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ONLINE THREATS: THE DIRE NEED FOR A REBOOT IN TRUE-THREATS JURISPRUDENCE

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Free speech protection ends where true threats begin.[1] The Supreme Court of the United States has defined "true threats" as "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."[2] However, the Court has not meaningfully expounded on the true-threats doctrine since *Black*, leaving federal circuits split on the meaning of intent in a true-threat analysis.[3] State high courts have further muddled the intent question in true-threats jurisprudence by adopting analytical standards that differ from the federal appellate circuits in which they sit.[4]

The First, Second, Third, Fourth, Sixth, Seventh, and Eighth Circuits apply an objective test, asking how the alleged threat would be construed by either a reasonable speaker or a reasonable listener.[5] The Fifth and Eleventh Circuits also apply an objective test but do not consider the perspective of the speaker or listener.[6] Conversely, the Ninth and Tenth Circuits evaluate whether the speaker had subjective intent to intimidate a person or group of persons,[7] with the Ninth Circuit further specifying that some threat statutes require both an objective and subjective analysis while others only require a subjective analysis.[8]

Within this milieu, the Pennsylvania Supreme Court in *Commonwealth v. Knox* correctly upheld the criminal conviction of Pittsburgh rapper Jamal Knox for

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1. *See* Virginia v. Black, 538 U.S. 343, 359 (2003).
2. *Id.*
3. United States v. Clemens, 738 F.3d 1, 2–3 (1st Cir. 2013).
4. *See* Clay Calvert et. al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 COLUM. J.L. & ARTS 1, 10–11 (2014).
5. Commonwealth v. Knox, 190 A.3d 1146, 1163 (Pa. 2018) (Wecht, J., concurring in part and dissenting in part).
6. *Id.*
7. *Id.* at 1163–64.
8. United States v. Bagdasarian, 652 F.3d 1113, 1117 (9th Cir. 2011).

terroristic threats and witness intimidation based solely on Knox's rap song.[9] The Commonwealth brought these charges against Knox after Pittsburgh police officers scheduled to testify against Knox discovered a music video titled "F--k the Police" posted on Facebook.[10] The first verse of the song, sung by Knox, featured violent statements directed at Pittsburgh Detective Daniel Zeltner and Police Officer Michael Kosko.[11] Knox's specific mention of Zeltner and Kosko appeared motivated by the officers' recent arrest of Knox for drug-related crimes.[12]

In a bench trial, the trial court rejected Knox's argument that his rap song was constitutionally protected speech on the grounds that the song was a true threat falling outside the scope of First Amendment protection.[13] Knox appealed to the Superior Court of Pennsylvania, which affirmed on the issue of Knox's intent to threaten but did not conduct a true-threat analysis.[14]

The Pennsylvania Supreme Court granted Knox's appeal to address whether the music video had any First Amendment protection.[15] Although the court correctly found that Knox intended to threaten or intimidate at least Zeltner and Kosko,[16] it incorrectly stated that it was adopting a purely subjective test for intent.[17] Moreover, the court's holding that *Black* "allows states to criminalize threatening speech which is specifically intended to terrorize or intimidate"[18] does not give lower courts any guidance on whether a high-level *mens rea*, such as specific intent, is *required* to keep a speech-restricting statute from running afoul of the First Amendment, or whether a lower *mens rea*, such as recklessness or knowing, suffices.

After giving an overview of the Supreme Court's two main cases on true threats—*Watts v. United States*[19] and *Virginia v. Black*—and explaining the current circuit split on the issue of intent,[20] the court stated that *Black* required an "inquiry into the speaker's mental state"[21] and a weighing of the contextual factors laid out in *Watts*.[22] The court understood its consideration of contextual factors as a means of interpreting the speaker's subjective intent.[23] Through this lens, the court first considered the lyrics of the song and the sound effects in the music to find that the music video was threatening and that directing threats to officers by

9. *Knox*, 190 A.3d at 1161 (majority opinion).
10. *Id.* at 1150.
11. *Id.* at 1149.
12. *Id.* at 1159.
13. *Id.* at 1151.
14. *See id.* at 1151–52 (citing Commonwealth v. Knox, No. 1136 WDA 2014, 2016 WL 5379299, at *5 (Pa. Super. Ct. Aug. 2, 2016) (slip op.)).
15. *Id.* at 1152.
16. *See id.* at 1160–61.
17. *See id.* at 1156–57.
18. *Id.* at 1158.
19. *See id.* at 1155 ("The true-threat doctrine has its genesis in the *Watts* case."); *see also* Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam) ("What is a threat must be distinguished from what is constitutionally protected speech.").
20. *See Knox*, 190 A.3d at 1155–56.
21. *Id.* at 1157.
22. *Id.* at 1159.
23. *See id.*

name in the song evinced Knox's subjective intent to threaten those officers.[24]

In its *Watts* analysis, the court considered the conditionality of the threats, whether the threatened officers had reason to believe that Knox was capable of engaging in violence, how the officers reacted to the threats, and whether the threats were communicated directly to the officers.[25] The court found that the threats were unconditional, that the presence of a gun at Knox's recent arrest gave the officers reason to believe that Knox was capable of engaging in violence, that the officers reacted to the music video by relocating and leaving the police force, and that the posting of the video online was the equivalent of communicating directly to the officers.[26] Before stating its holding, the court mentioned possible concerns of criminalizing artistic speech, especially in a genre pervaded by violent language.[27] Despite these valid concerns, the court found that calling out officers by name and referencing a recent altercation with those officers took Knox's rap song out of the artistic realm and into the realm of true threats.[28] Thus, the court affirmed Knox's conviction[29] and expressly declined to clarify the necessary *mens rea* to sustain a true-threat conviction.[30]

Although the majority's failure to clarify all aspects of the true-threats doctrine might have been prudent in this case,[31] this type of minimalism has "thwarted the advancement and coherence of First Amendment doctrine."[32] Despite the fact that the true-threats doctrine "screams out the loudest for clarification" above all other First Amendment doctrines,[33] the Supreme Court of the United States explicitly refused to address any First Amendment concerns in its most recent foray into true-threats jurisprudence in *Elonis v. United States*.[34] Moreover, the Court's holding regarding the *mens rea* required to result in criminal punishment—that a negligence standard would not suffice—only applies in the context of a specific federal statute criminalizing true threats.[35] Since the Court found that the statute at issue criminalized *specific* intent to threaten, it pointedly refused to be the first court to consider whether a recklessness *mens rea* could be punished.[36] This minimalist approach, which the Pennsylvania Supreme Court followed in *Knox*, leaves lower courts without an analytical framework to determine the *mens rea* required for analogous state statutes criminalizing certain speech. As a result,

24. *Id.* at 1159–60.

25. *Id.* at 1160.

26. *Id.* at 1159–60.

27. *See id.* at 1160 (citing Andrea L. Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 23 (2007)).

28. *Id.* at 1160–61.

29. *Id.* at 1161.

30. *See id.* at 1157 n.10.

31. *See id.* at 1162 (Wecht, J., concurring in part and dissenting in part).

32. Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943, 950–51 (2016).

33. *Id.* at 957.

34. 135 S. Ct. 2001, 2012 (2015) ("Given our disposition, it is not necessary to consider any First Amendment issues.").

35. *Id.* at 2011 (citing 18 U.S.C. § 875(c) (2012)).

36. *Id.* at 2013.

true-threats jurisprudence continues to become more muddled with each new case.

Despite the Pennsylvania Supreme Court's failure to use *Knox* to clarify the question of *mens rea* in a subjective true-threat analysis for Pennsylvania courts, the court correctly found that the United States Supreme Court's holding in *Virginia v. Black* mandated a subjective inquiry into the speaker's mind.[37] While some criticize the subjective-intent approach on the grounds that it puts a greater burden on the prosecution,[38] an increased burden in itself is not facially undesirable. Heightening the burden necessary to regulate pure speech would help ensure that civil tort standards, such as negligence, do not creep into criminal jurisprudence,[39] especially in an area as sensitive as regulation of speech. Such a prosecutorial burden in the regulation of speech falls in line with the general requirement of criminal law that the accused must have a culpable *mens rea*.[40] Additionally, the heightened subjective burden would promote the *Black* Court's philosophy that "the hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[41] A purely objective test would favor this "overwhelming majority" by disregarding the speaker's interest in communicating freely, however crude her method of doing so might be.[42]

Requiring the highest level of *mens rea*—specific intent to threaten—would not offend the objectives of criminal law in light of First Amendment concerns. Justice Wecht's concurring and dissenting opinion in *Knox* accurately points out that punishing speech, even true threats, is an exception to the general First Amendment prohibition against regulating content of speech.[43] Such regulations must be narrowly drawn.[44] The less rigorous the *mens rea* standard, the more likely the regulation is not narrowly drawn. Thus, a heightened *mens rea* standard would rein in government imposition of content-based restrictions.

Although the Pennsylvania Supreme Court purported to undertake only a subjective inquiry into the speaker's intent,[45] the court implicitly applied an objective, reasonable-listener test as well through its incorporation of contextual factors in the intent analysis.[46] The court noted that these contextual factors include "whether the victim had reason to believe the speaker had a propensity to engage in violence, and how the listeners reacted to the speech."[47] The court

37. Commonwealth v. Knox, 190 A.3d 1146, 1156–57 (Pa. 2018).

38. Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1273 (2006).

39. P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM. & ENT. L.J. 37, 47 (2015).

40. *Id.* at 45–46; *see also* Calvert & Bunker, *supra* note 32, at 60.

41. Virginia v. Black, 538 U.S. 343, 358 (2003) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

42. Crane, *supra* note 38, at 1272.

43. Commonwealth v. Knox, 190 A.3d 1146, 1164 (Pa. 2018) (Wecht, J., concurring in part and dissenting in part).

44. *Id.* (citing Chaplinksy v. New Hampshire, 315 U.S. 568, 571 (1942)).

45. *See id.* at 1157–58 (majority opinion).

46. *See id.* at 1158.

47. *Id.* at 1159 (quoting J.S. *ex. rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 858 (Pa. 2002), *abrogated by Knox*, 190 A.3d at 1146).

found that the presence of a firearm at the scene of Knox's prior arrest for drug charges was relevant in determining whether the officers had reason to believe that Knox would actually engage in violence.[48] Stated differently, the court considered how the officers as reasonable listeners would interpret Knox's statements in the music video in light of the gun's presence at the scene of his recent arrest. This analysis shows that the court not only considered Knox's mental state in delivering speech but also how such speech would be viewed by a reasonable listener under the relevant circumstances.

The court further injected objective, reasonable-listener standards into its contextual analysis by emphasizing the way the officers reacted to the video. The court noted that the officer who discovered the video "did not see it as mere satire or social commentary"[49] and that Zeltner and Kosko undertook drastic measures to ensure their own safety, such as resigning from the police force, moving to new residences, and obtaining security details.[50] The court also pointed to evidence from the song's lyrics that one of Knox's friends warned against publishing the song,[51] showing that other listeners believed the statements to be legitimate threats. Although the court did not expressly state that a reasonable listener's understanding of the speech matters for its analysis, it nonetheless considered the listeners' interpretation of the music video. Notably, the court also gave much weight to the actual effect the speech had on the officers,[52] reflecting the idea that criminal punishment generally should stand only if the victim suffers actual harm.[53] In this case, as in all true-threats cases, the harm suffered by the listeners was the fear of violence.[54] Clearly, consideration of both a reasonable listener's understanding of speech as well as the objective effect of speech on the actual listeners permeated the court's analysis under the guise of contextual factors.

In conducting their analyses, both the majority in *Knox* and Justice Wecht gave some consideration to the peculiarities of the medium of communication—rap music.[55] The majority did not provide much in-depth analysis regarding rap[56] but did recognize characteristics of the genre that should be taken into account in analyzing this type of communication.[57] The majority concluded, however, that Knox's calling out of officers by name and the reference to Knox's recent arrest

48. *Id.* at 1160.

49. *Id.* at 1159.

50. *Id.*

51. *Id.* at 1158.

52. *See id.* at 1160–61.

53. *See generally* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

54. Crane, *supra* note 38, at 1269–70 (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

55. *See* Motion for Leave to File Brief as Amici Curiae and Brief of Amici Curiae Michael Render ("Killer Mike") et al. in Support of Petitioner at 17–19, Knox v. Commonwealth, 139 S. Ct. 1547 (2019) (No. 18-949), 2019 WL 1115837, at *17–19 (expounding on these peculiarites), *cert. denied*, 139 S. Ct. at 1547.

56. For more on the history of rap and the genre's interactions with the American legal system, see ERIK NIELSON & ANDREA L. DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA 59–74 (2019).

57. *See Knox*, 190 A.3d at 1160; *see also* NIELSON & DENNIS, *supra* note 56, at 48–58 (discussing elements of rap music critical to properly analyzing the genre).

removed the lyrics from the realm of fiction into autobiography.[58] Although it can be difficult to distinguish between true threats and fictional grandstanding in a genre laden with over-the-top violent imagery, the majority's reliance on the personal nature of the song provides a logically sound line between fictional puffery and factual threats.

Another contextual aspect of the medium the court did not adequately analyze is that Knox's music video was posted online, not sent directly to the Pittsburgh police. Online speech differs primarily from in-person speech due to decontextualization that occurs when the communication is not experienced in a social setting.[59] Although the effect this difference should have on the analysis is outside the scope of this note, courts should at least consider the fundamental peculiarities of Internet communications in a true-threat analysis due to the development of online speech avenues. Internet use has exploded since *Black*,[60] which did not consider Internet communication at all. As cases regarding threatening Internet speech proliferate,[61] courts will need to resist judicial minimalism and adapt *Black* to the modern age.

One concern is that Internet communications are often not directed at the subject of the communication—or at anyone for that matter—yet are still viewed by millions. For example, tweets do not necessarily have to be directed at anyone in particular. In fact, most social media sites do not require communications to be directed at anyone. Both the majority and Justice Wecht in *Knox* pointed to the public accessibility of the music video as sufficient to find that Knox intended for the named law enforcement officers to see the video.[62] Although such a conclusion may be warranted, it is troubling that the court provides almost no analysis on this issue. This conclusion reeks of strict liability, which has no place in the criminalization of speech. The aforementioned concern of requiring greater protection for speech regulations would seem to necessitate a stricter showing of directly communicating a threat to the recipient, especially since common sense would indicate that threatening speech delivered online, however extreme, is much less likely to intimidate a reasonable listener who is not interacting face-to-face with the speaker.

Although the majority of courts do not apply both objective and subjective analyses in all true-threats cases, some legal scholarship argues for an objective and subjective analysis of Internet communication.[63] The dual analysis proposed herein, however, should not apply exclusively to Internet communications. Rather, this dual analysis can accomplish much more than merely contextualizing threatening communication. This approach would ensure the most equitable

58. *See Knox*, 190 A.3d at 1159–61.

59. Fuller, *supra* note 39, at 53.

60. *See* Andrew Perrin & Maeve Duggan, *Americans' Internet Access: 2000–2015*, PEW RES. CTR. (June 26, 2015), https://www.pewresearch.org/internet/2015/06/26/americans-internet-access-2000-2015/ [https://perma.cc/WP6T-64MC].

61. Fuller, *supra* note 39, at 49.

62. *Knox*, 190 A.3d at 1160; *id.* at 1168–69 (Wecht, J., concurring in part and dissenting in part).

63. *See, e.g.*, G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 1076–77; Fuller, *supra* note 39, at 75.

balancing of interests as to any type of speech. The chief interests at issue, recognized by both legal scholars and judges, include an individual's autonomy interest to form thoughts and beliefs for himself or herself free of government interference[64] and the listener's interest in being free from the fear of violence.[65] The dual analysis would compel courts to highly scrutinize regulations of speech and lead to a thoughtful balancing of these interests.

While some propose leaving the entire analysis exclusively in the hands of judges,[66] such an approach would doubtless lead to further muddying of true-threats jurisprudence. If the question of whether certain speech is a true threat is left to juries, courts would only need to ensure that juries receive proper instructions, which would require findings on the speaker's subjective intent, the objective effect on a reasonable listener, and the actual effect on the actual listener. If the question is left to courts, then courts will be required to develop methods of analyzing facts, which would open more avenues for division among circuits and states as to how certain facts should be interpreted by judges. Although submitting the question of whether certain speech is a true threat to juries may lead to divergent outcomes (i.e., different juries could come to different findings based on the same set of facts), it would at least lead to consistent application of the law. Thus, on review, appellate courts could defer to district courts' findings of fact in true-threats cases, ensuring a clear line between adjudication of law and finding of fact.

In cases of threats made online as allegedly artistic speech, as in *Knox*, courts must further refine their jury instructions to require findings on the specificity of threats. Courts must also admit evidence for juries to consider regarding the peculiarities of the artistic genre at issue, as well as the peculiarities of speech communicated on the Internet. Such evidence would be most relevant in an objective analysis.

Between the majority's and Justice Wecht's opinions in *Knox*, the Pennsylvania Supreme Court provided the optimal framework to analyze true threats in the context of artistic speech posted online. As expressly detailed by Justice Wecht and implicitly adopted by the majority, the question of intent to threaten should consider the speaker's subjective intent, a reasonable listener's objective interpretation of the communication, and the objective effect of the communication on the actual listener.[67] The subjective analysis should require the prosecution to prove specific intent to threaten, the highest *mens rea*, to ensure that content-based speech regulations are kept narrow so as to respect the autonomy of speakers and listeners to engage in conversation without interference.[68] The objective analysis will ensure that speakers are not punished for speech that would not have reasonably resulted in harm and did not in fact

64. Leslie Kendrick, *Free Speech and Guilty Minds*, 114 COLUM. L. REV. 1255, 1279 (2014).

65. Crane, *supra* note 38, at 1270.

66. *E.g.*, Blakey & Murray, *supra* note 63, at 1052 (arguing that judges are more neutral and more sensitive to First Amendment concerns than juries).

67. *See Knox*, 190 A.3d at 1165 (Wecht, J., concurring in part and dissenting in part) (citing J.S. *ex. rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 858 (Pa. 2002), *abrogated by Knox*, 190 A.3d at 1146).

68. *See id.*

result in harm. In both instances, the question of intent should be resolved by the trier of fact so as to lead to consistent application of the law. This approach would ensure a robust balancing of a speaker's interest in speech autonomy with the listener's interest in being free from fear caused by threatening speech[69] while also providing much-needed clarity and modernization to true-threats jurisprudence.

69. *See* Alexander Tsesis, *Deliberative Democracy, Truth, and Holmesian Social Darwinism*, 72 SMU L. REV. 495, 510 (2019) ("The task of free speech theory is to articulate the conditions for robust debate, cathartic expression, and informative communication, while defining narrowly tailored regulations that punish linguistic conduct that is intentionally threatening to individuals and groups or inciting of others to harm them.").