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On Criminalizing Violent Speech

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ABSTRACT

There is an increasingly high number of threats to kill, made by citizens against each other, and against public officials. These threats terrorize people, force them to take protective measures, make them reluctant to assume public office, and, when they do, make them feel as though they have to act cautiously. State and federal laws currently exist that prohibit such threats. This article examines the ways the courts have affected how these laws function. It concludes by suggesting ways these laws can be rendered more effective. Drawing on liberal communitarianism, this article seeks to offer practical recommendations for how the U.S. can adequately respond to our current historical circumstance—namely, one where public officials and lay people are receiving an increasing number of violent threats.

INTRODUCTION

For persons without legal training, it may seem obvious that a person cannot threaten to cause bodily harm to another person or threaten to kill them and get away with such threats. Moreover, persons without legal training would tend to assume that threatening to kill an elected official for the way they voted, or calling on compatriots to go and hang, say, Mike Pence, surely would be legally prohibited.[1] Many free speech advocates, in contrast, may argue that such statements are merely expressions of one's viewpoint and feeling. Additionally, such advocates may suggest that no harm was actually inflicted, that words should not be banned, and that surely words should not be subject to punishment by the state. This view is captured in an often-cited children's chant: sticks and stones may break

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1. Martin Pengelly, *'Hang Mike Pence': Twitter Stops Phrase Trending after Capitol Riot*, THE GUARDIAN, (Jan. 10, 2021, 12:21 PM), https://www.theguardian.com/us-news/2021/jan/10/hang-mike-pence-twitter-stops-phrase-trending-capitol-breach; *Pence 'Proud' of his Jan 6 Actions Despite Criticism from Trump*, REUTERS (Jun. 25, 2021,4:37 AM), https://www.reuters.com/world/us/pence-proud-his-jan-6-actions-despite-criticism-trump-2021-06-25/.

my bones, but words will never hurt me. The law itself is far from clear on this matter, as we shall see. This article suggests that deliberations as to whether or not threats to kill should be protected by the First Amendment would benefit from drawing on a liberal communitarian framework.

The subject at hand, the threat to kill, is a form of speech. Americans consider freedom of speech to be one of the most cherished individual rights. The Supreme Court has gone to great lengths to allow speech that many would consider unworthy of constitutional protection. For example, in 1977, the Court ruled that neo-Nazi groups have a First Amendment right to march through a Jewish community.[2] In 1989, the Court ruled that burning the American flag is protected by the First Amendment.[3] And, in 2011, the Court ruled that the Westboro Baptist Church had the constitutional right to scream homophobic slurs at a U.S. Marine's funeral on public property.[4] While other democracies have banned hate speech, the U.S. Congress and state legislatures have demurred. However, the Court has emphasized time and again that "the right of free speech is not absolute at all times and under all circumstances," and it has maintained the right to delineate between constitutionally protected and unprotected speech.[5] For example, the Court has defined some "well-defined and narrowly limited classes of speech" that fall outside the protections of the First Amendment, like "the lewd and obscene, the profane, [and] the libelous."[6] The subject of this article is the question of whether threats to kill should be added as a class of banned speech.

This article first introduces the social philosophy of liberal communitarianism. In Section II, the article reviews the existing federal statutes governing the making of threats. Section III examines major, relevant Supreme Court and lower court cases. Section IV reviews another area of relevant Supreme Court precedent: fighting words. Section V provides recent examples of a wave of threats to kill, which seem to be rising in frequency. The article concludes by providing prescriptive recommendations for ways to improve the deterrence of such threats. It cannot be stressed enough that this is not a review article; no attempt is made to review all the relevant cases and laws. A selection of key cases, the author suggests, will suffice to indicate the current state of affairs and what changes seem to be called for.

2. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977).
3. Texas v. Johnson, 491 U.S. 397 (1989).
4. Snyder v. Phelps, 562 U.S. 443 (2011).
5. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).
6. *Id.* at 571–72.

I. LIBERAL COMMUNITARIANISM, A BRIEF OVERVIEW

Liberal communitarianism seeks to combine two fundamentally opposing theories, liberalism and communitarianism. Liberalism and communitarianism maintain different conceptions of the role of moral reasoning in public spaces and political bodies, and, therefore, these two theoretical frameworks oftentimes produce opposing political prescriptions.

Liberalism, with its emphasis on rational thought and the autonomy of the individual, posits that every person can and should develop their own conception of the good and that the state should be morally neutral. For liberal societies, morality is a private matter. The main scholars responsible for the revival of liberal philosophy in the second half of the 20th century are Friedrich von Hayek and Milton Friedman on the right and John Rawls on the left.[7] In contrast, communitarianism posits that communities should come together in public spaces to define the good in terms of core shared values. Reemerging in the 1980s as a critique of contemporary liberalism, communitarian social philosophy holds that individualism leads to the atomization of society, harming members who need social bonding. Ultimately, communitarianism concludes that a flourishing society requires individual commitments to the common good (in other words, social responsibility). The main scholars who contributed to the communitarian social philosophy include Charles Taylor, Michael Sandel, Shlomo Avineri, Seyla Benhabib, William A. Galston, and Amitai Etzioni.[8]

Communitarianism has an authoritarian branch, as seen in the social conditions of Singapore and Japan. This kind of communitarianism maintains that individuals are to be viewed as cells of an organic body, whose main contributions and meaning are attained through their service to the communal whole, including both the local community and that of the nation. Social pressure is a main way that individuals are held in line. Some authoritarian societies draw heavily on the state for enforcement of their values; in all, social bonds and pressures to conform to norms play a

7. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962); JOHN RAWLS, A THEORY OF JUSTICE (1971).

8. *See* CHARLES TAYLOR, MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" (Amy Gutmann ed., 1992); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (1996); COMMUNITARIANISM AND INDIVIDUALISM (Shlomo Avineri & Avner de-Shalit eds., 1992); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2004); WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002).

key role. Japan, for example, has some authoritarian elements and still makes short shrift of the rights of women, ethnic minorities, LGBTQ+ people, and people with disabilities.[9]

Untethered, both liberalism and communitarianism fail to fulfill fundamental precepts of democracy. Liberalism fails to maintain the mutual respect and bonds among citizens that are required for reasoned debate and the formation of shared normative understandings—the basis of shared policies—whereas communitarianism fails to protect individual rights.

Liberal communitarianism assumes from the outset that a society ought to treat both individual rights and the common good as basic moral principles and that neither should be assumed to a priori trump the other. It does not overlook the fundamentally incompatible nature of liberalism and communitarianism; rather, it seeks to embrace their incompatibilities, as one's strength is the other's deficiency. Liberal communitarians recommend a constant balancing of the two sets of moral principles, requiring legislators and citizens alike to weigh the common good against individual rights to create policies and social norms that protect both. And, when the common good and liberty come into conflict, liberal communitarians must rule which should take precedence.

Liberal communitarians emphasize that deliberations that require a community to determine which principle—whether the common good or individual rights—should take precedence over the other must respond to the specific historic conditions of the time. There is no one "good" balance between rights and the common good. For example, security measures not considered legitimate before the September 11, 2001 attacks on the American homeland were quickly adopted afterwards. When no new attacks occurred over the following decades, these measures were scaled back. In short, liberal communitarianism allows for flexibility in determinations of the standing of the common good and individual rights; deliberations regarding which of these values should take precedence in any given situation must take historical context into account.

II. SUMMARY OF EXISTING LAWS

Laws prohibiting threats against government officials and lay people exist at both the state and federal level. At the state level, legislation

9. *See, e.g.*, *Interview: In Conversation with Doi Kanae, "How Japan Can Achieve 'Unity in Diversity'"*, INT'L HOUSE OF JAPAN, (Nov. 29, 2017), https://www.i-house.or.jp/eng/programs/ihj-world17/.

prohibiting threats varies greatly among states, with some criminalizing threats broadly and others largely ignoring the issue. Currently, nineteen states have laws criminalizing "terrorizing or making terroristic threats," defined generally "as threatening to kill another with the intent of putting that person in fear of imminent death and under circumstances that would reasonably cause the victim to believe that the threat will be carried out."[10]

The federal government, restricted by jurisdictional concerns and the Tenth Amendment—which ensures that, in most contexts, threats to kill would be adjudicated in state courts under state laws—only criminalizes some specific kinds of threats.[11] The federal government has criminalized threats made through interstate commerce and through the United States Postal Service.[12] The federal government has also criminalized threats, made in or out of interstate commerce or the mail, against the President, the Vice President, a major candidate for either of these offices,[13] or the immediate family of each of these individuals.[14] Outside of these specific categories, the federal government has not passed legislation criminalizing threats.

III. TRUE THREATS IN THE COURTS

This article turns next to a review of key cases that highlight the varying ways courts have made it ever more difficult to deter people from threatening each other and public officials. Under review are not only federal cases but also cases by lower courts. To reiterate, key cases were chosen to support the thesis of the article that it is increasingly difficult to charge people who threaten to kill, but the article does not review all relevant cases.

10. *Unlawful Communications*, JRANK, https://law.jrank.org/pages/11015/Unlawful-Communications.html (last visited April 1, 2021).

11. The Tenth Amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Since criminalizing threats to kill is not specifically delegated to the federal government, it is no surprise that Congress has never passed comprehensive "true threats" legislation, as a jurisdictional challenge would be inevitable. However, one could also explain the absence of more comprehensive legislation by a mere disinterest in criminalizing "true threats" or a lack of urgency or need to do so.

12. 18 U.S.C. § 876.

13. 18 U.S.C. § 871.

14. 18 U.S.C. § 879.

A. The Supreme Court Burdens the Government

On August 27, 1966, Robert Watts attended an anti-war public rally near the Washington Monument.[15] During the rally, the crowd broke into groups to discuss specific issues. In the discussion group in which Watts participated, which was assigned the topic of police brutality, someone commented that the younger people present should get more education before sharing their views. Watts, only eighteen years old at the time, responded:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.[16]

An undercover member of the Army Counter Intelligence Corps reported Watts's comments, which subsequently led to his arrest.

Watts was arrested for "violating a 1917 statute which prohibits any person from 'knowingly and willfully … [making] any threat to take the life of or to inflict bodily harm upon the President of the United States . . . .'"[17] At the trial and again on appeal, Watts made two arguments. First, he argued that the statute was unconstitutional on its face—namely, that someone who makes threats against the President's life should be protected by the First Amendment. Second, Watts maintained that his specific statement did not constitute a true threat. Watts argued "that the words he used could not be interpreted as a threat because they did not contain a statement of present intention to injure the President."[18] This was the root of his argument: a true threat is a statement that suggests an immediacy of action, as indicated by the word "present," and a willingness of action, as indicated by the word "intention."

Watts went on to describe four ways in which his statement demonstrated a lack of "present intention." First, he argued that his statement was an example of "common hyperbole," and was simply a rhetorical device he was using to make a point.[19] This, he argued, showed a lack of intention to carry out the threat. Second, he maintained that his statement was clearly "conditional" in nature, "that it was expressly made conditional upon an event—induction into the Armed Forces—which

15. Watts v. United States, 394 U.S. 705 (1969).
16. *Id.* at 706.
17. *Id*. at 705.
18. Watts v. United States, 402 F.2d 676, 680 (D.C. Cir. 1968).
19. *Id.*

petitioner vowed would never occur."[20] The conditional nature of his statement, he held, went toward the lack of immediacy of his statement. Third, he argued that his statement was merely an expression of a desire, not an actual threat, which went towards his lack of intention.[21] And fourth, he argued that the context of how his statement was received by those present, namely, that they laughed in response to his statement, demonstrated a lack of intention.[22] At trial, a jury found Watts's comment at the discussion group to be in violation of the statute, a ruling that the D.C. Circuit Appellate Court later affirmed. He appealed, and the Supreme Court granted certiorari.[23]

The Court answered two main questions in *Watts v. United States*. First, the Court considered whether laws criminalizing threats against the president's life were constitutional. In a *per curiam* decision—a decision in which the Court acts collectively, in contrast to standard opinions, in which an individual Justice is responsible for authoring the decision—the Court wrote:

> Certainly the statute under which the petitioner was convicted was constitutional on its face. The Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive and in allowing him to perform his duties without interference from threats of physical violence.[24]

In other words, threats against the President's life do not constitute protected speech under the First Amendment.

Second, the Court addressed whether Watts's specific comment constituted a threat, and whether it fell outside of protected speech. The Court agreed with the second half of Watts's argument, holding that context largely determines whether or not a threat is "true"[25] and "what is a threat must be distinguished from what is constitutionally protected speech."[26] According to this decision, the burden falls on "the Government to prove a true 'threat,'" and it is up to the courts to interpret where the dividing line between a true and an untrue threat falls.[27]

20. *Watts*, 394 U.S. at 707.
21. *Id.*
22. *Id.*
23. *Id*. at 706.
24. *Id*. at 707.
25. *Id.* at 708.
26. *Id.* at 707.
27. *Id.* at 708.

In this specific case, the Court drew that dividing line, finding that Watts's statement was a form of political hyperbole. Indeed, the Court agreed with Watts's argument that his statement was "'a kind of very crude offensive method of stating a political opposition to the President.'"[28] The Court wrote, "taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise."[29]

B. More Burdens

On August 22, 1998, Barry Black, a resident of Carroll County, Virginia, led a Ku Klux Klan (KKK) rally.[30] The rally took place on private property approximately 300 to 350 yards away from the public road, and occurred with the permission of the property owner, who was also in attendance.[31] The crowd attending the rally circled around a twenty-five-to-thirty-foot-tall cross, which was visible from the public road.[32] Having been made aware of the rally's occurrence, a police officer drove to its location and parked on the public road to observe the situation and report any unlawful activity.[33] Then, according to the police officer's testimony, "'all of a sudden . . . [the cross] went up in . . . flame[s].'"[34] The police officer then approached the rally and asked those in attendance who was responsible for the cross-burning.[35] As the leader of the rally, Black claimed responsibility, and the police officer subsequently arrested him for violating a Virginia statute that criminalizes cross burning.[36] Specifically, the Virginia cross-burning statute reads 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 on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.

28. *Id.*
29. *Id.*
30. Virginia v. Black, 538 U.S. 343, 348 (2003).
31. *Id.* at 348–49.
32. *Id.* at 349.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*

> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[37]

At trial, and in his appeal, Black argued that the Virginia cross-burning statute was unconstitutional. First, he argued that criminalizing cross-burning restricts free speech, and therefore the statute was unconstitutional on its face. Second, he claimed that, even if the court determined that it was constitutional to criminalize cross-burning in some contexts, the prima facie clause of the statute in question criminalized all cross-burnings, which fails to take context into account and hence is unconstitutional.

At trial, Black was convicted of violating the statute. On appeal, the Virginia Supreme Court found the statute unconstitutional on its face because it "discriminates on the basis of content since it 'selectively chooses only cross burning because of its distinctive message.'"[38] The court also found the "prima facie evidence provision renders the statute overbroad because 'the enhanced probability of prosecution under the statute chills the expression of protected speech.'"[39] The Commonwealth of Virginia appealed the decision, and the Court granted certiorari.

In the Court's opinion in *Virginia v. Black*, delivered by Justice O'Connor, the Court began by defining true threats under the existing precedent. The Court wrote:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."[40]

The Court identified two constitutional questions raised by *Virginia v. Black*. First, whether the intent to intimidate through speech, symbolic or otherwise, was protected under the First Amendment. And second, whether a speech act could be considered prima facie evidence of intimidation.

With regard to the first question, the Court found that, indeed, speech intended to intimidate is a type of true threat, and it can be criminalized

37. *Id.* at 348 (quoting VA. CODE ANN. § 18.2-423 (1983)).
38. *Id.* at 351.
39. *Id.*
40. *Id.* at 359−60 (citation omitted).

within the bounds of the Constitution, overturning the Virginia Supreme Court ruling. Justice O'Connor wrote, "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."[41]

However, with regard to the second question, concerning whether a speech act could be considered prima facie evidence of intimidation, the Court affirmed the Virginia Supreme Court ruling. It concluded that the burning of a cross is not always a symbol of intimidation, and, while it can be used for intimidation, the prima facie clause of the statute in question does not allow room for a situation in which cross-burning occurs for reasons not associated with intimidation. Justice O'Connor wrote:

> The prima facie provision makes no effort to distinguish among these different types of cross burnings. It does not distinguish between a cross burning done with the purpose of creating anger or resentment and a cross burning done with the purpose of threatening or intimidating a victim. It does not distinguish between a cross burning at a public rally or a cross burning on a neighbor's lawn. It does not treat the cross burning directed at an individual differently from the cross burning directed at a group of like-minded believers.[42]

In other words, cross-burning, like most speech acts, allows for the communication of many different things from the same act. One must consider the context in which a speech act is being made—as, for example, the Court considered the context, the nature of the statement, and its effect on the listeners in *Watts*—in order to determine its intent. Similar considerations are necessary in the context of cross-burning. In this way, the Court further limited the conditions under which threats are true: intent must also be taken into account.

It is important to note that the Court did not consider whether cross-burning could be a form of intimidation. Rather, it stated that "the history of cross burning in this country shows that cross burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence."[43] Furthermore, Black did not bring forth the argument that cross-burning cannot be used for the purpose of intimidation. As Justice O'Connor reported, "[r]espondents do not contest that some cross burnings fit within this meaning of intimidating speech, and rightly so."[44]

41. *Id.* at 360.
42. *Id.* at 366.
43. *Id.* at 360.
44. *Id.*

Thus, in this case, the Court did not consider whether cross-burning could be a form of intimidation through symbolic speech; rather, it considered whether intimidation, through symbolic speech or otherwise, is a constitutionally legitimate component of a true threat.

C. Still More Complexities

Anthony Douglas Elonis, an amateur and self-produced music artist, began posting rap videos and lyrics on Facebook after his wife left him.[45] His lyrics contained "graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement."[46] In one of these posts, Elonis wrote the following:

> Hi, I'm Tone Elonis.
>
> Did you know that it's illegal for me to say I want to kill my wife? . . .
>
> 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 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 … Yet even more illegal to show an illustrated diagram. [diagram of the house][47]

Elonis frequently claimed, in posts on Facebook and in testimony following his arrest, that he did not intend to threaten anyone through his lyrics; rather, he was using Facebook as a platform to publish his art, and he asserted that writing rap lyrics was "therapeutic."[48] As Chief Justice Roberts stated in the Court's opinion, "Elonis's co-workers and friends viewed the posts in a different light."[49]

Elonis was arrested and charged with five counts of violating 18 U.S.C. § 875(c), a federal statute that criminalizes threats made through interstate commerce. Specifically, the statute reads, "Whoever transmits in interstate or foreign commerce any communication containing any

45. Elonis v. United States, 575 U.S. 723 (2015).
46. *Id*.
47. *Id*. at 728.
48. *Id*. at 727.
49. *Id.*

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."[50]

Elonis argued that the word "threat" implies that the person making the statement knows that the statement is a threat.[51] As such, at his jury trial, Elonis requested the following jury instruction: "the government must prove that he [Elonis] intended to communicate a true threat."[52] This request was denied by the District Court. Instead, the jury instruction read as follows:

> A statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual.[53]

In other words, Elonis requested that the court recognize a higher burden of proof for prosecution under this federal statute. He argued that the government should be required to prove that the communicator of the threat intended to communicate the threat. Elonis claimed that the communicator's state of mind is an essential component for determining guilt and cannot be overlooked.[54] The government argued that this higher burden of proof was unnecessary for a conviction and that a "reasonable person" or negligence standard was sufficient.[55] Ultimately, the court denied Elonis's request and maintained the lower, "reasonable person" standard.[56] In applying this standard, the government need not prove that Elonis intended to communicate a threat; rather, they need only prove that a "reasonable person" would consider his words threatening. Elonis appealed the verdict, but the Appellate Court upheld the decision of the lower court.[57] Elonis appealed the verdict again, and the Supreme Court granted certiorari.[58]

The question the Court considered in *Elonis v. United States* was "whether the statute [18 U.S.C. § 875(c)] also requires that the defendant

50. 18 U.S.C. § 875(c).
51. *Elonis*, 575 U.S. at 732.
52. *Id.* at 731.
53. *Id.*
54. *Id.* at 732.
55. *Id.*
56. *Id.*
57. *Id.* at 723.
58. *Id*. at 732.

be aware of the threatening nature of the communication, and—if not—whether the First Amendment requires such a showing."[59]

The Court decided that the defendant must be aware of the threatening nature of his communication in order for him to be convicted of a felony under this statute.[60] The Court emphasized the history and precedent behind the two different burden of proof standards—the reasonable person standard and the intent or state of mind standard—in order to explain its ruling. Chief Justice Roberts, writing for the Court, highlighted the categorically different applications of these standards. The reasonable person standard is a common burden of proof in tort law, which determines civil liability. It is rarely ever applied to criminal law. He then went on to describe what is considered a "basic principle" of criminal law: that "wrongdoing must be conscious to be criminal."[61] While an individual need not know at the time of his crime that his actions are criminal—the well-known maxim *ignorantia juris non excusat* (ignorance of the law excuses not) still holds—once the law has been explained to him, he must "know the facts that make his conduct fit the definition of the offense."[62] Since "[f]ederal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state," Elonis's conviction, based on jury instructions that did not require jurors to consider his intention, was invalid.[63]

The conditional way in which Chief Justice Roberts framed the question of the case allowed the Court to bypass any consideration of the First Amendment implications of this case. His justification for not ruling on First Amendment questions, and thereby building on the Supreme Court's still flimsy definition of true threats, was purely prudential. He argued that the Court historically only responds to questions raised by the petitioner himself, not to questions the Justices find relevant.[64] Since Elonis built his case on the specifics of the jury instructions and the proper application of the reasonable person standard, it was to this question that the Court needed to respond. However, one could easily argue that the Court constructed their opinion specifically to avoid such First Amendment issues, which tend to be more challenging and controversial.

59. *Id.* at 726.
60. *Id.* at 740.
61. *Id.* at 734 (citation omitted).
62. *Id.* at 735 (citation omitted).
63. *Id*. at 740.
64. *Id.* at 740−42.

Rather than use the opportunity of *Elonis* to clarify the definition of true threats for the lower courts, the Court decided to avoid such consideration.

D. And Still More

Most recently, the Court had an opportunity to clarify its definition of true threats in *Perez v. Florida*.[65] Robert Perez was drinking a mixture of vodka and grapefruit juice, a concoction he called a "molly cocktail," with his friends on the beach. At one point, the group ran out of ingredients for the "molly cocktail" and went to a nearby liquor store to restock their supply.[66] At the liquor store, an employee, overhearing Perez and his friends, thought Perez was referring to an incendiary "Molotov cocktail" and asked if it would "burn anything up."[67] Perez responded to the store employee, saying that he did not have "that type" of cocktail, and the group laughed at his response. He then went on to say, in an action Justice Sotomayor calls "imprudent," that he had only "one Molotov cocktail" and could "blow the whole place up."[68]

According to Florida Statute §790.162 (2007), it is a felony "to threaten to throw, project, place, or discharge any destructive device with intent to do bodily harm to any person or with intent to do damage to any property of any person."[69] Robert Perez was arrested and found in violation of this statute based on his comments at the liquor store.[70]

Similar to the appeal in *Elonis*, Perez's appeal to the appellate court and later to the Supreme Court argued that, at his trial, the district court offered the jury instructions that, in effect, lowered the burden of proof to a reasonable person standard instead of a burden of proof where the jury must consider the mental state of the defendant. The Supreme Court declined to grant certiorari.

In a concurrence to the denial of certiorari, Justice Sotomayor emphasized the still ambiguous definition of true threats and its lack of concrete and comprehensive precedent. Sotomayor ultimately agreed, albeit "reluctantly," that *Perez v. Florida* was not the proper case to create such precedent.[71] Again, similarly to the decision in *Elonis*, the lower courts decided the case on the basis of a jury instruction question, not a

65. Perez v. Florida, 137 S. Ct. 853 (2017).
66. *Id*. at 853 (Sotomayor, J., concurring).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 853−854.
71. *Id.* at 854.

First Amendment question, and thus it would be improper to answer a First Amendment question through this specific case. But Justice Sotomayor went on to write that "the Court should also decide precisely what level of intent suffices under the First Amendment—a question we avoided two Terms ago in *Elonis*."[72]

Currently, as the law stands, there is a hole in the Court's constitutional interpretation of the First Amendment. Other "narrowly limited classes of speech"[73] have comprehensive definitions, allowing for clarity and consistency in the law's application in lower courts. However, true threats, as a category of speech that the government can constitutionally regulate, is as uncertain as it is unclear.

E. Lower Courts Are Struggling

The absence of a clear definition of true threats is reflected in the difficulties lower courts have exhibited in their dealings with people who threatened others. As legal scholars Kevin Francis O'Neill and David L. Hudson Jr. argued, federal circuit courts "left to their own devices[,] . . . created several approaches to their treatment of true threats cases."[74] For example, the Second Circuit Court of Appeals and the Ninth Circuit Court of Appeals both tried threats cases, but, having no clear superior court precedent to look to for guidance, both courts created their own definitions of true threats, which happen to be different.

The Second Circuit Court of Appeals decided a case in 1976, *United States v. Kelner*, concerning true threats.[75] Russell Kelner, the appellant in this case, was a member of the Jewish Defense League (JDL) in New York City. On November 11, 1974, the JDL notified United Press International (UPI) that they were having a press conference at the JDL headquarters later that day to address a speech Yasser Arafat—the leader of the Palestine Liberation Organization (PLO)—was scheduled to make in front of the United Nations General Assembly in New York City.[76] In an interview at this press conference, the following exchange took place between John Miller, a reporter for WPIX-TV (Channel 11) and Kelner:

72. *Id*. at 855.

73. Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

74. Kevin Francis O'Neill, *True Threats*, THE FIRST AMENDMENT ENCYCLOPEDIA (Updated June 2017 by David L. Hudson Jr.), https://www.mtsu.edu/first-amendment/article/1025/true-threats.

75. United States v. Kelner, 534 F.2d 1020, 1026 (2d. Cir 1976).

76. *Id.* at 1020–21.

> Kelner: We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive.
>
> Miller: How do you plan to do that? You're going to kill him?
>
> Kelner: I'm talking about justice. I'm talking about equal rights under the law, a law that may not exist, but should exist.
>
> Miller: Are you saying that you plan to kill them?
>
> Kelner: We are planning to assassinate Mr. Arafat. [sic.] just the way any other murderer is treated.
>
> Miller: Do you have the people picked out for this? Have you planned it out? Have you started this operation?
>
> Kelner: Everything is planned in detail.[77]

The editorial board at WPIX-TV decided to air the audio-video footage on the ten o'clock news. At trial, Kelner was convicted of "causing to be transmitted in interstate commerce a communication containing a 'threat to injure the person of another'" under statute 18 U.S.C. §§ 2, 875(c).[78] Kelner was sentenced to a year in prison and given a $1,000 fine. The appeals court affirmed the decision of the trial court. Kelner appealed to the Second Circuit Court.

In his appeal, Kelner argued that his communication (specifically what he had said in the interview) should be protected under the First Amendment as "political hyperbole," in accordance with *Watts*.[79] The decision of the Second Circuit, written by Judge Oakes, systematically reviewed the claims Kelner presented to the court. Judge Oakes wrote that it is important that the courts maintain "a narrow construction of the word 'threat' in the statute here, 18 U.S.C. § 875(c), as . . . is consonant with the protection of First Amendment interests."[80] However, he went on to write that, even with a narrow definition of the word "threat," a "threat itself may affront such important social interests that it is punishable absent proof of a specific intent to carry it into action when the following criteria are satisfied."[81] He wrote: "So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity

77. *Id.* at 1021.
78. *Id.* at 1020.
79. *Id.* at 1024.
80. *Id*. at 1027.
81. *Id.*

of purpose and imminent prospect of execution, the statute may properly be applied."[82]

In this decision, Judge Oakes offers four criteria for what constitutes a true threat. First, the threat must be obviously a threat, in and out of context. Second, the threat must be directed at a specific person. Third, the threat must convey a willingness to execute the threat. And fourth, the threat must convey an urgency or immediacy of execution. If all four of these criteria for a threat are met—which the court determined was the case in Kelner's interview transcript—then that threat is "true" and cannot be protected by the First Amendment's guarantee of freedom of speech.

The Ninth Circuit decided a case concerning true threats, *United States v. Cassel*, in 2005.[83] In 1998, Paul Kent Cassel was living on the property of Anastasia Kafteranis, his girlfriend, located near Randsburg, California. The federal government owned the lots surrounding Kafteranis's property, and the Bureau of Land Management (BLM) sought to sell them. "Cassel apparently liked his privacy" and was not keen on having new neighbors.[84] On two different occasions, when people came to view the lot adjoining the Kafteranis property, Cassel approached the prospective buyers with his aggressive dogs and tried to convince them that the lot was undesirable.

> Cassel claimed, among other things, . . . that the surrounding area was inhabited by child molesters, murderers, producers of illegal drugs, devil-worshipers, and witches; that the ground was a toxic waste dump contaminated with cyanide; that local law enforcement officials were corrupt; that mining explosions had damaged Kafteranis's own house; and that a neighbor had developed a disease known as "silica lung."[85]

One prospective buyer testified in court that Cassel told him, "that if I [Goodin] tried to build anything on Lot 107, that it would definitely burn. He would see to that. That if I left anything there, it would be stolen, vandalized. He would see to that."[86] None of the prospective buyers Cassel approached ended up buying the property, and eventually Kafteranis purchased the lot at auction.

In November 2000, Cassel was charged in the Eastern District of California with two counts of interfering with a federal land sale under 18 U.S.C. § 1860. The statute "punishes, in relevant part, '[w]hoever, by intimidation . . . hinders, prevents, or attempts to hinder or prevent, any

82. *Id*.
83. United States v. Cassel, 408 F.3d 622 (9th Cir. 2005).
84. *Id.* at 624.
85. *Id*. at 625.
86. *Id.*

person from bidding upon or purchasing any tract of' federal land at public sale."[87] Cassel was convicted of violating this statute by a jury in 2001, and he was sentenced to five months' imprisonment and 150 days of home confinement. Cassel appealed to the district court, which affirmed his conviction and sentence. Cassel appealed again to the appellate court.

The disputed question in this case is similar to the First Amendment question in *Elonis*, namely whether there was an intent to communicate a threat. In the circuit court opinion for *United States v. Cassel*, Judge O'Scannlain wrote that "the disputed question is whether the government must prove that the defendant intended his words or conduct to be understood by the victim as a threat."[88] Cassel argued that even though he intended to say the words he said to the prospective buyers, he did not mean for those words to be interpreted by the prospective buyers as a threat. Because the government did not prove that Cassel intended to threaten the prospective buyers, Cassel argued that his speech is protected under the First Amendment. The government argued that "speech is punishable if a reasonable person would understand it as a threat, whether or not the speaker meant for it to be so understood."[89] In other words, Cassel argued that an intent standard was necessary to restrict speech otherwise protected by the First Amendment, and the government argued that a lower burden of proof, a mere negligence or reasonable person standard, was sufficient for speech to be constitutionally restricted.

Drawing on the *Virginia v. Black* decision, Judge O'Scannlain argued that the Supreme Court's definition of true threats, as outlined in O'Connor's opinion in *Black*, clearly asserts the importance of an intent requirement for true threats. Judge O'Scannlain wrote, "the clear import of this definition is that only *intentional* threats are criminally punishable consistently with the First Amendment."[90] He went on to write that "[w]e are therefore bound to conclude that speech may be deemed unprotected by the First Amendment as a 'true threat' only upon proof that the speaker subjectively intended the speech as a threat."[91]

Returning to Cassel's specific case, the Ninth Circuit vacated the district court's judgement and remanded the case for re-trial. Because the government failed to demonstrate adequate *mens rea*, along with other inconsistencies such as improper jury instructions, Cassel's case,

87. *Id.* at 626.
88. *Id.* at 628.
89. *Id.*
90. *Id.* at 631.
91. *Id.* at 633.

according to the opinion of the court, warranted a re-trial according to their newly clarified definition of a true threat.

Kelner and *Cassel*, taken together, demonstrate that "[u]ntil the Supreme Court formulates a definitive test for true threats, lawyers must invoke the test that prevails in their jurisdictions."[92]

IV. FIGHTING WORDS FURTHER WEAKEN THE STATE

A different approach to limiting threatening speech without unduly curbing the First Amendment is to return to, and strengthen, "fighting words" as a category of unprotected speech. The Supreme Court has deemed it constitutionally permissible to criminalize fighting words. The Court first established the fighting words doctrine in the case *Chaplinsky v. New Hampshire*.[93] Walter Chaplinsky, a practicing Jehovah's Witness, was distributing literature in support of his beliefs on a public sidewalk in downtown Rochester, New Hampshire, when a town marshal approached him. Chaplinsky called to the marshal, saying, "You are a God damned racketeer" and "a damned Fascist."[94] Chaplinsky was subsequently arrested for, and convicted of, violating a state law that prohibited:

> "any offensive, derisive or annoying word" addressed to any person in a public place under the state court's interpretation of the statute as being limited to "fighting words"—i.e., to words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[95]

On appeal, Chaplinsky argued that the above law violated his First Amendment right to free speech on the grounds that it is overly vague.

In response, the Court reiterated that "the right of free speech is not absolute at all times and under all circumstances."[96] In 1942, when the opinion of the Court was written, the specific "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem" included "the lewd and obscene, the profane, [and] the libelous."[97] The court defined fighting words "narrowly" and "well" by stating that these words are

92. O'Neill, *supra* note 74.

93. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

94. *Id.* at 569.

95. Cong. Rsch. Serv., *Fighting Words, Hostile Audiences and True Threats: Overview*, CONSTITUTION ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1_2_3_2_1/ (last visited December 6, 2021).

96. *Chaplinsky*, 315 U.S. at 571.

97. *Id*. at 571–72.

"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[98] The Court then provided a test to determine whether or not a speech act falls into the category of fighting words and determined that a "reasonable person" standard is sufficient in determining whether or not a statement constitutes fighting words.

While the Supreme Court has not overturned *Chaplinsky,* in the nearly eighty years since the ruling, the Court has taken significant steps to minimize the scope of *Chaplinsky*'s precedent by carefully examining statutes criminalizing fighting words. The Court has closely scrutinized statutes for vagueness and on overbreadth grounds and has overturned convictions for not adequately falling within their increasingly narrow definition of fighting words.

The Court began to minimize the scope of fighting words just seven years after the *Chaplinsky* decision. In the case *Terminiello v. Chicago*, the Court overturned the conviction of Father Arthur Terminiello, who was arrested and initially convicted of causing a "breach of the peace" by way of his "vigorously, if not viciously, critic[al]" speech in front of a protesting crowd.[99] Not only did the Court overturn his conviction, but it found the ordinance criminalizing speech that caused a "breach in the peace" unconstitutional. Reading the *Chaplinsky* decision at its face, such an ordinance should easily fall into the category of fighting words defined as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[100] But, in the *Terminiello* decision, the Court narrowed the scope of fighting words to speech that would be "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[101] Defending this shift from a "breach of the peace" standard to a "clear and present danger standard" for fighting words, Justice Douglas, in the opinion of the Court, wrote that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[102]

The *Terminiello* decision was the first in a series of Supreme Court decisions in which the Court either overturned convictions based on "breach of peace" ordinances and statutes or reiterated the need for the

98. *Id.* at 571–72.
99. Terminiello v. Chicago, 337 U.S. 1, 3 (1949).
100. *Id.* at 26.
101. *Id.* at 4.
102. *Id.*

higher "clear and present danger" standard to constitutionally prohibit certain types of speech. For example, in 1951, in the case *Feiner v. New York*, the Court did not overturn the conviction, but emphasized the importance of a "clear and present danger" standard for criminalizing fighting words.[103] In 1963, in the case *Edwards v. South Carolina*, the Court overturned the convictions of 187 students convicted under a "breach of the peace" statute.[104] In 1969, in the case *Street v. New York*, the Court again overturned a conviction under "fighting words" legislation.[105] In the opinion, the Court emphasized how narrow the category of fighting words had become when it wrote: "we cannot say that the appellant's remarks were so inherently inflammatory as to come within that small class of 'fighting words.'"[106]

This trend of the courts, both lower and upper, refusing to apply the *Chaplinsky* precedent to affirm a fighting words conviction is well exemplified by the 1971 case *Cohen v. California*.[107] Justice Harlan, in the opinion of the Court, acknowledged the precedent *Chaplinsky* provides when he wrote:

"[T]he States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction."[108] But instead of using this precedent to affirm a conviction, the Court went on to apply a higher level of scrutiny—clear and present danger—than that called for by the *Chaplinsky* breach of peace precedent.[109]

Cohen v. California represents just one example of a visible pattern of the Court neglecting and essentially ignoring the *Chaplinsky* precedent. Therefore, while *Chaplinsky* remains formally alive, it is of little significance as constitutional precedent.[110]

All this shows that the fighting words doctrine is a very weak reed to rely on if one seeks to limit threats to kill.

103. Feiner v. New York, 340 U.S. 315, 320 (1951).

104. Edwards v. South Carolina, 372 U.S. 229 (1963).

105. Street v. New York, 394 U.S. 576 (1969).

106. *Id.* at 592.

107. Cohen v. California, 403 U.S. 15 (1971).

108. *Id.* at 20.

109. *Id.* at 27 (Blackmun, J., dissenting).

110. J. Michael Bitzer, *Chaplinsky v. New Hampshire (1942)*, THE FIRST AMEND. ENCYC. (2009), https://mtsu.edu/first-amendment/article/293/chaplinsky-v-new-hampshire.

V. WITHIN HISTORY

This section contains a few select examples of the many thousands of threats that are made each year in the U.S. A significant number of these threats are made against public officials, but many are also made against fellow citizens and family members. These threats terrorize people, force them to take protective measures, and make them increasingly reluctant to run for public office; when people do in fact take office, these threats tend to hold them back, lest they and their family be injured.

This phenomenon is exemplified by the telling case of the pain inflicted on Lenny Pozner, the father of six-year-old Sandy Hook shooting victim Noah Pozner. He received death threats from people claiming that the mass shooting on December 14, 2012 at Sandy Hook Elementary School in Newtown, Connecticut was a hoax. Noah was "A sweet-faced, big-eyed, brown-haired boy," yet "his tiny body took multiple bullets."[111] Just days after the shooting, conspiracy theories spread over the internet, claiming that Sandy Hook never happened, that it was staged by actors, or that the children had never existed and it was "a ruse by President Obama/the anti-gun movement/the 'New World Order global elitists.'"[112] Some people found these conspiracy theories so convincing that they began harassing and threatening the parents of the victims. For example, Lucy Richards, one such conspiracy theory believer, left Lenny Pozner threatening emails and voicemails such as: "you gonna die, death is coming to you real soon" and, "LOOK BEHIND YOU IT IS DEATH."[113]

Threats to grieving parents may shock the conscience, but they are far from the only chilling examples of threatening speech in the U.S. Politicians also receive death threats. President Biden received death threats shortly after he arrived at 1600 Pennsylvania Avenue. David Kyle Reeves called the White House switchboard and left a message that he "was going to kill everyone and 'chop [their] heads off.'"[114] In subsequent calls, he made threats directed at the President and at the Secret Service

111. Hadley Freeman, *Sandy Hook Father Leonard Pozner on Death Threats: 'I'd Never Imagined I'd Have to Fight for my Child's Legacy'*, THE GUARDIAN (May 2, 2017, 11:05 AM ET), https://www.theguardian.com/us-news/2017/may/02/sandy-hook-school-hoax-massacre-conspiracists-victim-father.

112. *Id.*

113. Daniella Silva, *Sandy Hook Conspiracy Theorist Gets Prison Time for Death Threats Against Parents*, NBC NEWS (June 7, 2017, 5:27 PM ET), https://www.nbcnews.com/news/us-news/sandy-hook-conspiracy-theorist-gets-jail-time-death-threats-against-n769276.

114. Tina Burnside & Hollie Silverman, *North Carolina Man Charged with Threatening to Kill President Biden*, CNN (Feb. 11, 2021, 6:54 PM ET), https://www.cnn.com/2021/02/11/us/man-charged-with-threatening-to-kill-president/index.html.

agent at the other end of the line.[115] Michigan Governor Gretchen Whitmer and Michigan Attorney General Dana Nessel received "credible [death] threats" sent by Robert Sinclair Tesh through a social media messenger on April 14, 2020.[116]

Brad Raffensperger, Georgia's Republican secretary of state, received a number of death threats in November and December of 2020. Following criticism and false allegations by President Trump against Georgia's vote counting, Raffensperger began receiving the following messages: "You better not botch this recount, [y]our life depends on it" and "The Raffenspergers should be put on trial for treason and face execution."[117] Furthermore, Raffensperger's wife received a text that read, "Your husband deserves to face a firing squad."[118]

Judge James Louis Robart, a sitting senior judge of the United States District Court for the Western District of Washington, began receiving death threats in late 2017. In December of that year, Judge Robart partially lifted the Trump administration's ban on refugees from eleven Muslim-majority countries. Former President Trump responded on Twitter, expressing his discontent with Robart's ruling and referring to him as a "so-called judge."[119] This subsequently led to Judge Robart receiving 40,000 threatening messages, 1,100 of which "were serious enough to be investigated."[120] The judge received so many direct death threats that "the U.S. marshals set up camp around [his] house." Of the messages he received, 100 were direct death threats.[121]

In November of 2020, Brian Maiorana, a fifty-four-year-old Staten Island resident, posted the following to social media: "As the Jew Senator from Jew York said nothing is off the table . . . We blow up the FBI

115. *Id.*

116. Craig Mauger, *Detroit Man Arrested After Allegedly Threatening to Kill Whitmer, Nessel*, THE DETROIT NEWS (May 15, 2020, 12:56 PM ET), https://www.detroitnews.com/story/news/local/detroit-city/2020/05/15/detroit-man-arrested-after-allegedly-threatening-whitmer-nessel/5199169002/.

117. Jake Lahut, *Georgia Republican Secretary of State and His Wife Received Texts Telling Them They Deserve 'to Face a Firing Squad' as Trump Escalated His Attacks on Election Results*, INSIDER (Nov. 19, 2020, 11:23AM), https://www.businessinsider.com/georgia-secretary-of-state-and-his-wife-receive-death-threats-2020-11.

118. *Id.*

119. Bill Whitaker, *Federal Judges Call for Increased Security After Threats Jump 400% and One Judge's Son is Killed*, 60 MINUTES (Feb. 21, 2021), https://www.cbsnews.com/news/federal-judge-threats-attack-60-minutes-2021-02-21/.

120. *Id.*

121. *Id.*; *Judges Raise Alarm as Personal Threats Intensify, Amplified by Social Media*, A.B.A. (Aug. 19, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/08/judges-raise-alarm-as-personal-threats-intensify—amplified-by-s/.

building for real. All the alphabet agencies assassination will become the new normal."[122]

After she spoke out against the baseless claims that the 2020 election was stolen, Michigan state Representative Cynthia Johnson used social media to share some of the many death threats she received. One voicemail left on her phone contained the following message: "Honey, how dare you bully witnesses on the stand. Your name and phone number are out there now." The voicemail continued: "You should be swinging from a f***ing rope you Democrat."[123] And another caller left this message: "I hope you like burning crosses in your front yard, because I'm sure by the time this is all said and done, there will be several, and maybe even a noose or two hanging from the tree in your yard."[124]

Amber McReynolds, the head of the National Vote at Home Institute, a nonprofit organization that promotes voting by mail, has experienced an increasing number of online threats since the 2020 election. Describing one such threat, McReynolds says, "He sent me a picture of a noose and said, 'You're a traitor to the American people.'"[125]

Data suggest that threats are increasing nationally. Rachel Kleinfeld, a senior fellow at the Carnegie Endowment for International Peace, said in an interview for NPR in 2020:

> We are facing a pretty unusual uptick in violence and threats and intimidation against public officials across the range, from the really hyper-local people who are either running for their state assemblies or public health officials, who are working on basic public health in the COVID pandemic, all the way to AOC [Alexandria Ocasio-Cortez] and members of Congress and so on.[126]

Some statistics do exist to support this statement: "In 2018 and again in 2019, for example, Capitol Hill law enforcement reported that threats

122. Jonathan Stempel, *NYC Man Charged with Making Death Threats Against Democratic Protesters, Politicians*, REUTERS (Nov. 10, 2020, 7:22 PM), https://www.reuters.com/article/us-new-york-arrest-threats/nyc-man-charged-with-making-death-threats-against-democratic-protesters-politicians-idUSKBN27R00V.

123. Max White, *State Rep. Cynthia A. Johnson from Detroit Posts Racist Voicemail Saying She Should Be Lynched*, WXYZ DETROIT (Dec. 7, 2020, 4:35 AM), https://www.wxyz.com/news/state-rep-cynthia-a-johnson-from-detroit-posts-racist-voicemail-saying-she-should-be-lynched.

124. Danielle Kurtzleben, *From Congress to Local Health Boards Public Officials Suffer Threats and Harassment*, NPR (Dec. 16 2020, 5:00 AM), https://www.npr.org/2020/12/16/946818045/from-congress-to-local-health-boards-public-officials-suffer-threats-and-harassm.

125. *Id.*; Michael Wines, *Here are the Threats Terrorizing Election Workers*, N.Y. TIMES (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/us/election-officials-threats-trump.html.

126. *Id.*

against members of Congress were increasing."[127] And, since 2015, "threats of federal judges have jumped 400% to more than 4,000 last year [2020]."[128]

A district attorney in a major city made the following comment about the preceding analysis:

> [C]aselaw is not giving the full picture of how many people may be in jail or awaiting trial or otherwise punished for threats… searches for "threats" may not reveal all the restraining orders, barring orders from public buildings, officers watching homes, threat givers getting picked up on other charges, outreach for mental/behavioral health help, in addition to actual threat cases that plea out without opinions, sometimes on lesser charges like "attempted threats" or something like that.[129]

A survey released by the American Enterprise Institute (AEI) "revealed that a significant number of Americans appear comfortable with the idea of using violence to address political failures, and across the political aisle, there is widespread agreement that the current democratic system is not working for ordinary people," according to the report analyzing this survey's findings.[130] AEI's survey contained several troubling points of data which support this claim. First, "[m]ore than one in three (36 percent) Americans agree with the statement: 'The traditional American way of life is disappearing so fast that we may have to use force to save it.'"[131] Second, the "majority (56 percent) of Republicans support the use of force as a way to arrest the decline of the traditional American way of life."[132] Smaller, but still nonzero percentages of "Independents (35 percent) and Democrats (22 percent) say the use of force is necessary to stop the disappearance of traditional American values and way of life."[133] Third, "[n]early three in 10 (29 percent) Americans completely or somewhat agree with the statement: 'If elected leaders will not protect America, the people must do it themselves even if it requires taking violent actions.'"[134]

127. *Id.*

128. Bill Whitaker, *Federal Judges Call for Increased Security After Threats Jump 400% and One Judge's Son is Killed*, 60 MINUTES (Feb. 21, 2021), https://www.cbsnews.com/news/federal-judge-threats-attack-60-minutes-2021-02-21/.

129. Private Communication on March 11, 2021.

130. Daniel Cox, *After the Ballots are Counted: Conspiracies, Political Violence, and American Exceptionalism,*, SURV. CTR. ON AMERICAN LIFE (Feb. 11, 2021), https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism/.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

In short, Americans are becoming increasingly comfortable with the idea of turning to violence to achieve a political goal.

There are no conclusive statistics that allow one to state that the frequency of threats to kill has recently increased. One has the impression that they have grown since 2015 as the general culture has turned more toxic. This article assumes, for the sake of the following argument, that these threats are too common, that they terrorize citizens and hamper public officials, and that they have been increasing.

The liberal communitarian thesis is, to reiterate, that the balance between individual rights and the common good must be constantly adjusted as historical conditions change. The assumption that violent speech, namely threats to kill and harm, has increased significantly in the U.S. in recent years, roughly since 2015, suggests that this issue may be ripe for rebalancing. Public discourse, Congress, and the courts should revisit the issue at hand and consider whether the time has come to relocate the marker that separates constitutionally protected speech from unprotected speech.

VI. RECOMMENDATIONS

Currently, in the U.S., there is a strong tendency to see the two major political parties as two opposing tribes, in the sense that members have developed strong bonds to their tribe, identify with it, and are hostile toward the other tribe. In 2014, Pew Research published a graphic titled "Beyond Dislike: Viewing the Other Party as a 'Threat to the Nation's Wellbeing.'"[135] The graphic appears in a study called "Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life." The study describes how people on the left and on the right have begun to hold increasingly opposing ideological views, how liberals and conservatives have different preferences for the kinds of communities in which they would like to live, how those who consistently identify with one party do not want their family members to marry people of opposing political affiliations, and how strong partisans are frequently only close friends with people who share their views.[136] Each tribe blames

135. *Political Polarization in the American Public*, PEW RSCH. CTR. (June 11, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/pp-2014-06-12-polarization-0-02/ (last visited April 1, 2021) (full study found at https://assets.pewresearch.org/wp-content/uploads/sites/5/2014/06/6-12-2014-Political-Polarization-Release.pdf).

136. *Id.*

the other for the heightened level of tensions, hostilities, and violence. One side points to white supremacy and the far-right wing; the other side points to Antifa and the far left.

One response, often coming from various voluntary associations committed to promoting civility, is to call for national unity, to promote efforts to overcome the ways in which these two tribes are different, and to emphasize that there are many more shared values and bonds of affinity than there are differences. Such a response oftentimes includes a call for a return to a world where both sides could put aside whatever differences they had in order to engage in not just peaceful but also civil discourse. However, there is little evidence that political and cultural tribalism can be overcome in the near future.

Others seek to ban a much wider span of speech than here suggested, namely hate or racist speech, following such bans by other democracies. The same people argue that focusing on tightening restrictions against threats of violence is a far too narrow approach. Such advocates often argue for the prohibition of hate speech as an essential step towards curing American political culture, which has become highly toxic. Indeed, such advocates often contend that violent forms of speech—such as death threats—are merely one expression of a much more pervasively hostile culture. However, such a ban would curb an exceptionally large amount of speech and would inevitably face the difficult challenge of determining which expressions are hateful and which are not.

Moreover, it is important to try to disaggregate the haters by separating those who are willing to turn to violence and violent speech from others. This call to separate hate speech from violent speech is not to suggest that hate speech, and its recent rise, is not concerning or problematic. Rather, emphasizing their separateness allows for the development of distinct treatments for the rise of violent speech and the rise of hate speech. This paper maintains that participants in the former should face the wrath of the law, and participants in the latter should face extensive civic and cultural educational initiatives. The suggestions made here, in this article, merely entail recriminalizing violent speech based on, and building upon, existing legislation that has been weakened by the courts. Banning hate speech would entail new federal laws and face strong opposition from supporters of the First Amendment on both the right and the left.

The preceding analysis suggests that laws governing the U.S. regarding threats to kill are not adequate in the current circumstances. From this conclusion come two prescriptive recommendations regarding how to properly proceed and begin to remedy this situation: first, all state

legislatures should adopt legislation criminalizing violent speech; second, the courts, in reviewing these laws and revisiting previous cases, should adopt a significantly lower standard of scrutiny for what is considered a true threat.

A. Legislation

Currently, only nineteen states have legislation criminalizing threats. Most of these state laws were enacted in 2002, as a component of different states' anti-terrorism legislation.[137] For example, in Arkansas, "A person commits the offense of terroristic threatening in the first degree if . . . the person threatens to cause death or serious physical injury or substantial property damage to another person; or" the "person threatens to cause physical injury or property damage to a teacher or other school employee acting in the line of duty," for "the purpose of terrorizing another person."[138] In Kentucky, "a person is guilty of terroristic threatening in the third degree when . . . he threatens to commit any crime likely to result in death or serious physical injury to another person or likely to result in substantial property damage to another person."[139] States that already have enacted legislation criminalizing threats should review their legal codes and determine whether the language of the laws, originally written to respond to the sociopolitical climate and culture following the 2001 attacks, still adequately responds to the current sociopolitical circumstances. The remaining thirty-one states should adopt similar legislation.

The essence of the law could be succinctly stated: thou shalt not threaten to kill. Once this is clearly stated, extenuating as well as exacerbating conditions, and levels of punishment, can be added. For example, if the person never was charged before and no evidence is present that the person has engaged in threatening behavior, the penalty might be limited to a warning and police record. If threatening is a pattern, the person may be required to attend anger management classes and may be subject to one or more restraining orders. At still a higher level, the person might be subject to home arrest, with allowances for work and religious services. In the case of some offenders, some jail time might be called for. The person may be added to various watchlists. Justice Sotomayor referred

137. Margot Williams & Trevor Aaronson, *How Individual States Have Criminalized Terrorism*, THE INTERCEPT (March 23, 2019, 8:30 AM), https://theintercept.com/2019/03/23/state-domestic-terrorism-laws/.

138. ARK. CODE ANN. § 5-13-301 (2017).

139. KY. REV. STAT. ANN. § 508.080 (West 2001).

to a lack of clarity as to what constitutes a threat.[140] One way to add such clarity is to make it crystal-clear that to threaten to kill is a crime. The historical conditions demand that kind of clarity because not only do individuals have the right not to be terrorized, but such clarity is required for American democracy to be safeguarded.

B. Judicial Review

The Court opened a Pandora's Box when it ruled that some threats to kill are not true threats, inviting the question of where to draw the dividing line between the two. Systematically, over the past decades, the Court has adopted an increasingly high standard of scrutiny for true threats legislation. The Court, however, can now reverse course and begin to adopt a lower standard of scrutiny for these cases. By far the most important change that is called for concerns the matter of intent. The Supreme Court has set a very high burden of proof, requiring the government to meet a *mens rea* standard, namely that the defendant considered his own statement a threat. This requires the prosecution to examine the state of mind of the offender, a highly subjective matter, and invites claims by the defense attorneys that the offender did not mean it. It makes prosecution of threats much too difficult.

Instead, the Court should find that the government must meet only the "reasonable person test," that is whether such a person would consider the communication of the defendant a threat. This is a test often used by the courts, for instance in determining expectations of privacy.[141]

Next is the matter of context. Some courts have demanded that the prosecution establish the social and cultural circumstances in which the threat was made to show that it was made in earnest and not as a joke or mere hyperbole. However, there are many thousands of threats, and, as shown by the examples cited above, a rising number seem to be genuine. Here, too, the reasonable person standard should be applied. The rest can be left to the discretion of the prosecutor. Surely they would not charge an actor who threatened another character in the context of a play, say, *Macbeth* or *Othello*, with "I will kill you!"

140. *See* Perez v. Florida, 137 S. Ct. 853 (2017) (Sotomayor, J., concurring) (cited *infra* note 66).

141. The Court may look to Justice Thomas's dissent in *Elonis v. US* for guidance as to the proper level of scrutiny the Court should apply to true threats cases, as he emphasizes that a *mens rea* standard is far too high to ever produce a conviction and is not constitutionally required. *See* Elonis v. United States, 575 U.S. 723, 750 (2015) (Thomas, J., dissenting)*;* discussion *infra* Section III.C.

CONCLUSION

Laws, and the public discourse that both leads to their enactment and follows their implementation, often help to reset social norms. The proposed changes in state laws and interpretations by the courts outlined in this article seek to reset the social norms that govern which speech is tolerable and which is not. Threatening to kill someone should be deemed unlawful. The re-criminalization of such threats should be viewed as a step towards a less toxic, and, one may hope, less violent social and political culture in the U.S. There may well be ways to achieve this goal other than by criminalizing violent speech—and there may be different ways to curb this kind of speech than those here suggested. However, until these are presented, the current societal conditions call for making it less acceptable to threaten other people, not to mention to act violently. Treating most threats as true threats seems like a significant step in the right direction.