Constitutional Law—Eleventh Circuit Holds True Threats Doctrine Analyzed Under Objective Standard—*United States v. Martinez*, 736 F.3d 981 (11th Cir. 2013)

Although the First Amendment generally bars government restrictions on speech based on message or viewpoint, the government may restrict certain categories of speech where the speech's content imposes harm that "'overwhelmingly outweigh[s]' any First Amendment concerns."[1] A true threat constitutes one such category of unprotected speech.[2] In *United States v. Martinez*,[3] the Court of Appeals for the Eleventh Circuit considered whether a true threat must be analyzed under an objective or subjective standard.[4] The court held that true threats are analyzed under an objective standard, and following therefrom, the indictment of the defendant was constitutional where she made a threat that "'an objectively reasonable jury could find beyond a reasonable doubt to be a serious expression of an intent to injure another person.'"[5]

On November 10, 2010, Ellisa Martinez sent an anonymous "form-response" email to talk-show host Joyce Kaufman at WFTL radio.[6] The anonymous email stated that the author was "planning something big around a government building . . . maybe even a school," and that the author was "going to walk in and teach all the government hacks working there what the [Second A]mendment is all about."[7] Hours after sending the email, Martinez called WFTL as an anonymous caller and told the station that her mentally-ill husband sent the email and that he planned on opening fire at a nearby school.[8] The Pembroke Pines Police Department instituted a code-red lockdown on all Broward County schools and shut down several other public buildings due to the communications from Martinez.[9] Investigators soon found that the anonymous communication was from Martinez.[10]

1. *See* United States v. Martinez, 736 F.3d 981, 984 (11th Cir. 2013) (quoting New York v. Ferber, 458 U.S. 747, 764-65 (1982)); *see also* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (reasoning First Amendment generally bars government from restricting speech based on content); New York v. Ferber, 458 U.S. 747, 763-64 (1982) (discussing content-based classification of speech).
2. *See* 736 F.3d at 984; *see also* United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (listing categories of speech not protected by First Amendment).
3. 736 F.3d 981.
4. *See id.* at 985.
5. *Id.* at 984.
6. *See id.* at 983.
7. 736 F.3d at 983.
8. *See id.*
9. *See id.*
10. *See id.*

Martinez maintained that she was innocent until a grand jury indicted her for violating 18 U.S.C. § 875(c).[11] Once indicted, Martinez admitted that she had made the communications and filed a motion to dismiss the indictment, which was denied by the district court.[12] By pleading guilty, Martinez reserved the right to appeal the denial of her motion to dismiss the indictment.[13] She appealed on the issues of "whether the indictment was insufficient because it did not allege Martinez subjectively intended to convey a threat to injure others;" and "whether § 875(c) was unconstitutionally overbroad because it did not require the Government to prove the speaker subjectively intended her statements to constitute a threat."[14]

Martinez agreed that she sent the email knowingly and willfully and that a reasonable jury could find that it was a "'serious expression of an intent to injure another person.'"[15] The district court accepted her guilty plea and ordered her to pay $5,350.89 for the costs incurred by the government in securing the schools and safeguarding the students.[16] Martinez appealed her conviction for knowingly transmitting a threatening communication in violation of 18 U.S.C. § 875(c); and she claimed her indictment was unconstitutional because it did not allege that she subjectively intended to convey a threat to injure others, which she asserted was required by precedent.[17]

The First Amendment protects free speech by barring the government from restricting most speech, even where a majority of people disagrees with the expression or where such expression is false.[18] Statutes that suppress free speech can have the unintended effect of restricting "free trade in ideas."[19]

11. *See* 736 F.3d at 983.

12. *See id.*

13. *See id.*

14. *Id.* at 983-84.

15. 736 F.3d at 984.

16. *See id.*

17. *See id.* at 983-84.

18. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech"); *see also* Virginia v. Black, 538 U.S. 343, 358 (2003). The Supreme Court emphasized that even where a majority of people believes the content to be false or evil, the state may not prohibit speech simply for expressing controversial content. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) (citing longstanding principles behind First Amendment protections). The Supreme Court also stated: "Freedom of speech and freedom of the press . . . are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action." Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); *see also* Elise Gabrielle Sweeney, *Freedom of Speech: Protections and Limitations,* 5 GEO. J. GENDER & L. 77, 78 (2004) (discussing fundamental right to engage in speech even where it contravenes status quo).

19. Virginia v. Black, 538 U.S. 343, 358 (2003) (stating First Amendment "hallmark" consists of ensuring "free trade in ideas"). In *Watts v. United States*, the Supreme Court stated, "[f]or 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 wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" Watts v. United States, 394 U.S. 705, 708 (1969) (elaborating on precedent); *see also* Watts v. United States, 394 U.S. 705, 712 (1969) (Douglas, J., concurring) (arguing Constitution forbids "[s]uppression of speech as . . . police measure"); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); United States v. Bagdasarian, 652 F.3d

Therefore, those statutes must be scrutinized under the "'national commitment to the principle that debate on public issues should be uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'"[20] Nonetheless, the constitutional right to free speech is not absolute, and the government may regulate certain types of speech when social interest and morality outweigh the social value of the speech's content.[21]

True threats constitute a category of speech falling within the free-speech exception, and the government may ban such speech in certain circumstances.[22] According to *Virginia v. Black*, "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[23] The true-threats exception was first expressed by the Supreme Court in *Watts v. United States*, where the Court held that the speech was not a true threat, but rather "political hyperbole."[24] Following *Watts,* the Supreme

1113, 1116 (9th Cir. 2011) (stating statutes which criminalize form of pure speech must be interpreted with First Amendment commands); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 317 (2001) (arguing omitting speaker's intent in determining true threats may discourage important social and political expressions). *But see* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 547 (2004) (discussing policy considerations for prohibiting true threats).

20. *See* Watts v. United States, 394 U.S. 705, 708 (1969) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); *see also* Jennifer L. Brenner, Note, *True Threats—A More Appropriate Standard for Analyzing First Amendment Protection and Free Speech When Violence is Perpetrated Over the Internet*, 78 N.D. L. REV. 753, 766-67 (2002) (discussing circuit courts' thresholds for punishing true threats).

21. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) (describing limitations of First Amendment protection). The Supreme Court has said, "it is well understood that the right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (discussing "slight social value" of certain speech); *see* Ashcroft v. ACLU, 535 U.S. 564, 573 (2002) (asserting government may not restrict expression, though principle not absolute). In *Chaplinsky*, the Court stated, "any benefit that may be derived from [certain expressions] is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); *see also* New York v. Ferber, 458 U.S. 747, 763 (1982) (reasoning content of speech determines First Amendment protection). In *Ferber*, the Supreme Court determined that in some cases "the evil to be restricted so overwhelmingly outweighs the expressive interests . . . that no process of case-by-case adjudication is required." New York v. Ferber, 458 U.S. 747, 763-64 (1982); *see also* Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother* Should *Butt In*, 23 DUQ. L. REV. 77, 113-14 (1984) (discussing when speech restricted).

22. *See* Virginia v. Black, 538 U.S. 343, 359 (2003) (reaffirming government's ability to ban true threats under First Amendment); *see also* Watts v. United States, 394 U.S. 705, 707 (1969) (clarifying importance of distinguishing protected from unprotected speech); United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012) (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)) ("[T]he government has the right, if not the duty, to 'protect[ ] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur,' all of which places the menacing words and symbols 'outside the First Amendment.'"); United States v. Bagdasarian, 652 F.3d 1113, 1116 (9th Cir. 2011) (reasoning true threats fall outside of First Amendment protections).

23. Virginia v. Black, 538 U.S. 343, 359 (2003); *see also* Watts v. United States, 394 U.S. 705, 706 (1969).

24. *See* Watts v. United States, 394 U.S. 705, 708 (1969); *see also* United States v. Elonis, 730 F.3d 321, 328 (3d Cir. 2013) (articulating true-threats exception crafted in *Watts*), *cert. granted*, 134 S. Ct. 2819 (2014).

Court did not address the doctrine again for over thirty years, until the *Black* decision in 2003.[25] After *Watts*, and until the Supreme Court's decision in *Black*, most courts examined the true-threats exception under an objective standard.[26]

Since *Black*, federal courts of appeals have split on the issue of whether a true threat should be analyzed under an objective or subjective standard.[27] Under the objective analysis, a threat is examined by looking at how a reasonable person would perceive the communication.[28] Under a subjective

In *Elonis*, the Third Circuit discussed three objective factors that supported the Supreme Court's finding in *Watts*. *See* United States v. Elonis, 730 F.3d 321, 328 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014); *see also* United States v. White, 670 F.3d 498, 507 (4th Cir. 2012) (reasoning statute criminalizing pure speech must withstand First Amendment protections).

25. *See* Virginia v. Black, 538 U.S. 343, 344 (2003) (discussing true threats); *see also* United States v. Elonis, 730 F.3d 321, 328 (3d Cir. 2013) (explaining true threats exception not addressed between *Watts* in 1969 and *Black* in 2003), *cert. granted*, 134 S. Ct. 2819 (2014).

26. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 624 (8th Cir. 2002) (upholding reasonable-recipient standard for true threats). The Eighth Circuit reasoned that the policy consideration of fear justified the true-threat exception and the objective standard. *See id.* at 622.

27. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (discussing different approaches by courts regarding true threats). The main disagreement among the courts, is whether the Supreme Court's decision in *Black*—by requiring a subjective intent to threaten—overturned the standard that a statement is a true threat when a reasonable speaker would foresee that the statement would be interpreted as a threat. *See* United States v. Elonis, 730 F.3d 321, 330-32 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 2819 (2014). According to most courts of appeals, the answer is no. *See id.* at 330; *see also* Recent Case, *First Amendment—True Threats—Sixth Circuit Holds That Subjective Intent Is Not Required by the First Amendment When Prosecuting Criminal Threats.*—United States v. Jeffries*, 692 F.3d 473 (6th Cir. 2012)*, 126 HARV. L. REV. 1138, 1138 (2013) (discussing disagreement among lower courts regarding true-threat standard); Jake Romney, Note, *Eliminating the Subjective Intent Requirement for True Threats in* United States v. Bagdasarian, 2012 BYU L. REV. 639, 639 (2012) (noting courts' difficulty determining what constitutes true threats). One author squarely blames the Supreme Court and its vagueness in *Black* for the disagreement. *See* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1226 (2006) (arguing Supreme Court's decision in *Black* further complicated true-threat analysis). Crane reasoned, "the Court in *Black* defined the term 'true threat;' however, in providing a definition, the Court created more confusion than elucidation." *Id.*

28. *See* United States v. Alaboud, 347 F.3d 1293, 1296 (11th Cir. 2003) ("A conviction under [18 U.S.C.] § 875(c) requires proof that the threat was made 'knowingly and intentionally.'"). The *Alaboud* court reasoned: "A communication is a threat when 'in its context [it] would 'have a reasonable tendency to create apprehension that its originator will act according to its tenor.'"" *Id.* (alteration in original) (quoting United States v. Bozeman, 495 F.2d 508, 510 (5th Cir. 1974)). "[T]he offending remarks must be measured by an objective standard." *Id.* at 1297. The court, in *Alaboud*, stated, "[w]hile this Court has not ruled on whether the recipient's reaction to the alleged threatening statements are relevant, every other circuit that has considered it has ruled that evidence of the recipient's reaction is relevant and admissible." *Id.* at 1298; *see also* Crane, *supra* note 27, at 1235 (explaining objective and subjective test standards). Crane wrote:

> 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.

Crane, *supra* note 27, at 1235.

analysis, the threat is examined by looking at whether the alleged offender actually intended his or her actions to be perceived as a threat.[29] Most circuits have held that *Virginia v. Black* did not alter the analysis for true threats because of the long-standing objective standard and the language used by the Court.[30] Many of these courts have reasoned that the objective analysis protects citizens better than the subjective test.[31] To date, only one circuit has held that *Black* requires a subjective-standard analysis for true threats.[32]

In *United States v. Martinez*, the Eleventh Circuit followed the majority of circuit courts by holding that a true threat should be analyzed by looking at the defendant's objective intent.[33] In determining whether the jury's indictment of

29. *See* United States v. Bagdasarian, 652 F.3d 1113, 1122 (9th Cir. 2011) (holding speaker must intend threat in order to fall outside of First Amendment protection). The majority in *Bagdasarian* held: "The Government must also show that he made the statements intending that they be taken as a threat." *Id.*

30. *See* United States v. Elonis, 730 F.3d 321, 332 (3d Cir. 2013) (arguing, despite Ninth Circuit's holding, *Black* does not change objective-standard analysis for true threats), *cert. granted*, 134 S. Ct. 2819 (2014); *see also* United States v. Nicklas, 713 F.3d 435, 440 (8th Cir. 2013) (holding reasonable-recipient standard applies to true threat); United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012) ("Several circuits have expressly rejected an additional subjective requirement in construing this and related threat prohibitions."). "Additionally, '*Black* did not criticize the existing case law,' which predominantly applied only the objective standard when determining whether a statement was a true threat. Since *Black* was decided, the majority of courts addressing the issue have not engrafted a subjective intent analysis onto true threat statutes either." Romney, *supra* note 27, at 650-51. Crane argues that the objective test was the predominant standard for true threats between the time *Watts* and *Black* were decided. *See* Crane, *supra* note 27, at 1243; *see* United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012) ("*Black* does not work the sea change that [the defendant] proposes."); *see also* United States v. Nicklas, 713 F.3d 435, 439 (8th Cir. 2013) (quoting *Jeffries*'s analysis). The Sixth Circuit further reasoned that *Black* "merely applies—it does not innovate—the principle that '[w]hat is a threat must be distinguished from what is constitutionally protected speech.'" *Id.* (alteration in original) (quoting Watts v. United States, 394 U.S. 705, 707 (1969)).

31. *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003) (discussing true threats); *see also* United States v. Elonis, 730 F.3d 321, 328 (3d Cir. 2013) (reasoning why objective test should be used), *cert. granted*, 134 S. Ct. 2819 (2014). The court in *Elonis* stated that the objective test better shields "'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.'" United States v. Elonis, 730 F.3d 321, 329 (3d Cir. 2013) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)), *cert. granted*, 134 S. Ct. 2819 (2014). The *Elonis* court stated that the objective test sufficiently dealt with the harms caused by true threats while safeguarding nonthreating speech. *See id.* at 332.

32. *See* United States v. Cassel, 408 F.3d 622, 632 (9th Cir. 2005) (arguing intent as key factor in analyzing whether speech protected); *see also* United States v. Bagdasarian, 652 F.3d 1113, 1116-18 (9th Cir. 2011) (arguing for subjective-intent standard in true-threat analysis and noting objective test insufficient). In responding to the *Black* court's statement that true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," the Ninth Circuit said:

> The clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment. First, the definition requires that "the speaker means to communicate . . . an intent to commit an act of unlawful violence." A natural reading of this 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.

United States v. Cassel, 408 F.3d 622, 631 (9th Cir. 2005) (ellipsis in original).

33. *See* 736 F.3d at 984-90.

Martinez was insufficient where it did not allege that she subjectively intended to express a threat to injure others, the court looked first to the standard set in *Watts*, then to whether or not *Black* altered that standard.[34] The court initially considered whether Martinez's actions constituted a true threat under the pre-*Black* definition of the term.[35] The court reasoned that a true threat is a category of unprotected speech under *United States v. Alvarez*, and under *Watts*, statutes penalizing speech must be interpreted with the First Amendment in mind.[36] The court further reasoned that an important distinction must be made between true threats and extreme political statements.[37] Finally, the court articulated that the conclusion in *Watts* was reached based on the objective characteristics of the speech and the context in which it was delivered.[38]

The court then considered whether, under *Black*, a true threat should be analyzed by looking at the defendant's subjective intent.[39] The court reasoned that *Black* was primarily a case about the "overbreadth of a specific statute."[40] In *Black*, the law itself required subjective intent, and therefore, whether the true-threats doctrine requires subjective intent was not at issue.[41] The court reasoned that *Black*'s definition of true threat was consistent with a general-intent standard, which requires examining only the objective characteristics of the speech.[42] Based on the foregoing, the court concluded that the Supreme Court in *Black* did not intend all true threats to require specific intent because the Court explicitly required subjective intent for a specific type of true threat: intimidation.[43] Finally, the court cited policy reasons, including protecting citizens from the fear of violence, for declining to alter the objective-standard analysis of true threats.[44]

34. *See id.* at 985-87.

35. *See id.* at 984-85.

36. *See id.* at 984.

37. *See* 736 F.3d at 984-85.

38. *See id.* at 985. The legal standard from 1969 to 2003 for a true threat was whether there was "a communication that, when taken in context, 'would have a reasonable tendency to create apprehension that its originator will act according to its tenor.'" *Id.* at 986 (quoting United States v. Alaboud, 347 F.3d 1293, 1296-97 (11th Cir. 2003)).

39. *See id.* at 985. The court considered whether a true threat must be determined under an objective or subjective standard. *See id.* at 986-87.

40. *See id.* at 986-87 (citing United States v. Jeffries, 692 F.3d 473, 479-80 (6th Cir. 2012)).

41. *See* 736 F.3d at 987 (citing United States v. Jeffries, 692 F.3d 473, 479-80 (6th Cir. 2012)). This is one reason that the court uses to support that *Black* did not change the objective-analysis test for "true threats." *See id.*

42. *See id.* at 987. The Court in *Black* defined intimidation as a type of true threat, which required specific and subjective intent to place listeners in fear of bodily harm or death. *See id.*; Virginia v. Black, 538 U.S. 343, 360 (2003). In *Martinez*, the court uses this fact to support the conclusion that the general class of true threats does not require such an inquiry into the speaker's subjective mental state. *See* 736 F.3d at 987.

43. *See* 736 F.3d at 987-88.

44. *See* 736 F.3d at 987-88; *see also* United States v. Elonis, 730 F.3d 321, 330 (3d Cir. 2013) (stating only requiring subjective intent for true threats would not protect individuals from fear of violence), *cert. granted*, 134 S. Ct. 2819 (2014).

While the court was correct in its conclusion that a true threat should be analyzed under an objective standard, it did not sufficiently address the adverse effects such a standard would have on free speech and the potential benefits of a subjective standard.[45] An objective standard puts the essential American right of free speech in jeopardy by unduly allowing certain expressions to fall outside of constitutional protection.[46] Citizens may be overly careful not to express their thoughts because they will worry that they might be criminally charged for making a threat when they are simply expressing themselves.[47] Furthermore, determining true threats based on an objective standard may allow the speaker's constitutional rights to be conditioned on how a recipient

45. *See* Crane, *supra* note 27, at 1272 (reasoning objective-intent standard too broad). Crane argued that the standard was too broad because it "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". *Id.* Crane further argued that the subjective-standard test is more appropriate because "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." *Id.* at 1273; *see also* Recent Case, *supra* note 27, at 1144-45 (arguing objective standard chills speech because speaker would need to know what jury considers threatening). "[T]he objective standard may fail to 'winnow[] out' discomforting, inexact, and abusive speech that is nonetheless protected under core First Amendment principles." Recent Case, supra note 27, at 1144 (second alteration in original) (quoting United States v. Jeffries, 692 F.3d 473, 480 (6th Cir. 2012)). *But see* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (internal quotation marks omitted) ("The government is permitted to regulate speech that falls within these categories because the speech is 'of such slight social value . . . that any benefit . . . is clearly outweighed by the social interest in order and morality.'"). In the present case, if there is a social value to allowing threats such as the one made by Martinez, it is outweighed by the social interest. *See* 736 F.3d at 989 (discussing low social value of true threat speech). The court reasoned in *Elonis* that the subjective standard does not "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." United States v. Elonis, 730 F.3d 321, 330 (3d Cir. 2013) (quoting Virginia v. Black, 538 U.S. 343, 360 (2003)), *cert. granted*, 134 S. Ct. 2819 (2014); *see also* United States v. White, 670 F.3d 498, 507 (4th Cir. 2012) (reasoning true threats threaten security of individuals, and punishment traditionally has not offended First Amendment). The majority in *Elonis* reasoned the objective test worked best for dealing with harms caused by true threats while ensuring free-speech protection. *See* United States v. Elonis, 730 F.3d 321, 332 (3d Cir. 2013) (discussing benefit of objective standard), *cert. granted*, 134 S. Ct. 2819 (2014). Crane argues that most courts incorrectly apply an objective standard because such standard does not protect free speech. *See* Crane, *supra* note 27, at 1271-72 (noting prevalence of objective standard). "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." *Id.* at 1269.

46. *See* Rothman, *supra* note 19, at 317 (arguing omitting speaker's intent in determining true threats may discourage important social and political expressions); *see also* Crane, *supra* note 27, at 1272-73 (reasoning speakers will overcompensate, censoring communication potentially susceptible to being viewed as threat). Crane concluded, "[p]ut simply, an objective standard chills speech." Crane, *supra* note 27, at 1273.

47. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 623 (8th Cir. 2002) (explaining under reasonable-recipient test, speaker may dilute speech "in fear of triggering a recipient's unknown sensitivity"); *see also* Rothman, *supra* note 19, at 316 ("Punishing merely negligent speech will chill legitimate speech by forcing speakers to steer clear of any questionable speech."). "Speakers will have difficulty telling in advance what will be construed as a threat by a jury, and therefore may be deterred from speaking even where their speech is not negligent." Rothman, *supra* note 19, at 316-17 (calling current test vague). "[A] speaker may not be able to predict the jury's determination of what is reasonable." *Id.* at 317.

feels about such communication.[48] Finally, under the objective standard, one can be punished for negligent speech, an idea rejected by the Supreme Court.[49]

The court was correct in its conclusion that *Black* did not alter the objective standard.[50] In *Black*, the court did not have the occasion to reach the issue of subjective intent because the underlying statute already required subjective intent.[51] The court would have addressed the subjective versus objective test

48. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 623 (8th Cir. 2002) (indicating reasonable-recipient standard risks determination of constitutional rights turning on recipient's unique characteristics). "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." Crane, *supra* note 27, at 1272.

49. *See* Rogers v. United States, 422 U.S. 35, 47 (1975) (noting Court's reluctance "to infer that a negligence standard was intended in criminal statutes"); Rothman, *supra* note 19, at 317 (reasoning negligence generally not sufficient for free-speech restrictions under First Amendment). "Individuals who communicate poorly or who unknowingly use words that can be misconstrued should not be punished for their lack of oratorical skills when they do not speak with the purpose, knowledge, or reckless disregard of making a threat." Rothman, *supra* note 19, at 317.

> If, for example, an individual were to upload a video to YouTube and negligently but honestly believe the video's privacy settings prevented anyone else from viewing it, the objective standard would not take the individual's subjective intent into account, and would deprive the defendant of First Amendment protections even if a jury believed the individual intended neither to distribute the video to any other viewer nor act on any speech contained therein.

Recent Case, *supra* note 27, at 1144 (suggesting speaker's intent as foremost contextual cue in proper analysis); *see also* Rothman, *supra* note 19, at 315 (arguing objective test improperly imposes negligence standard for crimes). *But see* United States v. White, 670 F.3d 498, 511 (4th Cir. 2012) (rejecting consideration of mens rea in distinguishing protected from unprotected speech). Rothman writes, "First Amendment law often requires proof of a specific state of mind before finding a speaker liable or allowing a criminal conviction of the speaker." Rothman, *supra* note 19, at 319.

50. *See* 736 F.3d at 987 ("*Black* leaves our analysis and objective standard unaltered.").

51. *See* Virginia v. Black, 538 U.S. 343, 347 (2003) (identifying statute at issue); *see also* United States v. Elonis, 730 F.3d 321, 329 (3d Cir. 2013) (reasoning *Black* holding limited to analysis of statutes requiring intent), *cert. granted*, 134 S. Ct. 2819 (2014); United States v. Jeffries, 692 F.3d 473, 479-80 (6th Cir. 2012) (stating *Black* does not "work [a] sea change" on objective standard). In *Jeffries*, the court wrote:

> [*Black*] says nothing about imposing a subjective standard on other threat-prohibiting statutes, and indeed had no occasion to do so: the Virginia law itself required subjective "intent." The problem in *Black* thus did not turn on subjective versus objective standards for construing threats. It turned on overbreadth—that the statute lacked any standard at all. The prima facie evidence provision failed to distinguish true threats from constitutionally protected speech because it "ignore[d] all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate," and allowed convictions "based solely on the fact of cross burning itself."

United States v. Jeffries, 692 F.3d 473, 479-80 (6th Cir. 2012) (second alteration in original) (quoting Virginia v. Black, 538 U.S. 343, 367 (2003)). The court in *White* suggests that the context of *Black*'s analysis reveals that the discussion regarding subjective intent simply referred to the element in the relevant statute. *See* United States v. White, 670 F.3d 498, 510 (4th Cir. 2012) (discussing reasoning in *Black*). The Ninth Circuit reasoned, however, "*Black* requires that the subjective test must be met under the First Amendment whether or not the statute requires it, [and therefore] an objective test is not an alternative but an additional requirement over-and-above the subjective standard." United States v. Bagdasarian, 652 F.3d 1113, 1117 n.14 (9th Cir. 2011).

directly if it desired to change the long-standing objective test.[52] Furthermore, as the court reasoned, a reading that *Black* altered the objective standard requires too much of a logical leap.[53]

The court correctly analyzed the true threat statute under an objective standard because, when compared to the subjective test, the objective test better protects the safety of the public, particularly regarding the fear of violence.[54] Furthermore, the objective standard for true threats fits well with the rationale behind the standard and with other types of expression that fall outside of First Amendment protection.[55] Finally, an objective standard is appropriate

52. *See* United States v. Elonis, 730 F.3d 321, 329 (3d Cir. 2013) (embracing objective standard), *cert. granted*, 134 S. Ct. 2819 (2014). The majority in *Elonis* stated:

> Instead, we read "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence" to mean that the speaker must intend to make the communication. It 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." This is not what the Court wrote, and it is inconsistent with the logic animating the true threats exception.

Id. (alteration in original) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).

53. *See* United States v. Jeffries, 692 F.3d 473, 479-80 (6th Cir. 2012) (arguing holding *Black* requires subjective-intent analysis "reads too much into *Black*").

> The statement in *Black* relied on by [the defendant] is entirely consistent with *Darby*. The Supreme Court in *Black*, which was not focusing on § 875(c) but rather on a Virginia statute making it a crime to burn a cross with the intent of intimidating a person, stated that "true threats" "encompass those statements where the speaker *means to communi*cate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

United States v. White, 670 F.3d 498, 508 (4th Cir. 2012) (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)). The court read the "use of the word 'means' in 'means to communicate' to suggest '*intends* to communicate,' so that the speaker must *intend* to communicate a threat, the general intent standard [the court] applied in *Darby*." *Id.* at 509.

54. *See* Romney, *supra* note 27, at 654 (arguing subjective standard does not adequately protect public from fear of violence); *see also* United States v. Elonis, 730 F.3d 321, 329 (3d Cir. 2013) (discussing how liability for true threats protects citizens from fear of violence), *cert. granted*, 134 S. Ct. 2819 (2014); United States v. White, 670 F.3d 498, 507 (4th Cir. 2012) (arguing "fundamental concerns about the security and safety" require placing threats of violence outside protection); United States v. Kosma, 951 F.2d 549, 558 (3d Cir. 1991) (stating subjective test "frustrates the purposes of section 871" and makes prosecution difficult). *But see* Crane, *supra* note 27, at 1273 (arguing speakers will not go unpunished simply by carefully crafting speech). Crane argued, "[i]n 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." Crane, *supra* note 27, at 1273.

55. *See* United States v. Jeffries, 692 F.3d 473, 480 (6th Cir. 2012) (arguing objective standard aligns with original reason for true-threat exception). "What is excluded from First Amendment protection—threats rooted in their effect on the listener—works well with a test that focuses not on the intent of the speaker but on the effect on a reasonable listener of the speech." *Id.*; *see also* Romney, *supra* note 27, at 639 ("[R]ationale for proscribing true threats from First Amendment protection originates from objective harm to others."). "First Amendment principles distinguish protected speech from unprotected speech based on an *objective* view of the speech, not its *mens rea*." United States v. White, 670 F.3d 498, 511 (4th Cir. 2012).

considering the violence that has followed threats over the past decade.[56]

In *Martinez*, the Eleventh Circuit followed the majority of courts that have addressed the issue in holding that true threats should be analyzed under an objective standard. The court did not adequately deal with the issue of whether an objective analysis may stifle free speech. The court was correct, however, in its conclusion that *Black* did not alter the objective standard, and that the objective standard serves policy purpose by better protecting the public.

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56. *See* Romney, *supra* note 27, at 648-49 (discussing "growing number of violent shootings . . . presaged by internet postings"). For instance, "[t]he 1999 shootings at Columbine High School, the 2007 killings at Virginia Tech, and the more recent shooting of Arizona Representative Gabrielle Giffords all occurred after the assailants posted material on the internet that revealed their violent feelings." *Id.* Further, Crane argues:

> 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. 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."

Crane, *supra* note 27, at 1231.