the following statement was found to be a true threat: “I really, truly and sincerely wish you were dead. Oh, how I wish a 10–ton I-beam would fall on you... Boy, would I love to see that! Perhaps someday I will.” The court affirmed the conviction, notwithstanding its ambiguity, holding that the only requirement is that a reasonable person would expect someone to interpret the statement as a threat.

Similarly, the Second Circuit affirmed a jury conviction where a man stated on his blog that judges should be killed following an court opinion. The post was later updated to include personal information, room numbers, and a map for navigating the courthouse. The court held that the communication could reasonably be interpreted as a threat. The injustice here is not the ultimate findings of the juries; rather, the injustice is that the juries are explicitly kept from giving any consideration whatsoever to the speaker’s intention. The result is that the objective approach may allow juries to convict a person based on speech that is in fact protected under the First Amendment. A subjective intent requirement is necessary to retain the First Amendment protections guaranteed in the Constitution. The fact that the true threat doctrine limits that protection demands the subjective intent to ensure that only truly proscribable speech is regulated. Similarly, incitement, another unprotected area of speech, requires the subjective intent of “advocacy [that] is directed to inciting or producing imminent lawless action.” Therefore, the only logical conclusion is that threats should require the same subjective intent.

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114 White, 670 F.3d at 524.
115 Clemens, 738 F.3d at 5.
116 Id. at 12. See also United States v. White, 670 F.3d 498, 502-3 (4th Cir. 2012) (affirming a conviction that the following statement was a threat: “Lord knows that drawing too much publicity and making people upset is what did in Joan Lefkow;” Lefkow was a judge whose husband and mother had been murdered by a disgruntled litigant).
118 Id. at 415-16.
119 Id. at 425.
120 Clemens, 738 F.3d at 12; White, 670 F.3d at 512; Turner, 720 F.3d at 425.
121 See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the First Amendment protects the advocacy of violence and speech will not be afforded such protection only if it is intended to cause “imminent lawless action”).
C. Twenty-First Century Communication Practices

The transition to online communication practices also brings concern as to using the objective approach. Communication methods have drastically changed with the turn of the twenty-first century. People are more interconnected than ever, and the typical sequence of thought is post now, think later.123 “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”124 Now, more than ever, “[t]he content on the Internet is as diverse as human thought.”125 The result with respect to an objective true threats analysis is that a person posting a message may be liable to any person who then reads that post and reasonably interprets it as a threat. This range of liability is vast considering that there is no requirement that the threat be communicated to the intended person or with any immediacy or specificity.126

Communication across the Internet allows for the reader to interpret the words with very few limitations, without regard as to who the person is, his mindset, his tone of voice, or his intended audience.127 “A speaker may post a statement online with the expectation that a relatively small number of people will see it, without anticipating that it could be read - and understood very differently - by a much broader audience.”128

Internet users often assume entirely new identities, sometimes with new personalities, and occasionally even with a new gender.129 This “fantasy-type world” can alter a speaker’s cognitive skills, which some have even characterized as a defense known as “Internet intoxication.”130 Consequently, the subjective approach is required to adapt the legal analysis to communication transmitted across the Internet.

123 Hammack, supra note 24, at 84 (“Now, in a fit of rage, people can email or post a threat, that with even a moment’s reflection they otherwise would not have. Once that message is out in cyberspace, it is often impossible to delete and may continue to incite readers long after the speaker has moderated her position.”).
125 Id. at 870.
126 Clemens, 738 F.3d at 8; Turner, 720 F.3d at 424.
127 Hammack, supra note 24, at 84 (“Thus, an Internet threat is more intimidating than a threat made in other media.”).
129 Hammack, supra note 24, at 84-85.
130 Hammack, supra.
The Ninth Circuit recognized the new complexities involved in speech disseminated through the Internet in its application of the subjective approach in United States v. Bagdasarian.\textsuperscript{131} In Bagdasarian, a man posted numerous violent statements in an online message board, which advocated that President Obama should be killed.\textsuperscript{132} The court held that no reasonable person could find that this man intended to threaten the life of President Obama.\textsuperscript{133} The court held that “[a] statement that the speaker does not intend as a threat is afforded constitutional protection and cannot be held criminal.”\textsuperscript{134} The court further stated that Black requires the State may punish only those threats in which 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.”\textsuperscript{135}

Without the protection that the subjective analysis provides, a disproportionate amount of people will be prosecuted for communicating virtually innocent, constitutionally-protected speech.\textsuperscript{136} “A subjective intent requirement addresses this problem by allowing a jury to consider more evidence contextualizing the online comment than could be considered under a purely objective standard, including the defendant’s intended audience, other remarks clarifying the challenged statement’s meaning, the defendant’s motive for making the statement, and so forth.”\textsuperscript{137}

D. PROTECTING CREATIVE EXPRESSION

The protection of artistic expression also requires the adoption of a subjective intent in analyzing true threats. The Supreme Court has emphasized the importance of protecting dissenting political speech.\textsuperscript{138} However, in practice, that is not always the result. For example, in Jeffries, the court affirmed the jury’s

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\item[131] 652 F.3d 1113 (9th Cir. 2011).
\item[132] Id. at 1115-16.
\item[133] Id. at 1123.
\item[134] Id. at 1122.
\item[135] Id. (quoting Black, 538 U.S. at 359).
\item[136] See e.g. Hunter Stewart, Caleb Clemmons, Georgia Southern University Student, Jailed Over Tumblr Remark, The Huffington Post (Aug. 12, 2013, 3:07 p.m.) available at http://www.huffingtonpost.com/2013/08/12/caleb-clemmons-jailed-tumblr-remark_n_3743477.html. (student arrested for a post stating that he was going to post a threat on his account as a literary experiment to see if he would be prosecuted).
\end{enumerate}
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conviction that a music video posted on YouTube constituted a threat against a judge.\footnote{Jeffries, 692 F.3d at 482.} The court held that the defendant could not insulate his threat by putting it in the form of a music video.\footnote{Id.} The court, however, did not allow evidence of the defendant’s subjective intent.\footnote{Id.} Nor did the court allow evidence that the defendant had previously posted numerous other videos in an effort to show the jury his odd sense of humor.\footnote{Id.}

Similarly, allegedly threatening rap lyrics are at issue in \textit{Bell v. Itawamba County School Board}. In this case, an aspiring rap artist and high school student was punished for recording a rap song including the following lyrics: “(1) looking down girls’ shirts/drool running down your mouth/messing with wrong one-going to get a pistol down your mouth” and (2) “middle fingers up if you can’t stand that nigga/middle fingers up if you want to cap that nigga.”\footnote{Bell v. Itawamba Cnty. Sch. Bd., 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).} The artist used alleged actions of a teacher (which were told to him by the alleged victims) as inspiration for rap lyrics.\footnote{Id.} The rap artist did not bring his recording to school; rather, he posted it on Facebook, which is how students and teachers at school found it.\footnote{Id.} The court found that the lyrics of his song were not protected by the First Amendment; therefore, the school board was appropriate in taking action against the rap artist based upon the finding that the lyrics constituted a threat.\footnote{Id. at 840.}

As illustrated the concern in criminalizing speech without requiring subjective intent is especially heightened with respect to rap lyrics. “To an outside observer, for instance, the frenetic and aggressive maneuvers of break dancers engaged in head-to-head competitions (called “battles”) can appear out of control or violent; in fact, there have been cases in which police intervened because they mistakenly believed the dancers were fighting.”\footnote{Brief of the Marion B. Brechner First Amendment Project and Rap Music Scholars (Professors Erik Nielson and Charis E. Kubrin) as Amicus Curiae, at *8, \textit{Elonis v. United States}, No. 13-983 (Aug. 18, 2014).} Requiring subjective intent would protect this form of art and expression while regulating on the speech which meets the threshold of being a true threat.

\textbf{E. PROTECTING SATIRE AND HYPERBOLE}
Protection of speech that is meant for entertaining purposes also requires the implementation of a subjective analysis. It is a fundamental truth that hyperbole is protected under the First Amendment.\textsuperscript{148} The protection of “loose, figurative, or hyperbolic language” assures that “public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of this Nation.”\textsuperscript{149} Despite this well-established principle, several situations have arisen involving the allegation that a speaker’s hyperbolic speech is a threat. In one case, an editorial contained a comedic narrative of how terrible George W. Bush was performing as a president.\textsuperscript{150} The editorial asked Jesus to “claim the life” of then President Bush and several members of his administration, adding that it would be fine if Jesus sent “some crazy mortal” to do the job.\textsuperscript{151} Secret Service invaded the publisher and told them charges would be pressed.\textsuperscript{152} Though the incident did not result in a conviction, the intrusive nature and harassment that ensues is unacceptable.

A similar incident occurred in Arizona. In 2003, the Tucson Citizen published a letter to the editor that stated, “Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter.”\textsuperscript{153} The trial court allowed an action by a Muslim couple, which contained claims of assault and intentional infliction of emotional distress.\textsuperscript{154} The Arizona Supreme Court ultimately dismissed the claim, but it did so under an objective standard citing that the conditional nature and ambiguity precluded anyone from finding there was a true threat.\textsuperscript{155} The same result may not have been reached by the courts that do not give any deference to the fact that language is conditional or ambiguous.\textsuperscript{156}

One of the most alarming recent cases involves concerns of both Internet communication and hyperbole. Justin Carter, a nineteen-year-old boy in San Antonio, Texas, was arrested for a post made on a Facebook group for fans and players of League of Legends, a popular video game.\textsuperscript{157} Another poster called Carter “crazy” to which he replied, “I’m fucked in the head alright. I think I’ma shoot up a kindergarten and watch the blood of the innocent rain down and eat the

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\item \textsuperscript{148}Watts, 394 U.S. at 708.
\item \textsuperscript{149}Milkovich v. Lorain Journal Co., 497 U.S. 1, 2 (1990).
\item \textsuperscript{150}Lauren Gilbert, Mocking George: Political Satire as ‘True Threat’ in the Age of Global Terrorism, 58 U. Miami L. Rev. 843, 848 (2004).
\item \textsuperscript{151}Gilbert, supra note 150.
\item \textsuperscript{152}Gilbert, supra note 150.
\item \textsuperscript{153}Citizen Publishing Co. v. Miller, 210 Ariz. 513, 515 (Ariz. 2005).
\item \textsuperscript{154}Id.
\item \textsuperscript{155}Id. at 521.
\item \textsuperscript{156}Clemens, 738 F.3d at 12; White, 670 F.3d at 512; Turner, 720 F.3d at 425.
\item \textsuperscript{157}Doug Gross, Teen in Jail for Months Over ‘Sarcastic’ Facebook Threat, CNN, (July 3, 2013 7:18 a.m.) available at http://www.cnn.com/2013/07/02/tech/social-media/facebook-threat-carter/.
\end{itemize}
beating heart of one of them.”158 The post was followed by “J/K” and “LOL.”159 Nevertheless, the threat was reported by a woman in Canada, which resulted in authorities jailing Carter.160 The teen was released after five long months, when an anonymous donor paid his bail.161 The case has not yet been heard before a court.162

III. CONCLUSION

As illustrated by these cases, billions of people across our nation who speak words which they may believe are protected may unknowingly be subjecting themselves to liability for communicating a “true threat.” Without analyzing the speaker’s subjective intent, this will result in the conviction of a speaker simply because someone, somewhere interpreted his speech as a threat, by no intention of the speaker. Many proponents of the objective approach have expressed concerns that the difficulty in proving subjective intent will undermine the purpose of prosecuting those who communicate true threats.163 On the contrary, it will simply ensure that only those who communicate true threats are found guilty, rather than those who are communicating within their First Amendment rights. Most importantly, the subjective analysis does not set the burden of proof too high. There is no confession of the defendant’s mindset needed. Subjective intent may be deduced based upon objective evidence.164 For example, a jury can infer intent to kill when a person uses a deadly weapon, without any subjective evidence about the defendant's state of mind.165 Likewise, subjective intent to threaten may be deduced from the defendant’s conduct. The subjective analysis simply provides fair opportunity for the defendant to explain the speech and will not chill the speech of others.

Punishing a speaker without examining his subjective intent results in consequences that are contrary to intentions of punishment and work as an obstacle to the practical operation of the justice system. An objective analysis alone will unduly hinder speech and take away a significant part of the First Amendment protection afforded by the Constitution. On the contrary, the

158 Gross, supra note 157.
159 Gross, supra note 157.
160 Gross, supra note 157.
162 Griggs, supra note 161.
163 Celis, supra note 107, at 236.
164 Celis, supra.
165 Celis, supra.
Supreme Court in its decision in *Elonis v. United States* has the opportunity to restate the broad protection afforded by the First Amendment. The Court should articulate a new standard required for a true threat conviction—requiring the speaker’s subjective intent to threaten.

**APPENDIX**

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

Moles. Didn't I tell ya'll I had several? Ya'll saying I had access to keys for the fucking gates, that I have sinister plans for all my friends and must have taken home a couple. Ya'll think it's too dark and foggy to secure your facility from a man as mad as me. You see, even without a paycheck I'm still the main attraction. Whoever thought the Halloween haunt could be so fucking scary?"166

Threats made to Mrs. Elonis:

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

It's illegal.

It's indirect criminal contempt.

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

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

I'm not actually saying it.

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

It's kind of like a public service.

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

166 *Elonis*, 730 F.3d at 324.
Um, what's interesting is that it's very illegal to say I really, really think someone out there should kill my wife.

That's illegal.

Very, very illegal.

But not illegal to say with a mortar launcher.

Because that's its own sentence.

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

Perfectly legal.

I also found out that it's incredibly illegal, extremely illegal, to go on Facebook and say something like the best place to fire a mortar launcher at her house would be from the cornfield behind it because of easy access to a getaway road and you'd have a clear line of sight through the sun room.

Insanely illegal.

Ridiculously, wrecklessly, insanely illegal.

Yet even more illegal to show an illustrated diagram.

---[ ]---house
........^...:...:...:cornfield
...............
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getaway road

Insanely illegal.\(^{167}\)

There's one way to love you but a thousand ways to kill you. I'm not going to rest until your body is a mess, soaked in blood and dying from all the little cuts. . . . So hurry up and die, bitch, so I can forgive you.\(^{168}\)

**Threats to Mrs. Elonis and local law enforcement:**

Fold up your PFA and put it in your pocket Is it thick enough to stop a bullet?

Try to enforce an Order

That was improperly granted in the first place Me thinks the judge needs an education on true threat jurisprudence

\(^{167}\) *Id.* at 324-25

\(^{168}\) *Id.* at 324.
And prison time will add zeroes to my settlement
Which you won't see a lick
Because you suck dog dick in front of children
And if worse comes to worse
I've got enough explosives to take care of the state police and the sheriff's
department169

Threat to local elementary school:
That's it, I've had about enough
I'm checking out and making a name for myself Enough elementary schools in a
ten mile radius to initiate the most heinous school shooting ever imagined
And hell hath no fury like a crazy man in a kindergarten class
The only question is ... which one?170

Threats to FBI:
You know your shit's ridiculous when you have the FBI knockin' at yo' door
Little Agent Lady stood so close
Took all the strength I had not to turn the bitch ghost
Pull my knife, flick my wrist, and slit her throat Leave her bleedin' from her
jugular in the arms of her partner
[laughter]
So the next time you knock, you best be serving a warrant
And bring yo' SWAT and an explosives expert while you're at it
Cause little did y'all know, I was strapped wit' a bomb
Why do you think it took me so long to get dressed with no shoes on?
I was jus' waitin' for y'all to handcuff me and pat me down
Touch the detonator in my pocket and we're all goin'
[BOOM!]

169 Id. at 325-26.
170 Id. at 326.