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Freedom of Speech and the Classification of True Threats

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The First Amendment is a living right used by all persons in the United States. Such practices of the first clause in Article I are decided as protected or unprotected by the Supreme Court. Justice Holmes in *United States v. Schwimmer* eloquently described the nature of the First Amendment in his dissent: "Not free thought for those who agree with us but freedom for the thought that we hate."[1] In contemporary times the practice of free speech exists on the Internet. The intent of speakers is effectively hidden through text and accordingly poses major problems for people to dinstinguish threats from passionate speech. There are people who would exploit the safeguard of free speech in a way that is most detrimental not only to society, but to all of the scholars that have proclaimed its value. It is natural that in the course of our nation's history, the Supreme Court would eventually come to the question of what limitations there can be to free speech. Unlike protected speech, speech that engenders the breach of peace, incites havoc in a polity, or undermines the process of justice has no place in American society and serves no value of the fundamental principles of the First Amendment. The Stone Court established precedent for such relevant free speech questions. In *Chaplinsky v. New Hampshire,* Justice Murphy established a two-tier theory. This theory categorized unprotected forms of speech which "contributed to the expression of ideas or possessed any social value in the search for truth."[2] While Murphy's opinion in *Chaplinsky* did not refer to "true threats," his very words would be the precursor for cases to come regarding communicated threats. The government is given capacity by Title 18 of United States Code § 875 (c) to prosecute based on threatening content within speech:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.[3]

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[1] Holmes, J. (Concurring) *United States v. Schwimmer*, 279 U.S. 644 (1929).

[2] "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. *It has been well observed that such utterances are 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."* Emphasis added. Murphy, J. (Opinion). *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

[3] Title 18, U.S.C. Part I, Chapter 41 §875 (c).

The crux of the modern-day argument over whether the qualifying factor for determining a "threat" is based on the judicial balancing tests known as subjective and objective intent. For the government, it is easy to find criminal culpability with objective intent. It has to be proven that the communicated message was sent and had the ramifications of a threat.[4] To reliably prove that such a statement was intended to be a threat, it is imperative to understand the applicable level of *mens rea. Mens rea* is the legal element that determines the state of mind of the person who committed a crime. The degree of *mens rea* for the one who communicated an alleged threat is at the level of criminal negligence. The Model Penal Code clarifies *criminal negligence* to equate something that a "reasonable" person would consider substantial and unjustifiable risk[s] that their conduct would lead to a prohibited result.[5] For subjective intent, the one who uttered the speech in question must show what they intended for the communicated message to be, and as such, requires *purposeful* culpability of *mens rea.*[6] For the government, this is harder to prove because the burden lies on them to prove that there was specific intent to threaten as opposed to the consequences of the message. The lack of unity among circuit courts in their methodology answering individual cases pertaining to true threats was stemmed by Justice O'Connor's opinion of *Virginia v. Black.* Precisely, Justice O'Connor stated:

> 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.[7]

She continued:

> 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.[8]

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[4] In the course of this paper the types of objective tests will be explained, but in how they related to criminal negligence is in the respect that the speaker understands that they uttered a threat.

[5] Model Penal Code §2.02 - General Requirements of Culpability, (2), *Negligence.*

[6] Model Penal Code §2.02 - General Requirements of Culpability, (2), *Purposeful.*

[7] O'Connor, J., (Opinion). *Virginia v. Black* 538 U.S. 343 (2003)

[8] *Ibid.*

The Supreme Court's decision in *Virginia v. Black* has ushered legal scholars and lower court justices alike towards an ambiguous method on proving the intent of a threat. As will later be elaborated, it is of utmost importance for the government to determine which balancing test of intent is in line with the principles of the First Amendment. Unchecked by circuit courts, there is a bridge between the application of the test and the constitutionality of the test. To remedy such an issue, the Supreme Court must resolve the free speech issues from governmental efforts to limit threats posted on social media sites such as Facebook. Once these issues are resolved, the government can then lawfully limit threats on the Internet. Such free speech questions the government will ask itself include: Are true threats protected under the First Amendment? More importantly, which test for intent is the proper channel to prosecute "true threats" under 18 U.S. Code §875(c)?

The first question asked is one which can be more easily resolved, given prior precedent set by federal courts. It is not new for courts to acknowledge that there are certain types of unprotected speech. The very fact that there still exists federal statutes l that prohibit threats within communication across interstate commerce is evidence of such basic constitutional understanding. A challenge on the face of legislation can be made as to whether or not it is constitutional, but among the differing approaches by the circuit courts, it is well agreed that such an argument falls short unless there is proof of real and substantial overbreadth.[9] All previous judicial thought on how courts would approach an argument against "true threats" does so in a systematic fashion— every decision pertaining to unprotected forms of speech starts from *Chaplinsky*—the observation that there are utterances that are not any essential part in the exchange of thought and have no social value.[10] While Justice Murphy applied it to fighting words and added to his opinion the obscene, the profane, and the libelous, this is what gave breath to the start of the constitutional limits of speech. This separation would become more substantive with the decision in *R.A.V. v. City of St. Paul,* where it held against content-based discrimination ordinances and the proscribable threat of certain messages. Stated in Blackmun's concurring opinion, "threats are outside the First Amendment to protect individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened

[9] "I do not deny this possibility, but *to prevail in a facial challenge, it is not enough for a plaintiff to show "some" overbreadth. Our cases require a proof of "real" and "substantial" overbreadth*, Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973)... but which nonetheless has some redeeming value for minors or does not appeal to their prurient interest--is a very small one." O'Connor, J., (Concurring). Reno v American Civil Liberties Union 521 U.S. 844 (1997).

[10] Murphy, J. (Opinion). *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

violence will occur."[11] The Ninth Circuit deliberated further upon Blackmun's opinion from *R.A.V.* in *Planned Parenthood v. American Coalition of Life Activists*:

> This purpose is not served by hinging constitutionality on the speaker's subjective intent or capacity to do (or not to do) harm. Rather, these factors go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm. This suffices to distinguish a "true threat" from speech that is merely frightening. Thus, no reasonable speaker would foresee that a patient would take the statement "You have cancer and will die within six months," or that a pedestrian would take a warning "Get out of the way of that bus," as a serious expression of intent to *inflict* bodily harm; the harm is going to happen anyway.[12]

For many reasons the federal judicial branch does believe in this separation of pure speech from unprotected speech. Starting from *Chaplinsky*, it has only become more refined through time in later cases which further describe the relationship of pure speech to the idea of "true threats." As such, the foundation is laid for the judicial recognition of true threats on the Internet which the government wishes to limit.

With two foundational questions presented, the judicial history of true threats must first be made known. To begin, one must look at the case of *Virginia v. Black*. *Black* was unique in the respect that it is one of the few court cases that helped to establish a definition of true threats. Cited previously, O'Connor decided with a mere one sentence (as opposed to the extensive discourse on true threats given by the Ninth Court in their decision of *Planned Parenthood*) that the definition was a serious communicated message expressing the intent to commit an act of unlawful violence to a particular individual or group of individuals. It is not the first time the courts have used the terms "intend" or "intent." In a case decided by the Tenth Circuit four years prior to the decision in *Black*, they deliberated upon *United States v. Viefhaus*, which involved the family of James Dodson Viefhaus and his fiancée. The couple maintained a hotline that broadcasted messages as the "Aryan Intelligence Network." Only those who

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[11] Blackmun, J., (Concurring). *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992).

[12] Rymer, J. (Opinion) *Planned Parenthood v. American Coalition for Life Activists,* 290 F.3d 1058 (2002).

called to leave a message on the hotline and listened in could hear some of the threatening content they expressed. The respondent was prosecuted under a violation of 18 U.S. Code §844(c).[13] He appealed his conviction, claiming that his message was not a true threat, but rather political speech and should follow prior court precedent in *Watts v. United States.*[14] In *Watts* the Stone Court sought to answer whether or not the petitioner's speech in question was political speech or a true threat in relation to 18 U.S.C §871(a).[15] It was found to be hyperbolic because he uttered a conditional—if it could not be interpreted as a true threat, but as political speech. Furthermore, in *Watts* it was held that a statute which punishes threatening speech is constitutional on its face. [16] Through *Viefhaus,* the Tenth Circuit defined a true threat as a "declaration of *intention*, purpose, design, goal, or determination to inflict punishment, loss, or pain on another, or to injure another or his property by the commission of some unlawful act."[17] In *Planned Parenthood*, Justice Berzon further described that true threats are not required to

[13] Viefhaus was indicted on one count of using a telephone to transmit a bomb threat, in violation of 18 U.S.C. § 844(e): "Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both." 18 U.S.C. § 844(e).

[14] The holding to the legal question, "Was Watt's statement a legitimate threat within the meaning of 18 U.S.C.

§871(a). The court concluded: The language of the political arena… is often vituperative, abusive, and inexact. Thus, considering the context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, the Court ruled that Watts' statement was not a true threat. (Per curiam). *Watts v. United States,* 394 U.S. 705 (1969). The Oyez Project at IIT Chicago-Kent College of Law.

[15] Whoever knowingly and wilfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States[...] shall be fined under this title or imprisoned not more than five years, or both. 18 U.S.C. §871(a).

[16] "Certainly the statute under which petitioner was convicted is 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." (Per curiam*). Watts v. United States* 394 U.S. 705 (1969).

[17] Emphasis added, Briscoe, J (Opinion).. *United States v. Viefhaus,* 168 F.3d 392 (10th Cir. 1999).

have an element of imminence of danger.[18] What matters most is the conscious intent to carry out the expressed threat. As questions regarding true threats are examined, the first question can be answered. However, one underlying issue is still discernible: true threats have yet to be well defined and narrowly classified. The cases examined later will resolve this issue granted that the government *is* allowed to limit true threats for they are a form of unprotected speech.

To that end, the second question must be addressed: Which test for intent is the proper channel to prosecute "true threats" under U.S. Code §875 (c)? There is a clear gap of understanding between the Supreme Court and circuit courts on defining a true threat. Black is often inaccurately regarded as a case which *strictly* covered true threats. There is a deeper component within the case that is overlooked. *Black* did not seek to define a true threat, but rather to claim an analytical formula for the means of lawfully suppressing forms of symbolic speech. To reiterate: *Black*'s focus is not on the definition of a true threat, but rather analyzing discrimination based on *Black* sought to give the tools to guide justices through the proper channel in deciding what content discrimination is and what it isn't. In this regard it is analogous to the guideline established in a previous case, *Feiner v. New York. Feiner* held that speech can be constitutionally limited by the reaction it receives when the officers arrests someone on a content-neutral rule. Connecting to *Feiner,* speech can be constitutionally limited if the suppression is found to be content neutral regardless of the intent of the speaker.[19]Conversely, in *Black* tells us the opposite for symbolic speech— if the demonstration in question (specifically in *Black* it was cross-burning) can be proven with a specific intent such as intimidation, the state can rightfully suppress it. Given this observation, *Black* and *Feiner* together establish a framework for determining true threats. The federal statute that limits threats does not dissect the content of the threat, but whether or not a threat is being uttered. Interpreting *Black* by itself limits the classification of a true threat and as a result of this, the circuit courts have composed their own interpretation of the type of objective test that should be used to determine intent within a threat. These tests can be categorized as such: The reasonable-speaker test, the reasonable-hearer test, and the objective neutral approach. In *United States v. Fulmer*, the First Circuit adopted its objective test that focused on the reasonable speaker:

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[18] "... although the majority opinion is less clear on this point — I would, where true threats are alleged, not require a finding of immediacy of the threatened harm. Berzon, J,. (Dissenting) *Planned Parenthood v. American Coalition for Life Activists,* 290 F.3d 1058 (2002)

[19]It is implied from this that a cause of suppressing speech in a content neutral fashion stems from keep society in order.

> We believe that the appropriate standard under which a defendant may be convicted for making a threat is whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is [*sic*] made. This standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the "reasonable-recipient standard," namely that the jury will consider the unique sensitivity of the recipient. We find it particularly untenable that, were we apply a standard guided from the perspective of the recipient, a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant.[20]

This case followed the prosecution of the respondent Kevan Fulmer for threatening a federal agent. Fulmer had close contact with an FBI agent, Richard Egan, after Fulmer reported that his family was committing tax fraud.[21] The FBI agent looked into his case and found no evidence as such and had no grounds to prosecute his family.[22] Fulmer protested the decision in response. Shortly after Fulmer left the FBI agent, he sent a threatening message to him and the agent thought it was a threat.[23] The court arrived at a conclusion affirming the petitioner's case and thus set precedent for the reasonable-speaker test of the First Circuit. In a distinguishing manner, a separate circuit court established the reasonable-recipient test.[24] The reasonable-recipient test was established in the Eighth Circuit case, *United States v. Dinwiddie*:

> Although the government may outlaw threats, the First Amendment does not permit the government to punish speech merely because the speech is forceful or aggressive. What is offensive to some is passionate to others. The First Amendment, therefore, requires a court (or a jury) that is applying FACE's prohibition on using "threats of force," to differentiate between "true threat[s], and protected speech. The court must analyze

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[20] Torruella, J., (Opinion). *United States v. Fulmer,* 108 F.3d 1486, 1491 (1st Cir. 1997)

[21] *United States v. Fulmer,* 108 F.3d 1486,

1491 (1st Cir. 1997)

[22] *Ibid.*

[23] *Ibid.*

[24] Synonymous with "reasonable speaker test"

> an alleged threat "in the light of [its] entire factual context, and decide whether the recipient of the alleged threat could reasonably conclude that it expresses "a determination or intent to injure presently or in the future."[25]

The Eighth Circuit then later established this precedent:

> When determining whether statements have constituted threats of force, we have considered a number of factors: the reaction of the recipient of the threat and of other listeners, whether the threat was conditional, whether the threat was communicated directly to its victim, whether the maker of the threat had made similar statements to the victim in the past, and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive.[26]

In a decision the Eighth Court, the First Amendment was short shrifted when the court applied a form of speech and determined the intent based on the listener's reaction.[27] As a result, their test fundamentally goes against the First Amendment. Such an objective-subjective test based on whether or not the listener found it to be offensive avoids the consideration of the speaker's intent whatsoever. The last test to determine intent was adopted by the Fifth Circuit.[28] In the case of *United States v. Morales,* the court applied a two-factor test: A threat is knowingly made if the speaker comprehends the meaning of the words he utters and if the speaker voluntarily speaks the words with the intent to carry out the threat.[29] It made no difference whether Morales communicated the threat to the school itself or to a third party, only the character and context of the threat are relevant. These objective tests all establish a low level of *mens rea* on the

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[25] Citations omitted. *United States v. Dinwiddie,* 76 F.3d 913 (8th Cir. 1996)

[26] *Ibid*.

[27] *Ibid.*

[28] It is imperative to note that all three examples of these tests are interpretations by the circuit courts. Every court has dealt with a case pertaining to true threats and they predominantly use one objective test out of the three.

[29] The respondent was an eighteen year old high school student. He made threatening messages on the internet stating he was going to kill teachers and students at Milby High School in Houston. He was arrested and convicted of one count of transmitting a threat to injure another in violation of 18 U.S. Code §875(c).

speaker. Since the speaker must only know of the effect his utterance had, there is only a level of criminal negligence, giving the prosecutors a low level of culpability to prove.

Now that the objective intent to threaten test and all its derivations have been explained, the other test to determine intent has to be examined. Both Circuit Courts and the Supreme Court have rarely used the subjective test for intent to determine culpability. The subjective test differs from the objective test in two ways. The first is where the emphasis of intent is placed: For the objective standard the intent is placed on the speaker that could foresee the statement being interpreted as a threat. The subjective standard's intent is placed on the speaker. The statement in question is deemed as a threat if the speaker specifically intended to have his messaged be conveyed in a threatening manner. In addition, the other distinction is that subjective intent has an innately higher degree of *mens rea*. With criminal negligence or recklessness being assigned to objective intent, subjective intent requires the speaker to be engaged in the conduct and hoping to act upon the actions being spoken. Because of this higher degree of *mens rea*, there is a higher bar for the government to prosecute someone who makes a threat. In lower circuit court Justice Wright's dissent in *Watts*, he disagreed with the application of *Ragansky* and argued that the government should have to prove that the defendant intended to carry out the threat. [30] Specifically, the application of Ragansky is by two factors: that the uttered threat is knowingly made by the speaker and that the speaker wilfully uttered the words.[31] When the case was brought to the Supreme Court, it was determined that Watts' threats constituted political speech. He was consequently let go because political speech is protected under the First Amendment. Joined by Justice Douglas in the case of *Rogers v. United States*, Justice Marshall stated that "the statute had to be read in a fashion that all threats that the speakers intends to be interpreted as expressions of an intent to kill or injure the President ought to be proscribable."[32] Marshall evoked the concept of the subjective intent— it is not whether or not the threat made should be taken reasonably as something that

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[30] This is in essence the application of *Ragansky*. For a comprehensive articulation of the Ragansky approach see: Principe, Craig, Matthew. "What Were They Thinking?: Competing Culpability Standards For Punishing Threats Made To The President. Volume 7, Issue 2, (2012)

[31] *Ibid.*

[32] "Because § 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself, I believe that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President. This construction requires proof that the defendant intended to make a threatening statement, and that the statement he made was, in fact, threatening in nature." Marshall, J., (Dissenting). *Rogers v. United States,* 422 U.S. 35 (1975)

would be done by the person, the listener, or within context, but more importantly that the speaker himself intends for the communication to be made as a threat.[33]

The last question will decide for the courts which test is most appropriate to prove intent. The objective test, while absolutely stringent in its applicability, has a chilling effect to it. Justice Berzon described the chilling effect in his dissent of *Planned Parenthood*:

> The First Amendment protects advocacy statements that are likely to produce imminent violent action, so long as the statements are not directed at producing such action. To do so otherwise would be to endanger the First Amendment protection accorded advocacy of political change by *holding speakers* responsible for an impact they did not intend.[34]

Berzon's examination undertook the necessary test to apply the First Amendment's tenets to the question of whether statements in the case could be protected even if they are likely to produce imminent violent action, contrasting with other analyses by other circuit justices. The use of the objective test as the prevailing measure that courts apply not only stops criminals, but stifles future speech demonstration by activists in fear of arrest when they hold innocent intentions. If the objective test were to be applied to free speech cases pertaining to the Internet, the objective test would act as a sensitive trigger to determine criminal culpability for *everyone* who uses passionate words.

While these court decisions pertaining to true threats at the circuit level came before *Black*, *Black* has done nothing to clarify lower courts which test to determine a true threat is best. The lack of a proper definition in the opinion allows for prior circuit precedent to persist. By extension, the usage of the objective intent tests among the circuit courts does not necessarily proscribe *true* threats because it does not examine the concept of personal agency to speak. The underlying fault of the objective intent to determine a true threat is that it deviates from a principle that the intent of speech is *not* determined through personal agency but the reaction that it receives. There has been no similar test that determines the meaning of one's own words held in any other First Amendment case. Speech is a means of communicating a purposely intended message. In this light, the subjective test respects that personal liberty. It is what allows one to

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[33] Marshall, J., (Dissenting). *Rogers v. United States,* 422 U.S. 35 (1975)

[34] Emphasis added. Berzon, J., (Dissenting) *Planned Parenthood v. American Coalition for Life Activists,* 290 F.3d 1058 (2002)

differentiate the statement of a comedian making a crass joke from that of a man with criminal intent to harm another individual. What the subjective test fails to take into consideration, though, is how the words are to be received, similar to what is found in *Feiner*. Feiner's incapacitation was from the emotions engendered by his speech and not its content. Consequently, the subjective test is questionable in modern times because it does not weigh the explicit words with the intent of the speaker as it applies to the Internet. Because of both tests' shortcomings, the courts must decide the determining test of intent in a manner that combines the factors of intent and the effect of speech. A new standard ought to be established by the Supreme Court for determining intent that is decided with a rational mentality analogous to the Fourth Amendment case called *Illinois v. Gates.* In respect to threats posted on the Internet, the proper method to determine intent is to consolidate the subjective and objective tests, and utilize the combination as a standard that allows justices and juries to determine intent based on the "totality of *all* factors,"[35] namely the speaker's intent, and the rational interpretation of the text in question. It is only possible to prosecute if *both* of these factors are present. This new standard is the true determining factor that the government must use to prosecute someone under 18 U.S.C§873(c). With this standard, governmental efforts to limit threats are within the First Amendment by not overstepping the intent of speaker who types passionate text on the Internet.

Not only have the two questions been resolved, but there is a resolution to the long disputed standard for determining intent. The lack of clarity in *Black* has only brought ambiguity to the determination of true threats. Because *Black* brought ambiguity to future relevant cases, circuit courts concluded on separate forms of an objective-based test The Supreme Court must now determine that the only acceptable method of determining intent is with this new test that takes into account the whole situation. By weighing in on the intent of the speaker and taking into consideration the literal utterance of threats, the Court can decide on the constitutional limit that government has in limiting threats on the Internet.[36] Thus this standard is similar to the spirit of determining probable cause as it was in *Gates.* Furthermore, this test follows the nature of why such a test *ought* to be valued: It moves away from a hyper-technical analysis of determination to its respective reason to undergo a test.[37] For *Gates* it was to determine probable

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[35] The phrasing of this sentence is purposely constructed as the language of the opinion in *Gates.*

[36] And by extension, *all* forms of interstate commerce.

[37] An allusion to the wording of Rehnquist's opinion of *Gates*. "A grudging or negative attitude by reviewing courts toward warrants is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; "courts should not invalidate warrants

cause, while for "true threats" it is for determining intent.[38] Moreover, such a standard as described allows for users on the Internet to make passionate statements without unintentionally stepping into a legal quagmire on determination of intent. By removing the chilling factor of the objective test, the government can limit true threats that are made with the intent to harm others and in the same standard can differentiate such violent persons from those who are innocent. Under these reasons, this test is established in such a way that it respects the personal connection of one's will to speak out to the freedom of speech. With the modern world being connected through the Internet, this standard can respect old observances of free speech. To quote Justice Thurgood Marshall from one court case, "freedom of speech serves not only the needs of the polity, but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity."[39] The government must recognize that the First Amendment is always being applied on the Internet before they push efforts to limit threats on Facebook. In hope that this is observed, the breadth of which free speech can thrive is not undermined while also protecting society from those who truly intend to harm individuals. Once the government properly balances the relationship between the free exercise of speech with a proper test of intent to determine intent, they can limit threats within their constitutional boundary.

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by interpreting affidavits in a hypertechnical, rather than a common sense, manner." *Illinois v. Gates*, 462 U.S. 213 (1983).

[38] The Aguilar-Spinelli test only obstructed magistrates. By abandoning it magistrates are able to deal with the facts on individuals cases in a reasonable fashion to determine probable cause. In that respect, the totality of circumstances for probable cause is like this test for intent: It looks at the case in the respect of taking into thought what the intent of the speaker is and the effect it has on society. It does needs not to take into account other similar cases or following a strict test, but rather observe the two factors, intent and effect, to determine if the threat is true or not.

[39] Marshall, J., (Concurring in Part II). *Procunier v. Martinez*, 416 U.S. 396 (1974).

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