# ONE-OFF & OFF-HAND: DEVELOPING AN APPROPRIATE COURSE OF LIABILITY IN THREATENING ONLINE MASS COMMUNICATION EVENTS·

## INTRODUCTION

In July of 2013, the Internet transformed Caroline Criado-Perez from champion to victim.

A feminist activist,[1] Criado-Perez had spent the prior three months spearheading a campaign to urge the Bank of England to portray Jane Austen on the £10 English banknote.[2] Her online petition received more than 36,000 signatures and inspired lively debate concerning the role of women in English history.[3] Though the campaign was ultimately successful,[4] Criado-Perez immediately became a target for her outspokenness.[5] Via her Twitter account, she became the subject of a mass communication event ("MCE"),[6] receiving hundreds of tweets

[1] *See* Cathy Newman, *Meet the Woman Fighting the Banks to Keep Females on Fivers*, TELEGRAPH (June 6, 2013, 7:00 AM), http://www.telegraph.co.uk/women/womens-life/10101757/Meet-the-woman-fighting-the-Bank-to-keep-females-on-fivers.html.

[2] *Women Banknote Petition Delivered*, BELFAST TELEGRAPH (July 05, 2013), http://www.belfasttelegraph.co.uk/news/local-national/uk/women-banknote-petition-delivered-29397814.html; Caroline Criado-Perez, *Keep a Woman on English Banknotes*, CAROLINE CRIADO-PEREZ, http://carolinecriadoperez.com/keep-a-woman-on-english-banknotes/ (last visited Mar. 30, 2014).

[3] Caroline Criado-Perez, *We Need Women on British banknotes*, CHANGE.ORG , http://www.change.org/en-GB/petitions/we-need-women-on-british-banknotes (last updated July, 2013).

[4] Emma Barnett, *Jane Austen Unveiled as Face of New £10 Note*, TELEGRAPH (July 24, 2013, 3:30 PM), http://www.telegraph.co.uk/women/womens-life/10199138/Jane-Austen-unveiled-as-face-of-new-10-note.html.

[5] *See* Chris Baraniuk, *'I'm Not Giving Up' Says Caroline Criado-Perez as Twitter Abuse Storm Thunders On*, WIRED (Aug. 1, 2013), http://www.wired.co.uk/news/archive/2013-08/01/caroline-criado-perez.

[6] For the purposes of this Note, a mass communication event refers to the act whereby a single

threatening murder, rape, the bombing of her home, generally heinous insults, and various other forms of violent communications.[7] By September 6th, still receiving rape threats, despite the fact that online communication was an integral part of her job, Criado-Perez removed herself from the online community,[8] despite the fact that online communication was an integral part of her job.

Criado-Perez described the incident as life altering; to this day, she feels the residual psychological effects of the MCE, namely fear, panic and horror.[9] During the course of the MCE and in the time since, she remains in constant fear that the threateners will locate her and execute the threats as planned.[10] Though Ms. Criado-Perez has not been harmed physically, the perpetual state of fear in which she now lives is nightmarish nonetheless.[11]

Recently, two individuals were found guilty of having managed eighty-six of the Twitter accounts that directed threats towards Ms. Criado-Perez.[12] Together, the pair of offenders admitted to sending thirty-six of the hundreds of intimidating messages.[13] However, this admission merely identified a fraction of the class of anonymous speakers. It was the cumulative effect of the threats, rather than any threat in particular, that inspired fear in Criado-Perez.[14] The degree of fear in these circumstances is dynamic, and in many cases is proportional to the quantity, rather than quality, of the threats.[15]

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user is the recipient of a large volume of messages from a large quantity of senders. *See infra* Section I.B.

7 Annalisa Quinn, *Book News: Campaigner for Jane Austen Banknote Deluged with Threats*, NPR (July 30, 2013, 7:24 AM), http://www.npr.org/blogs/thetwo-way/2013/07/30/206902781/book-news-campaigner-for-jane-austen-banknote-deluged-with-threats. *See also* Natasha Culzac, *'Police Lost Abuse Evidence,' Says Caroline Criado-Perez Before Deleting Twitter Account*, METRO (Sept. 6, 2013, 4:25 PM), http://metro.co.uk/2013/09/06/woman-bank-note-campaigner-caroline-criado-perez-distressed-at-police-loss-of-online-abuse-evidence-3952633/.

8 Alexandra Topping, *Caroline Criado-Perez Deletes Twitter Account After New Rape Threats*, GUARDIAN (Sept. 6, 2013, 10:53 AM), http://www.theguardian.com/technology/2013/sep/06/caroline-craido-perez-deletes-twitter-account. Ms. Perez has since reopened a Twitter account under another moniker, having returned as a key figure in the arena of online free speech disputes.

9 Sentencing Comments of Judge Howard Riddle, Senior Dist. Judge (Chief Magistrate) in the Westminster Magistrates' Court, on R. v. Nimmo and Sorley (Jan. 24, 2014) [hereinafter Nimmo & Sorley Sentencing], *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-nimmo-and-sorley.pdf.

10 *Id.*

11 *Id.* ("'I don't think I will ever be free of them.' It is a moving, detailed, and entirely understandable account of the effect of these crimes on her. These offences have caused serious and entirely predictable harm to her.").

12 *See Two Jailed for Twitter Abuse of Feminist Campaigner,* GUARDIAN (Jan. 24, 2014, 11:04 AM) [hereinafter *Two Jailed*], http://www.theguardian.com/uk-news/2014/jan/24/two-jailed-twitter-abuse-feminist-campaigner.

13 Nimmo & Sorley Sentencing, *supra* note 9, at 1–2.

14 *Id.* at 2 ("She describes how the effects of the harassment she has received have been life-changing…. She feared the abusers would find her and carry out their threats.").

15 That is not to ignore, of course, the occasional *highly* specific threatening message that trumps

Customarily, though not without exception, a participant in an MCE sends one individual message to the designated target, and thereby avoids violating prototypical state cyber-harassment statutes.[16] Moreover, a participant will often craft that threat in a spontaneous,[17] non-specific[18] manner in which a threatening MCE message is written is often unlikely to satisfy the objective, general-intent standard of the "true threat doctrine."[19] This "true threat doctrine" is addressed *infra* in Part II. Though a single message may not, in isolation, objectively cause the harmful effects of threatening speech, that same message, taken as a part of a much larger pool of messages, *does* have a significant, threatening impact on the recipient. This Note explores the traditional legal remedies available to victims of one-off instances of online threats as well as occasions of cyber-harassment, and argues that these remedies are either misapplied or inadequate when taken in the context of the MCE model.

Part I of this Note briefly illustrates the uniqueness of Twitter[20] and distinguishes between the traditional online communication model and the MCE model, while focusing on the challenges that this unique speech relationship presents for lawmaking. Part II delivers a general overview of true threat doctrine jurisprudence and how the several Federal Circuit Courts have divided over the appropriate standard of intent in the context of "true threats." Part III then demonstrates how the majority approach fails to adequately address the problems presented by the MCE model. Changing direction, Part IV explores prototypical state cyber-harassment statutes and the two-tiered problem therein, arguing that the customary rigidity of the law as it stands fails to embrace victims of MCEs. Finally, Part V provides proposes a possible federal legislative solution to the problems presented by MCE-model threats.

the aggregation in mind, nor an attempt to argue for a "threatening supremacy" one way or the other, but rather, to simply acknowledge the effect of the MCE aggregation theory in the abstract.

16 *See infra* Part IV.

17 *See Two Jailed*, *supra* note 12 ("Kennedy said that, when Nimmo's original tweet was responded to and retweeted, it encouraged him to send more messages as he saw it as an 'indication of popularity.'").

18 For instance, a message that reads, "I am going to kill you," is fairly non-specific when compared to other messages that detail specific information about an MCE victim, such as that person's address, or the time and place at which the threat will supposedly occur.

19 *See* Andrew P. Stanner, *Toward an Improved True Threat Doctrine for Student Speakers*, 81 N.Y.U. L. REV. 385, 390–91 (2006) ("This is largely because the true threat inquiry asks whether or not a reasonable recipient of the statement would believe it constituted a true threat.").

20 Though Twitter occupies a significant space in this Note, it is important to realize that Twitter is simply the most convenient medium for transmissions of MCE messages presently available. While Twitter may be replaced by a different medium, the MCE model described in this Note is here to stay.

## I. A PARADIGM SHIFT IN COMMUNICATION

### A. *The Reach and Influence of Twitter*

First, a general remark worth making regarding Twitter[21]: there is significant debate surrounding the impact that the micro-blogging platform actually has on the flow of speech.[22] Whereas Twitter once boasted a figure of 500 million "accounts,"[23] it now submits a more realistic and useful estimate of 200 million unique, monthly active users sending 500 million tweets per day.[24] Moreover, it is widely held that the lion's share of data transferred via Twitter originates from a small minority of power-users,[25] which might lead one to believe that most people are not *using* their Twitter accounts, in some sense of the word. However, it is not inconsequential that most Twitter users are, on an average day-to-day basis, "listening" rather than "speaking," and when significant events transpire that trigger public response—sometimes usefully measured by a corresponding spike in television news ratings—so too does a proportional stir transpires on Twitter.[26] Put another way, just as the general public adopts a relatively passive approach to the news on an average day-to-day basis, so too is this the case on Twitter.

There are, however, instances in which Twitter is at the forefront

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21 *New User FAQs*, TWITTER, https://support.twitter.com/articles/13920-new-user-faqs (last visited Mar. 9, 2014) ("Twitter is a service for friends, family, and coworkers to communicate and stay connected through the exchange of quick, frequent messages. People write short updates, often called 'Tweets' of 140 characters or fewer. These messages are posted to your profile, sent to your followers, and are searchable on Twitter search.").

22 *See* Stephen Baker, *Why Twitter Matters*, BLOOMBERG BUSINESSWEEK (May 15, 2008), http://www.businessweek.com/stories/2008-05-15/why-twitter-mattersbusinessweek-business-news-stock-market-and-financial-advice.

23 *See Twitter Reaches Half a Billion Accounts, More Than 140 Millions in the U.S.*, SEMIOCAST (July 30, 2012), http://semiocast.com/publications/2012_07_30_Twitter_reaches_half_a_billion_accounts_140m_in_the_US.

24 *Compare* Twitter, Inc., Twitter, Inc. Amendment toForm S-1 Registration Statement (Form S-1) Under the Securities Act of 1933 (Oct. 3, 2013), *available at* http://www.sec.gov/Archives/edgar/data/1418091/000119312513390321/d564001ds1.htm, *with* Twitter's Status on December 18, 2012, TWITTER (Dec. 18, 2012, 7:01 AM), https://twitter.com/twitter/status/281051652235087872 (noting the number of monthly active users).

25 *See* Alex Cheng & Mark Evans, *An In-Depth Look at the 5% of Most Active Users*, SYSOMOS (Aug. 2009), http://www.sysomos.com/insidetwitter/mostactiveusers (noting that the most active 5% of users comprise about75% of daily online activity).

26 *See New Study Confirms Correlation Between Twitter and TV Ratings*, NIELSEN (Mar. 20, 2013), http://www.nielsen.com/us/en/newswire/2013/new-study-confirms-correlation-between-twitter-and-tv-ratings.html (noting that, in the case of television series, "[B]y midseason Twitter was responsible for more of the variance in ratings for 18-34 year olds than advertising spend."). *Compare* Brett Logiurato, *CNN's Ratings Plunged a Whopping Amount After the George Zimmerman Trial*, BUS. INSIDER (July 31, 2013), http://www.businessinsider.com/cnn-ratings-george-zimmerman-trial-fox-news-july-msnbc-2013-7, *with* Mark Jurkowitz & Nancy Vogt, *On Twitter: Anger Greets the Zimmerman Verdict*, PEW RES. CENTER (July 17, 2013), http://www.pewresearch.org/fact-tank/2013/07/17/on-twitter-anger-greets-the-zimmerman-verdict (noting that 4.9 million tweets were sent in the twenty-six hours immediately following the George Zimmerman not-guilty verdict).

of communication, and not simply a plus-one to traditional media. Out of the debris brought on by the 2008 financial crisis, the Occupy Wall Street Movement emerged in 2011 as a highly vocal grassroots movement that took aim at social and financial inequality, particularly in the context of the financial services sector.[27] Deliberately (for better or for worse) devoid of any central leadership,[28] those involved utilized Twitter at the local level to disseminate time-sensitive information regarding protest arrangement and any instances of Occupy-related police force, as well as at the national level to gain traction with a broader audience.[29] Whether or not Occupy's use of Twitter was successful is indeed difficult to measure, and ultimately outside the scope of this Note.[30] What can be said, however, is that the movement's use of Twitter as a key intermediary communication platform proved contagious, as Twitter has since played a central role in connecting citizens during the 2009 Iranian election,[31] and in informing the Western World throughout the 2011 Arab Spring uprisings.[32] The important takeaway regarding the influence of Twitter is the growing rate of adoption by large numbers of users to communicate about the same matters at the same time. Underscoring the significance of Twitter's ability to process large batches of speech about particularly controversial topics is a recent partnership with CNN, which plans to produce faster, more reliable news stories by mining Twitter data.[33]

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27 *See* Dan Berrett, *Intellectual Roots of Wall St. Protest Lie in Academe*, CHRON. HIGHER EDUC. (Oct. 16, 2011), http://chronicle.com/article/Intellectual-Roots-of-Wall/129428.

28 *See* Kenneth Rapoza, *The Brains Behind 'Occupy Wall Street,'* FORBES (Oct. 14, 2011, 3:09 PM), http://www.forbes.com/sites/kenrapoza/2011/10/14/the-brains-behind-occupy-wall-street-and-where-its-heading/.

29 *See* Michael D. Conover, Emilio Ferrara, Filippo Menczer & Alessandro Flammini, *The Digital Evolution of Occupy Wall Street*, PLOS ONE (May. 29, 2013), http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0064679.

30 For a discussion on this and related topics, see Andrew Ross Sorkin, *Occupy Wall Street: A Frenzy That Fizzled*, N.Y. TIMES (Sept. 17, 2012, 8:51 PM), http://dealbook.nytimes.com/2012/09/17/occupy-wall-street-a-frenzy-that-fizzled ("The Wall Street banks themselves hardly felt the pinch of the protesters, beyond considering them a nuisance and an additional security cost. Despite campaigns for customers to move money to smaller, community banks, few customers did."); *see also* Marina Sitrin, *Occupy Wall Street and the Meanings of Success*, HUFFINGTON POST (Sept. 14, 2012, 2:08 PM), http://www.huffingtonpost.com/marina-sitrin/occupy-wall-street-anniversary_b_1884829.html.

31 *See* Alicia Grae Solow-Neiderman, *The Power of 140 Characters? #IranElection and Social Movements in Web 2.0*, 3 INTERSECT: STAN. J. SCI., TECH. & SOC'Y 30, 37 (2010).

32 *See* Philip Howard, Aiden Duffy, Deen Freelon, Muzammil Hussain, Will Mari & Marwa Mazaid, *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* (Project on Info. Tech. & Pol. Islam Working Paper 2011.1, 2011), *available at* http://pitpi.org/wp-content/uploads/2013/02/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPI.pdf.

33 *See* Daniel Terdiman, *CNN, Twitter Release Tool to Help Journalists Find News Faster*, CNET (Jan. 29, 2014), http://news.cnet.com/8301-1023_3-57618007-93/cnn-twitter-release-tool-to-help-journalists-find-news-faster/.

### B. *The Mass Communication Event Model*

Though scholars have spent considerable effort arguing to the contrary,[34] at this juncture it is pure oversimplification to speak of "Internet speech" as denoting one particular style of online discourse.[35] Rather, it is crucial to recognize that the Internet now fosters a number of variants by which users can communicate with one another: on a one-to-one basis, in groups, or via some blend of the two.[36] There is one process, however, which lends itself most readily to situational eruptions that drive Internet users to focus their communicative efforts on one particular point of contact: the MCE.

Traditional speech models invoke the well-known 1:1 speech ratio, neatly involving one speaker and one listener. Analytically, this participant model is treated the same irrespective of the medium, be it online, over the telephone, or in-person.[37] The MCE model, on the other hand, implicates an N:1 speech ratio,[38] where a large number[39] of speakers ("speaker$^{n}$") interact with a single listener ("listener"). Notably, the MCE must remain a true form of directed speech (i.e., from speaker$^{n}$ to listener) rather than speech broadcasted generally.[40]

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34 *See, e.g.*, John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 428 (2002); *see also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 331 (2001) ("[T]here is no reason to treat threats differently depending on the medium in which they are conveyed.").

35 *See generally* William Fisher, *Freedom of Expression on the Internet*, BERKMAN CENTER FOR INTERNET & SOC'Y HARV. L. SCH. (last updated June 14, 2001), http://cyber.law.harvard.edu/ilaw/Speech/.

36 *See* Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 150 (2011).

37 In 1934, 18 U.S.C. § 875, a federal regulation of interstate communication, was revised to include then-emerging technologies such as the telephone and telegraph. *See* 18 U.S.C. § 875; Unite States v. Baker, 890 F. Supp. 1375, 1383, 1390 (E.D. Mich. 1995) (noting that "[w]hile new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not . . . qualitatively change the analysis under the statute or under the First Amendment.").

38 The designation N:1 has been chosen for the purposes of referring to the solecism of "N," wherein the figure is intended to convey a number raised to a very high level (as in the idiom "to the Nth degree"), despite it being abstractly unspecified.

39 Quite obviously, it is difficult (perhaps impossible) to clearly define a threshold number of speakers required for a mass communication event to occur. Context should inform whether a given scenario is an MCE. The power to make discretionary determinations in ostensibly unfamiliar arenas is not, for judges, unchartered territory. *See, e.g.*, Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1980) ("In determining whether or not to approve a proposed settlement of a derivative stockholders' action . . . the Court of Chancery is called upon to exercise *its own business judgment*.") (emphasis added).

40 In the case of Caroline Criado-Perez, directed speech involved speaker$^{n}$ tweeting directly at her by mentioning her username, as opposed to speaking generally about the situation at hand without any explicit mention of either Ms. Criado-Perez as an individual or as the owner of her online persona. *See Twitter Trolls Jailed Over Menacing Abuse Sent to Feminist Campaigner Caroline Criado-Perez*, LONDON EVENING STANDARD (Jan. 24, 2014), http://www.standard.co.uk/news/crime/twitter-trolls-jailed-over-menacing-abuse-sent-to-feminist-campaigner-caroline-criadoperez-9082213.html.

Twitter in particular has embraced the MCE model by integrating into its platform the ability for users to communicate directly with others simply by "mentioning" the account name of another, irrespective of whether or not the intended recipient is in any way associated with the sender.[41] Twitter's code architecture interprets any tweet that begins with "*@username*"[42] as being sent directly to the account being mentioned, and will therefore copy it to the recipient's main feed and mentions folder.[43] Twitter users can speak to any other uses for whom they know the relevant account name.[44] In the context of a mass communication event, it is typically the case that a user's account name is either already widely known, or quickly becomes widely known.[45]

The public's widespread adoption of Twitter is due in part to the ubiquity of the mobile telephone,[46] specifically the smartphone,[47] which can connect to data and Wi-Fi networks, allowing users to connect to Twitter via their mobile devices.[48] This is of particular significance given the current era of unbroken mobile connectivity and the maturation of the "always on" generation.[49] There has been a sea change in the way people are exposed to, and choose to receive, information. This change is exemplified by Justice Harlan's opinion in *Cohen v. California*,[50] in which the Justice reasoned that individuals subjected to offensive speech could simply avert their attention,[51] could ever find its

41 *See Replies Are Now Mentions*, TWITTER, https://blog.twitter.com/2009/replies-are-now-mentions (last visited Oct. 20, 2013).

42 A user's username is more commonly known as a handle. *See The Twitter Glossary,* TWITTER http://support.twitter.com/articles/166337-the-twitter-glossary#h (last visited Mar. 29, 2014) ("A user's Twitter handle is the username they have selected and the accompanying URL, like so: http://twitter.com/username.").

43 The mentions folder is a single location wherein a user can view all of her @mentions. Only the user in question can view her own mentions, except of course for circumstances in which account credentials become compromised. *See Replies Are Now Mentions*, *supra* note 41.

44 *See What are @replies and mentions?*, TWITTER, http://support.twitter.com/articles/14023-what-are-replies-and-mentions (last visited Mar. 29, 2014).

45 Generally, An ordinary search performed on any web search engine for "[public figure name] + twitter" will return a results page with a third-party hyperlink to that individual's Twitter page. *See, e.g.*, Search Results for "Barack Obama + Twitter," GOOGLE, https://www.google.com/search?q=Barack+Obama+%2B+twitter&oq=Barack+Obama+%2B+twitter&aqs=chrome..69i57j0l5.17895j0j7&sourceid=chrome&espv=210&es_sm=93&ie=UTF-8 (last visited Mar. 30, 2014).

46 *See* Henry Blodget, *Actually, The US Smartphone Revolution Has Entered the Late Innings*, BUS. INSIDER (Sept. 13, 2012), http://www.businessinsider.com/us-smartphone-market-2012-9.

47 *See Smartphone*, PHONESCOOP, http://www.phonescoop.com/glossary/term.php?gid=131 (last visited Mar. 29, 2014).

48 *See* Shea Bennett, *Facebook vs Twitter: Revenue, Users, Average Time Spent, Key Mobile Data*, MEDIABISTRO (Nov. 5, 2013), http://www.mediabistro.com/alltwitter/facebook-vs-twitter-data-stats_b51335 (noting that the Twitter platform integration for mobile phones is utilized by approximately "176.3 million users").

49 *See* Dan Anderson, *Elon Studies the Future of Generation Always-On*, ELON U. (Mar. 28, 2012), http://www.elon.edu/e-net/Article/59585.

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

51 *Id.* at 21 ("In this regard, persons confronted with Cohen's jacket were in a quite different

way into a decision centered on Twitter.[52] Practically speaking, asking individuals such as Ms. Criado-Perez to simply avoid the harmful speech in question means eliminating the ability to mass communicate in the first place.[53] But for individuals like Ms. Criado-Perez—activists, journalists, and the like—the ability to utilize a mass communication platform is everything.[54] Even for those individuals whose jobs do not require an online presence, such as law school professors,[55] having a social media identity has become an increasingly vital means of marketing oneself in various professional industries.[56]

This function of an individual's intimate (and soon, literally physical) connection to technology, and thus to the universe of potential speaker[n] classes of other individuals, is what makes the MCE model such a particularly important legal phenomenon to properly adjudicate. We are fast approaching an era of ubiquitous wearable technology, headlined famously by Google Glass, a wearable computer with an optical head-mounted display, which among other functions has the ability to display a user's notifications in real-time, *literally* right before the user's very eye One would be hard pressed to avert one's view from what is simply being displayed directly in front of one's corneas.[57]

Though Criado-Perez, by virtue of maintaining a Twitter account,

posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

52 By today's standards, one's immediate receipt of Twitter notifications—threatening or not—is analytically closer in kind to the deafening noise of passing trucks that the Justice considered inescapable than to the courthouse jacket embroidered with explicit language, which he saw fit to simply look away from.

53 Under that usage scenario, individuals such as Ms. Criado-Perez rely on mass communication platforms like Twitter to facilitate a speaker to listener[n] communication, thereby permitting their issues to be observed and considered by the masses.

54 The speaker to listener[n] model has always played an important role in American history, beginning most notably with the publication and wide dissemination of Thomas Paine's *Common Sense* in 1776, which is widely credited as a major stimulus for pushing the average American colonist to favor the war for independence from Great Britain. *See, e.g.*, *American Revolution: Jan 9, 1776: Thomas Paine Publishes Common Sense*, HISTORY, http://www.history.com/this-day-in-history/thomas-paine-publishes-common-sense (last visited Mar. 30, 2014).

55 *See* Bridget Crawford, *Census of Law Professor Twitter Users—Beta Version*, FAC. LOUNGE (July 7, 2012), http://www.thefacultylounge.org/2012/07/census-of-law-professor-twitter-users-beta-version.html.

56 *See, e.g.*, *Top 100 Scientists on Twitter*, ACCREDITED ONLINE COLLEGES (Mar. 13, 2012), http://www.accreditedonlinecolleges.com/blog/2012/top-100-scientists-on-twitter; Bonnie Kavoussi, *26 Economists You Should Be Following on Twitter*, HUFFINGTON POST (Dec. 12, 2012), http://www.huffingtonpost.com/2012/11/13/economists-twitter_n_2122781.html; *AJ Reveals the Top 100 Architects on Twitter*, ARCHITECTS J. (June 29, 2011), http://www.architectsjournal.co.uk/news/daily-news/aj-reveals-the-top-100-architects-on-twitter/8616782.article.

57 *See Glass: What it Does*, GOOGLE, http://www.google.com/glass/start/what-it-does/ (last visited Mar. 29, 2014); Brian Heater, *All Dressed Up: The State of Wearable Technology*, ENGADGET (Nov. 9, 2013, 1:40 PM), http://www.engadget.com/2013/11/09/wearables-expand/; Wayne Cunningham, *Nissan Teases Google Glass Competitor*, CNET (Nov. 11, 2013, 3:02 PM), http://reviews.cnet.com/8301-13746_7-57611837-48/nissan-teases-google-glass-competitor.

directly received the threats made against her, offline-victims remain similarly susceptible to the fear of violence engendered by the content of a threatening MCE. During George Zimmerman's trial for the murder of Trayvon Martin,[58] Martin's supporters took to Twitter, expressing fear that Martin would not be found guilty, and an intention to take matters into their own hands should be let off.[59] Countless messages were sent by users promising[60] to kill Mr. Zimmerman themselves, while some urged others to commit the crime.[61]

Given the high profile nature of the George Zimmerman trial[62] and the racially charged issues at stake—both in the court of law and of public opinion—Mr. Zimmerman had plenty of good reason to fear for his safety. This fear was only heightened when film director Spike Lee sent a tweet containing Zimmerman's supposed home address.[63] Though the address was incorrect and thus no harm was done to Mr. Zimmerman as a result, it is likely that had it been the correct address, Mr. Zimmerman's life would have been in serious danger. The elderly couple that *does* occupy the address broadcasted to Lee's 240,000+ Twitter followers was forced to abandon their home, continues to receive death threats, and remains unable to sell the property.[64] Though Mr. Zimmerman has not received any of the threatening messages directly, that is, in a manner similar to Ms. Criado-Perez, he is nonetheless a victim of a threatening MCE event, and his fear is as real and as serious as hers.[65]

## II. TRUE THREAT JURISPRUDENCE: THEN AND NOW

The Supreme Court first articulated the true threats exception to speech protected under the First Amendment in *Watts v. United States*.[66]

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58 *State v. Zimmerman (2012-CF-001083-A)*, EIGHTEENTH JUDICIAL CIRCUIT COURTS, http://www.flcourts18.org/page.php?129 (last visited Mar. 29, 2014).

59 *See Twitter Lynch Mob Threatens to Kill George Zimmerman*, TWITCHY (July 13, 2013, 10:30 PM), http://twitchy.com/2013/07/13/twitter-lynch-mob-threatens-to-kill-george-zimmerman.

60 *Id.* ("Put this on mama I will kill Zimmerman.").

61 *Id.* ("SUMBODY MUST KILL ZIMMERMAN ASAP!!!!").

62 Twenty-five percent of Americans reported following news about the trial. *See Trayvon Martin Killing Is Public's Top News Story*, PEW RES. CENTER FOR PEOPLE & PRESS (Mar. 27, 2012), http://www.people-press.org/2012/03/27/trayvon-martin-killing-publics-top-news-story.

63 *See* Colleen Curry, *Spike Lee Sued over George Zimmerman Tweet*, ABC NEWS (Nov. 11, 2013, 11:57 AM), http://abcnews.go.com/blogs/headlines/2013/11/spike-lee-sued-over-george-zimmerman-tweet.

64 *See* Elizabeth Dilts, *Spike Lee Sued for Tweeting Wrong George Zimmerman Address*, HUFFINGTON POST (Nov. 11, 2013, 7:38 PM), http://www.huffingtonpost.com/2013/11/12/spike-lee-sued-zimmerman_n_4257211.html.

65 *See* Josh Levs & Ben Brumfield, *Marked Man? Zimmerman Fears for Life, Could Face New Charges*, CNN (July 15, 2013, 10:10 AM), http://www.cnn.com/2013/07/14/justice/zimmerman-what-next/index.html?hpt=hp_t1 ("Zimmerman, 29, has kept his address under wraps for more than a year and worn a disguise whenever he left his four walls. He has often strapped on body armor . . . .").

66 Watts v. United States, 394 U.S. 705 (1969).

During a rally opposing the Vietnam War, the eponymous defendant remarked to the crowd that he refused to fight in the war, and would sooner point his rifle at President Lyndon B. Johnson than at an enemy soldier overseas.[67] The Court reversed Watts' conviction for making a threat against the president[68] because the statement was deemed a pronouncement of political hyperbole, rather than a true threat.[69] Specifically, the court articulated three factors[70] supporting its finding: (1) the context was political speech; (2) the statement was expressly conditional; and (3) the reaction of the listeners who laughed after the statement was made.[71] *Watts* remained the final word on the issue of true threats for more than three decades until the Supreme Court decided *Virginia v. Black* in 2003.[72]

### A. Virginia v. Black *and the Legacy of Intent: Competing Interpretations*

In *Virginia v. Black*, the Supreme Court considered a Virginia statute that banned burning a cross with the intent of intimidation, and provided that any burning of a cross was prima facie evidence of an intent to intimidate a person or group of persons.[73] The Court reviewed three separate convictions of defendants under the statute and concluded that intimidating cross burning could be proscribed as a true threat under the First Amendment.[74] Under consideration was not only the plain language of the statute, but also the historic and contextual meanings behind cross burning.[75] The Court found that cross burning could conceivably convey a political message, a cultural message, or a threatening message, depending on the circumstances.[76] Most importantly, in a brief section focusing on purely doctrinal analysis, the Court laid out its understanding of the true threat doctrine generally, without any specific application of the Virginia cross-burning statute in question:

> "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.

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67 *Id.* at 706.
68 18 U.S.C. § 871 (2014).
69 *See Watts*, 394 U.S. at 708.
70 Notably, the Court's use of the term "factors" is distinguished from the oft-employed use of the term "prongs," which ordinarily entail systematic triggers for liability. The differentiation is significant, particularly in the domain of First Amendment jurisprudence, for the purposes of exercising judicial discretion on a case-by-case basis.
71 *Watts*, 394 U.S. at 707–08.
72 Virginia v. Black, 538 U.S. 343 (2003).
73 *Id.* at 348.
74 *Id.* at 363.
75 *Id*. at 354–57.
76 *Id.*

> 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."[77]

Unfortunately, the Court did not clearly settle the issue of intent; the Court's primary focus, after all, was on content-based restrictions on free speech.[78] Alas, neither *Watts* nor *Black* provided concrete legal guidance as to what standard lower courts ought to apply when evaluating allegedly threatening statements—specifically, whether the statement should be assessed from the subjective viewpoint of the sender or from the objective viewpoint of the hypothetical reasonable recipient.[79] The distinction, of course, is critical.

1. The Objective Intent ("Reasonable Listener") Standard

An objective test defines a true threat as a communication that a reasonable person would find threatening.[80] The standard typically comes in one of two forms: (1) the reasonable speaker, or (2) the reasonable listener.[81]

Each of the two objective tests requires only one element of intent: *general intent*.[82] That is to say, the government must prove only that the statement in question was not made as a result of mistake, duress or coercion;[83] it must have been the intent of the speaker to transmit the message, whether the speaker intended to affect a fear of being threatened in the listener is disregarded. Thus, at trial a defendant accused of transmitting a threatening message cannot claim as a defense that she did not intend for the speech to *be threatening*.

2. The Subjective Intent ("Reasonable Speaker") Standard

Under the subjective test, in order for speech to be deemed outside the scope of the First Amendment and thus proscribable,[84] the government must prove both the general intent element of the crime, and a *specific* intent element, namely, either that the defendant intended to carry out the threat, or that the defendant intended for his speech to

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77 *Id.* at 359–60 (citations omitted).

78 *See* Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287, 1290 (2005).

79 *See* Casey Brown, *A True Threat to First Amendment Rights: United States v. Turner and the True Threats Doctrine*, 18 TEX. WESLEYAN L. REV. 281, 294 (2011).

80 *See* Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU. L. REV. 829 (2002).

81 *Id.* at 937–1002. Though those two iterations of the objective standard exist, the reasonable listener standard is the standard applicable to the scope of later portions of this Note.

82 *Id.*

83 United States v. Hart, 457 F.2d 1087, 1091 (1972).

84 *See* Ronald K. Chen, *Speech We Love to Hate*, N.J. LAW. MAG., Aug./Sept. 1994, at 32.

threaten the listener.[85] As *Black* remained open for interpretation, the lower courts acquired the opportunity to make the essential judgment for themselves.

### B. *The Lower Courts Respond to Supreme Court Ambiguity*

The majority of the Federal Circuit Courts that have considered the question of subjective versus objective intent in true threat jurisprudence have found that the Supreme Court in *Virginia v. Black* adopted the objective standard.[86]

The Fourth Circuit in *United States v. White* and the Sixth Circuit in *United States v. Jeffries* both held that *Black* does not require a speaker to subjectively intend to threaten a listener; rather, that 18 U.S.C. §875(c) is a general intent crime.[87] These Circuits held in this manner under the confidence that context would prevent against obscuring fundamental First Amendment ideals. For one, the court in *White* worried not of a chilling effect on political speech, as it reasoned that any future statements of arguably political discourse would always be rooted in—and thus protected by—relevant context.[88] Seemingly drawing inspiration from the Fourth Circuit, [89] the court in *Jeffries* noted that the factual circumstances surrounding the speech in question would allow a jury to appreciate the intent of the speaker while preserving the objective standard.[90] Adopting a similar position, the Third Circuit in

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[85] For the purposes of this Note, the latter variant of the subjective intent standard is of primary import.

[86] Five of the thirteen circuits have had occasion to weigh in on the matter, with four of the five finding in favor of the objective intent standard. *See* United States v. Elonis, 730 F.3d 321, 330 (3d Cir. 2013) ("We do not find that the unconstitutionality of Virginia's prima facie evidence provision means the true threats exception requires a subjective intent to threaten."); United States v. Nicklas, 713 F.3d 435, 440 (8th Cir. 2013) ("[§] 875(c) does not require the government to prove a defendant specifically intended his or her statements to be threatening, but rather requires the government to prove a reasonable recipient would have interpreted the defendant's communication as a serious threat to injure."); United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012) ("*Black* does not work the sea change that Jeffries proposes. . . . It says nothing about imposing a subjective standard . . . ."); United States v. White, 670 F.3d 498, 508 (4th Cir. 2012) ("A careful reading of the requirements of § 875(c), together with the definition from *Black,* does not, in our opinion, lead to the conclusion that *Black* introduced a specific-intent-to-threaten requirement into § 875(c) . . . ."); United States v. Mabie, 663 F.3d 322, 332–33 (8th Cir. 2011), ("This objective test . . . has been applied repeatedly since *Black* . . . .").

[87] *Jeffries*, 692 F.3d at 479 ("To convict under § 875(c), a jury need conclude only that 'a reasonable person (1) would take the statement as a serious expression of an intention to inflict bodily harm . . . and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation . . . .'") (quoting United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997)); *White*, 670 F.3d at 509.

[88] Alarmingly, the court in *White* acknowledged that only arguably political speech and "statements of jest" would be protected by reasonable considerations of context, leaving countless classifications of speech unaccounted for and out in the cold. *White*, 670 F.3d at 509.

[89] The two cases were decided just five months apart. *Jeffries*, 692 F.3d 473 (decided in August 2012); *White*, 670 F.3d 498 (decided in March 2012).

[90] *Jeffries*, 692 F.3d at 480 ("The reasonable-person standard winnows out protected speech because, instead of ignoring context, it forces jurors to examine the circumstances in which a

*United States v. Elonis* reasoned that (1) the Court in *Black* chose not to write in a subjective intent requirement,[91] and (2) the very notion of subjective intent is plainly inconsistent with the logic behind the true threats exception to the First Amendment.[92]

The Eighth Circuit in *United States v. Mabie*[93] adopted a seemingly more open-minded approach to the issue of intent, noting that it had never before expressly stated whether a defendant's subjective intent to threaten is a necessary element of true threat analysis.[94] However, the court conceded that the objective intent standard is the *accepted* standard and is applied regularly to true threat cases.[95] In examining *Black*, the Eighth Circuit looked not to the Court's express language, but to the First Amendment values extolled therein: the court reasoned that § 875(c) is meant to protect listeners of speech from the fear of violence, and so it is only logical that the test be applied from the perspective of the listener, not from the speaker.[96]

Standing alone, the Ninth Circuit in *United States v. Cassel*[97] embraced the opposite view, and found that the True Threats Doctrine articulated in *Black* requires that the speaker both intend to make a communication *and* intend for that communication to threaten the victim.[98] The *Cassel* court reasoned that *Black* required a finding of intent to threaten for *all speech* labeled as true threats, not merely for the specific act of cross burning at issue in the *Black* case.[99]

Specifically, the Ninth Circuit argued that, in *Black*, the prima facie evidence provision[100] of the Virginia cross burning statute rendered the entire law facially unconstitutional because the law made it unnecessary for the government to prove the defendant's intent.[101] Since

statement is made . . . ."). This Note questions why the Sixth Circuit could not see how context would similarly aid a jury under a subjective intent standard to achieve the same goal of comprehending a complete picture of the scenario surrounding the transmission of allegedly threatening speech.

91 *Elonis*, 730 F.3d at 329.

92 *Id.* at 321, 330 ("Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from 'the fear of violence' and the 'disruption that fear engenders,' because it would protect speech that a reasonable speaker would understand to be threatening.") (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).

93 United States v. Mabie, 663 F.3d 322 (8th Cir. 2011).

94 *Id.* at 332.

95 *Id.*

96 *Id.* at 333 (citing New York *ex rel.* Spitzer v. Cain, 418 F. Supp. 2d 457, 479 (S.D.N.Y. 2006) ("A standard for threats that focused on the speaker's subjective intent to the exclusion of the effect of the statement on the listener would be dangerously underinclusive with respect to the first two rationales [in *Black*] . . . .")).

97 United States v. Cassel, 408 F.3d 622 (9th Cir. 2005).

98 *Id.* at 631.

99 *Id.* at 631–32.

100 VA. CODE ANN. § 18.2-423 (2006) ("Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.").

101 Virginia v. Black, 538 U.S. 343, 387 (2003).

the Supreme Court struck down the statute on those grounds, the Ninth Circuit argued that a true threat will only be deemed devoid of any First Amendment protection upon proof that the speaker on trial subjectively intended to threaten the listener.[102]

Thus we are left with a circuit split—albeit one with a strong majority view in favor of the objective standard—and the issue remains open to debate. While courts will ultimately determine what standard *is*, examining these issues in the context of the MCE model can shed a great deal of light on what, moving forward, the standard *ought to be*.

## III. THE TRUE THREAT DOCTRINE AS APPLIED TO THE MCE MODEL

It is crucial to recognize at the outset that, while the Federal Circuits Courts have had the opportunity to analyze the issue of intent under the *Black* framework in their respective jurisdictions, each of the circuit court's principal cases listed above have invoked the traditional speech model: namely, the 1:1 speaker to listener ratio.

The Third Circuit's decision in *Elonis* concerned a man posting violent messages regarding his wife and an FBI agent to his personal Facebook page;[103] in just a few months' time, Mr. Elonis' wife had left him and, soon after, he was fired from his job at a local amusement park for exhibiting inappropriate behavior.[104] The Third Circuit distinguished *Elonis* from *Virginia v. Black* on the grounds that the speech made in its case took the form of traditional verbal "communications," as opposed to demonstrative communications such as interpretive cross burning. The communications in question were comprised of threatening messages to specific individuals. Thus, the Third Circuit maintained its objective listener standard in judging each of the several counts of 1:1 speech as objectively threatening.

The Fourth Circuit's analysis of intent under *White*,[105] too, concerned a single defendant making threatening online posts on his personal website towards other individuals at different points in time.[106] Each count was based on a communication between White and a unique recipient – in other words, a 1:1 ratio. Similarly, the Sixth Circuit's holding in *Jeffries* concerned two separate instances in which the defendant recorded and uploaded violent, threatening songs to YouTube as well as to his Facebook page.[107]

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102 *Cassel*, 408 F.3d at 632 ("Thus, eight Justices agreed that intent to intimidate is necessary and that the government must prove it in order to secure a conviction.").

103 United States v. Elonis, 730 F.3d 321, 324–26 (3d Cir. 2013).

104 *Id.* at 324.

105 United States v. White, 670 F.3d 498 (4th Cir. 2012).

106 Though White was indicted on a total of five counts, each of these five respective instances implicated a 1:1 speaker to listener ratio between Mr. White and the five unique targets of his messages. *Id.*

107 United States v. Jeffries, 692 F.3d 473, 475–77(6th Cir. 2012).

The Eighth Circuit in *Mabie* was faced with a defendant who sent a letter to his intended recipient's mother, left a threatening voicemail on a machine belonging to a police lieutenant, and spoke directly to a police sergeant over the telephone.[108] These communications represented three unique instances of 1:1 speech, and the defendant was found guilty of each.

Alas, the Ninth Circuit's determination centered on three separate occasions of in-person speech interaction, each of which concerned a defendant who threatened to vandalize or burn down any house a potential homebuyer planned to erect on the land.[109]

Thus, while the several circuit courts have chimed in on the matter of true threats, the 1:1 speech model at the heart of those cases leaves us with little direct precedent from which to draw a standard for an N:1 communication event. What is available, however, is the opportunity to test both the objective and subjective intent standards against the parameters of the MCE model in order to gauge their relative effectiveness in embracing MCE victims.

### A. *The Reasonable Listener Standard As Applied to the MCE Model*

One observation that is readily apparent from the available circuit court decisions is not only that the communications in question occurred in the context of a 1:1 ratio, but also that the individuals involved were, in some fashion, closely familiar with one another. Relationships between the speaker and listener were seldom as intimate as husband and wife,[110] but nonetheless, *some* prior relationship existed between the involved parties.

Moreover, the several circuit court decisions implicate situations in which the threats transmitted by the respective speakers were highly specific.[111] This element went towards the credibility of the threats and their propensity to cause a reasonable listener to *be threatened*, and thus scared for his life.

Under the MCE model, however, the speech in question is rarely

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108 United States v. Mabie, 663 F.3d 322, 326–28 (8th Cir. 2011).

109 United States v. Cassel, 408 F.3d 622, 625 (9th Cir. 2005).

110 United States v. Elonis, 730 F.3d 321, 324–26 (3d Cir. 2013).

111 *Id.* at 324–25 (explaining that the defendant posted a diagram of his estranged wife's home using keyboard characters, and included a promise "not . . . to rest until your body is a mess, soaked in blood and dying from all the little cuts."); *Jeffries,* 692 F.3d at 475–76 ("Take my child and I'll take your life. I'm not kidding, judge, you better listen to me. I killed a man downrange in war. I have nothing against you, but I'm tellin' you this better be the last court date."); *White*, 670 F.3d at 512 (discussing that the defendant's threats included highly specific information about the plaintiff's identity previously unknown to the defendant, in addition to insinuating the plaintiff's murder by using a famous murder trial as innuendo); *Mabie*, 663 F.3d at 326 (demonstrating that not only did the defendant address his letter to his target's mother, but wrote: "the only way he could get away with it is if no one knows who did it, and the ACTUAL owner is not ready to put several bullets in his head and his kids and grandkids heads. This is a problem, as it would take hours to clean up the blood.").

exchanged between speaker[n] and listener with a pre-existing relationship,[112] and the content of the messages are either non-specific or of minor significance. Removal of these two critical elements leaves one wondering whether the reasonable listener standard is left with any force.

Messages sent during an MCE are spontaneous[113] and are sent in large part because other similar messages are being sent.[114] There are of course exceptions; certain messages sent by speaker[n] during an MCE are specific enough to conceivably implicate the reasonable listener standard.[115] But what about the other messages sent by speaker[n]? Those, which individually are far less specific and the result of spontaneous speech flare-ups?[116] Would those far less specific messages satisfy the objective listener standard? An analysis of the rationales underlying the four circuit court decisions shows that the objective listener standard is highly unlikely to win in the case of non-specific, spontaneous threats that are nonetheless subjectively threatening to the listener of an MCE. In coming to their decisions to read an objective intent standard into the holding of *Black*, the four Circuit Courts promoted four unique benchmarks by which speech can run afoul the true threats doctrine. The four criteria delineated by the courts were meant to serve as the benchmarks by which speech can run afoul of the rights of a listener. Should the four conditions be met, the speech in question is arguably proscribable as a means of protecting victims of threatening communications.

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112 Though the identities of listeners are, in a sense, "known," the average Internet user can hardly be said to have any meaningful, pre-existing relationship with a public figure or any individual whose actions were significant enough to warrant the occurrence of an MCE.

113 *See, e.g.*, Erik Schonfeld, *The Top Spiking Tweets of 2011*, TECHCRUNCH (Dec. 6, 2011), http://techcrunch.com/2011/12/06/top-spiking-tweets-2011/ (noting that individuals who took to Twitter to protest the execution of Troy Davis did so by sending an astounding 7,671 tweets per second); Andrew Springer, *Celebs Take to Twitter to Share Outrage Over George Zimmerman Verdict*, ABC NEWS (July 14, 2013), http://abcnews.go.com/blogs/headlines/2013/07/celebs-take-to-twitter-to-share-outrage-over-george-zimmerman-verdict/ (noting that following the issued verdict in the George Zimmerman trial, users voiced their opinions by sending 47,800 tweets per minute).

114 On August 3, 2013, during the airing of a popular animated film in Japan, an official record was set as an eruption of 143,199 tweets per second were sent by viewers. *See* Raffi Krikorian, *New Tweets Per Second Record, and How!*, TWITTER (Aug. 16, 2013, 22:33), https://blog.twitter.com/2013/new-tweets-per-second-record-and-how. While the number itself is staggering, of much greater importance is that the overwhelming majority of those tweets all conveyed literally the same message, a key phrase from the climax of the film. *Id.* Much the same practice is seen to occur in threatening MCE incidents, wherein users speak similarly to those users whom have already engaged in threatening speech.

115 Laura Smith-Spark, *Calls for Action as Female Journalists Get Bomb Threats on Twitter*, CNN (Aug. 2, 2013), http://edition.cnn.com/2013/08/01/world/europe/uk-twitter-threats/index.html ("She alerted police after receiving the message, which read: 'A BOMB HAS BEEN PLACED OUTSIDE YOUR HOME. IT WILL GO OFF AT 10:47.'").

116 *Id.* ("Criado-Perez contacted police after a daylong onslaught in which she *received around 50 sexually abusive tweets an hour*.") (emphasis added).

### 1. Fear of Violence[117]

Despite the fact that a speaker need not intend to actually threaten a listener, the four courts repeatedly emphasized the language of *R.A.V. v. City of St. Paul*, namely that the prohibition on true threats protects individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.[118] The wording in *R.A.V.* points to these components not as three separate concepts, but as three elements as to what constitutes a true threat. Put another way, *R.A.V.* can be read as defining a true threat as a part of speech that causes a fear of violence in the listener, causes a disruption due to the fear engendered, and generates the possibility[119] that the threat in question might be carried out.

Read this way, it is clear that the specificity of the alleged threat in question will be paramount to the government's case. As discussed previously, the cases heard before the several circuits involved defendants who had pre-existing relationships with the victims, while the actual threats were not only heinous, but also exceptionally specific. While a non-specific, evidently spontaneous message *might*, in a vacuum, threaten the objective listener, it appears exceedingly unlikely that the government could meet its burden in a case involving such a threat. This, of course, is precisely the problem underlying a MCE: it is not that the content of any one message necessarily engenders a fear of violence, but that the scope of the messages, in the aggregate, causes fear within the listener.

### 2. Plainly Threatening Language[120]

Though "plainly threatening language" is a factor that goes towards proving the fear of violence, the Circuits separately analyzed whether the alleged threats in question were made using plainly threatening language. This standard was adopted from the Court in *Black*, which was tasked with deciphering the particular implication of cross burning in its case, as opposed to cross burning as historically

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117 Each of the four Circuit Courts mentions this element explicitly as a part of its respective analysis regarding both the question of intent and the overarching First Amendment principles that the true threats exception to free speech is designed to foster. United States v. Elonis, 730 F.3d 321, 329 (3rd Cir. 2013); United States v. Jeffries, 692 F.3d 473, 478 (6th Cir. 2012); United States v. White, 670 F.3d 498, 507 (4th Cir. 2012); United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011).

118 R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992).

119 The Court's use of the word "possibility" is key, as it would be quite an uphill battle for the government to prove that a threat satisfied a different standard such as "probable" or "more likely than not." *Id.*

120 While each of the four Circuit Courts alludes to this element by means of assessing the respective fact patterns under consideration, the Fourth Circuit does so explicitly. *White*, 670 F.3d at 511 (noting that "A true threat to injure a person, however, standing alone, is not protected speech and can be the subject of a constitutionally acceptable criminal statute . . . .").

protected political speech.[121] The issue in the MCE context, then, is whether ostensibly harmless individual instances of speech will be disregarded as not plainly threatening, or whether they will be considered threatening given the context of an MCE. How the court takes this factor into account therefore rests on its broader determination of context.

### 3. Context[122]

While each of the four Circuits embraced the importance of context and the role it plays in determining the outcome under an objective listener standard, the Sixth Circuit in *Jeffries* established an important context precedent in true threat cases:

> Each of Jeffries' Facebook links represents a communication. Although Chancellor Moyers was the only target of Jeffries' threat, he was not the only receiver of the communication: All of the Facebook friends to whom Jeffries sent the video were recipients. The messages accompanying each link were available to these recipients, and they provide relevant context for determining whether, objectively speaking, a recipient would perceive the video as a threat. The district court did not abuse its discretion by allowing the jury to consider *all of the messages as part of all of the contexts* in which Jeffries made these communications.[123]

The MCE model is, of course, not structured in a speaker to listener[n] model, so an evidence ruling permitting the jury to consider all of the messages sent by Jeffries does not directly bear on the issue at hand. However, the goal of allowing the jury to consider the entire scope of the messages sent is clear: to provide a jury with relevant context for determining whether, objectively speaking, a listener would perceive a communication as threatening. The question, then, is: what exactly is the proper context of communicated speech during an MCE? There are seemingly two possibilities.[124] For example, a judge might determine that all messages employing the same or nearly identical meanings are relevant, or that all message during a designated timeframe should be included.

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121 Virginia v. Black, 538 U.S. 343, 365–66 (2003) ("As . . . history . . . indicates, a burning cross is not always intended to intimidate. . . . [S]ometimes the cross burning is a statement of ideology . . . . It is a ritual used at Klan gatherings, and it is used to represent the Klan itself. Thus, '[b]urning a cross at a political rally would almost certainly be protected. . . .'") (quoting *R.A.V.*, 505 U.S. at 402).

122 *Jeffries*, 692 F.3d at 477 ("In evaluating whether a statement is a true threat, you should consider *whether in light of the context* a reasonable person would believe that the statement was made as a serious expression of intent to inflict bodily injury . . . .") (emphasis added).

123 *Id.* at 483 (emphasis added) (citing Fed. R. Evid. 403).

124 It is true, of course, that a judge might exercise discretion in choosing any number of methods of determining the proper context of the alleged threat. The options are virtually limitless, but include such possibilities as: messages conveying the same or nearly identical wording; messages sent during the same designated timeframe; etc.

On the one hand, it might be considered improper to weigh the sum of all messages as the context of an MCE; it may simply be the case that the individual message, sent from speaker to listener, will act as the basis of the ruling. The scope of evidence considered under this approach is simply the content of the individual message sent from speaker to listener, without regard for the messages sent by other speakers to the same listener.

On the other hand, the proper context might be the entire scope of the MCE, namely, all of the messages that comprise the MCE, rather than the individual message at the heart of any one case. Importantly, under this approach, all speaker$^{n}$:listener communication would be admissible as evidence of context.

The fact remains that under the paradigm of the MCE model, fear engendered through threatening messages comes not as a result of any one particular message,[125] but as an impact of the entire event in the aggregate. One particular message threatening, "I am going to kill you," for example, may not have a significant impact on the objective listener, whereas one hundred unique messages delivering the same sentiment may be objectively threatening. It is for this reason that the latter approach, assessing the individual threat as a single function of the entire MCE, is the correct approach for purposes of determining context.

There are, however, significant drawbacks to adopting the aggregate context approach. For one, by the approach's very nature, determining that a series of communications comprised an MCE is an inherently ex post determination. That is to say, there is no clearly defined threshold between a series of unconnected messages, considered to be discrete messages from individuals, and a series of connected messages, considered to be part of an MCE. Such a determination will, more often than not, be largely arbitrary, and as MCE situations are dependent on the peripheral circumstances surrounding the messages, it will be difficult to establish any sort of precedent on which future speakers or listeners can rely.

Moreover, there exists the potential difficulties of determining how to separate out any particular speaker for liability, and how to do so without chilling valuable forms of speech altogether. There might be the concern, for instance, that political speech buried in a mountain of threatening language appears threatening. Of course, the goal is not to jettison protected speech simply because, when positioned among unprotected speech, an MCE victim feels threatened by it. Rather, protected speech remains protected; it is the theoretically ordinarily

[125] Excepting for the highly specific, personal messages, which are punishable on their own merits.

innocuous "I am going to kill you" kind of message that, when aggregated with a quantity of unprotected speech, might transform into a threat by virtue of aggregation.

With these and other difficulties lurking behind the aggregate context approach, however, it seems more likely that the approach of analyzing the individual message, without any particular reference to messages sent by other users, will be the adopted standard. Given that the crux of the MCE problem is the impact on the listener due to the aggregate of sender[n] messages, this method fails the victim.

#### 4. Underinclusiveness[126]

The Circuit courts believe that reading a subjective intent standard, which would focus on a speaker's actual intent, into 18 U.S.C. § 875(c) would be underinclusive with respect to the rationale supporting the proscription of threatening speech as outlined in *Virginia v. Black*.[127] If the real purpose of proscribing threatening speech is to protect listeners from fear, so the argument goes, then the actual intent of the speaker is ultimately of secondary importance to the effect on the listener.

As demonstrated, and as applied to the MCE model, the objective intent standard in its current state is indeed also an underinclusive standard. Concerns such as cultural desensitization to the quality of Internet speech have radically shaped the perception of what the objective listener ought to expect as par for the course.

### B. *The Subjective Speaker Standard As Applied to the MCE Model*

In subjective speaker standard jurisdictions, cases that invoke the MCE model require the government to prove that a defendant *actually intended to threaten* the plaintiff.[128] Since the issue of the context of the message is removed from the analysis,[129] it is likely an impossible task to find that any one individual MCE message—taken alone and without reference to the fact that it occurred *during* an MCE—satisfies the true threat exception to the First Amendment. As the aggregate effect of speaker[n] messages directed to the listener is what causes the feeling of being threatened, the subjective standard as articulated by the Ninth

126 United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011) ("A standard for threats that focused on the speaker's subjective intent to the exclusion of the effect of the statement on the listener would be dangerously underinclusive with respect to the first two rationales [in *Black*] for the exemption of threats from protected speech.").

127 Virginia v. Black, 538 U.S. 343 (2003).

128 United States v. Cassel, 408 F.3d 622, 633 (9th Cir. 2005) ("[We] 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.").

129 The Ninth Circuit in *Cassel* distinguishes its procedural analysis under the subjective intent standard from that performed under the objective standard. *Id.* at 632 n.10 (quoting United States v. Nishnianidze, 342 F.3d 6, 15 (1st Cir. 2003)) ("A true threat is one that a reasonable recipient *familiar with the context of the communication* would find threatening.") (emphasis added).

Circuit likely fails to provide the potential MCE victim with any realistic legal recourse.

## IV. STATE CYBERHARASSMENT STATUTES: A LEGISLATIVE EFFORT TO CURB THREATENING SPEECH ONLINE

In its traditional offline form, harassment is typically defined as any words, conduct, or action that annoys, alarms, or causes substantial emotional distress, which serves no legitimate purpose outside of affecting the harassed.[130] However, as Internet communications and other forms of electronic media have become increasingly ubiquitous, so too has the prevalence of harassment online.[131] In recent years, 48 of the 50 state legislatures have either enacted new proprietary legislation or amended pre-existing criminal law to target cyberharassment.[132] There exists no single definition of cyberharassment; classification varies between jurisdictions, particularly with regard to the elements of the intent of the accused and the effect on the alleged victim. Generally speaking, cyberharassment refers to unwanted communication between adults, while cyberbullying refers to similar activity between minors.[133]

### A. *The Four Paradigmatic Legislative Approaches:*

Cyberharassment statutes can be broken down into four broad categories on the basis of how they treat intent: (1) those that adopt an objective standard from the perspective of the speaker; (2) those that adopt an objective standard from the perspective of the listener; (3) those that require specific intent on behalf of the speaker; and most commonly, (4) those that apply some combination of the above elements.[134]

The objective reasonable-speaker standard turns on whether the defendant in fact knew, or reasonably should have known, that her speech would cause the listener either emotional stress or fear for her safety.[135] Under ordinary speech model contexts, sufficient notice is

130 BLACK'S LAW DICTIONARY 733 (9th ed. 2009).

131 *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, NAT'L CENTER FOR INJURY PREVENTION & CONTROL, http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf (last visited Apr. 2, 2014).

132 *State Cyberstalking and Cyberharassment Laws*, NAT'L CONF. ST. LEGISLATURES (Nov. 16, 2012), http://www.ncsl.org/research/telecommunications-and-information-technology/cyberstalking-and-cyberharassment-laws.aspx (last updated Dec. 5, 2013).

133 *What Is Cyberbullying, Exactly?*, STOP CYBERBULLYING, http://stopcyberbullying.org/what_is_cyberbullying_exactly.html (last visited Apr. 2, 2014) ("Once adults become involved, it is plain and simple cyber-harassment or cyberstalking. Adult cyber-harassment or cyberstalking is NEVER called cyberbullying.").

134 Though other such interpretations of the statutory organization exist, the four mentioned approaches are the model relevant to the scope of the MCE.

135 *See, e.g.*, MINN. STAT. ANN. § 609.749(1) (2013) ("[T]o engage in conduct which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the

provided to the defendant that her conduct is or likely is illegal. Moreover, prosecution is more likely to be successful than under other more demanding standards of proof.[136]

By contrast, liability under the objective reasonable listener standard depends on whether it can be proven that the defendant's actions would have caused a reasonable listener to suffer serious emotional distress or fear of bodily injury to him or herself or to his or her family members.[137]

Several other states require a fact finder to determine that the speaker had an actual intent to threaten, harass, annoy, alarm, abuse, torment, or embarrass the listener.[138] Legislatures that have adopted this subjective speaker standard are concerned with promoting overly broad legislation that offends the U.S. Constitution. That is, legislation that, in the course of proscribing unprotected speech, similarly proscribes *protected* speech.[139]

Most states, however, employ a combination of the above elements, which combines objective speaker standard, the objective listener standard, and the specific, subjective intent standard.[140] In

victim . . . ."); N.H. REV. STAT. ANN. § 633:3-a(1)(a) (2006) ("Purposely, knowingly, or recklessly engages in a course of conduct targeted at a specific person which would cause a reasonable person to fear for his or her personal safety . . . ."); TENN. CODE ANN. § 39-17-308(a)(4) (2012) ("Communicates with another person . . . and . . . [m]aliciously intends the communication to be a threat of harm to the victim; and . . . [a] reasonable person would perceive the communication to be a threat of harm."); UTAH CODE ANN. § 76-5-106.5(2) (2008) ("[K]nows or should know that the course of conduct would cause a reasonable person . . . to fear for the person's own safety or . . . suffer other emotional distress.").

136 *See* Joseph C. Merschman, *The Dark Side of the Web: Cyberstalking and the Need for Contemporary Legislation*, 24 HARV. WOMEN'S L.J. 255, 270 (2001).

137 *See* N.J. STAT. ANN. 2C:12-10(b) (2019) ("A person is guilty of stalking, a crime in the fourth degree, if . . . he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a *reasonable person* to fear for his safety or the safety of a third person or suffer other emotional distress.") (emphasis added); OKLA. STAT. ANN. tit. 21 § 1173(A)(1) (2000) ("Would cause a reasonable person or a member of the immediate family of that person . . . to feel . . . intimidated, threatened . . . .").

138 *See, e.g.*, ARK. CODE ANN. § 5-41-108(a) (2006) ("A person commits the offense of unlawful computerized communications if, *with the purpose* to frighten, intimidate, threaten, abuse, or harass another person . . . .") (emphasis added); IND. CODE ANN. § 35-45-2-2(a) (2009) ("A person who, *with intent to* harass, annoy, or alarm another person . . . .") (emphasis added); 18 PA. CONS. STAT. ANN. § 2709(a) (2010) ("A person commits the crime . . . when, *with intent to* harass, annoy, or alarm another . . . .") (emphasis added).

139 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

140 *See, e.g.*, ALA. CODE ANN. § 13A-11-8(b)(1)(a) (2013) ("A person commits the crime of harassing communications if, with intent to harm or alarm another person, he or she . . . [c]ommunicates with a person, anonymously or otherwise . . . in a manner likely to harass or cause alarm."); CONN. GEN. STAT. ANN. § 53a-182b(a) (20012) ("A person is guilty of harassment in the first degree when, with the intent to harass, annoy, alarm or terrorize another person, he . . . communicates such threat . . . in a manner likely to cause annoyance or alarm . . . ."); N.Y. PENAL LAW § 240.30(1)(a) (2012) ("A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten, or alarm another person, he or she . . . communicates with a person, anonymously or otherwise . . . in a manner likely to cause annoyance or alarm . . . ."); CAL. PENAL CODE § 646.9(a) (2008) ("Any person who willfully,

theory, combining elements of the standards provides fair notice to would-be defendants, relaxes the burden of proof on the government, and avoids concerns of First Amendment overbreadth.

### B. *The Pitfalls Curtailing the Effectiveness of the Available Standards in the MCE Context*

#### 1. The MCE Model Under the Objective Speaker Statutory Scheme

Issues of context and speaker expectation that plague the true threats discussion are similarly entrenched in this statutory approach.[141] As the objective reasonable-speaker standard centers on whether the defendant actually knew, or should reasonably have known, that her speech would cause the listener either emotional stress or fear for her safety, it is critical that the message not be analyzed in isolation, but in the context of the MCE. Practical issues render the possibility that the scope of the MCE be included increasingly unlikely. As such, taken in isolation, a non-specific, off-hand threat is unlikely to satisfy the objective speaker standard. It is, after all, the aggregate effect of the messages sent by speaker[n] that causes the MCE to bestow upon its listener the particular feeling of being threatened.

#### 2. The MCE Model Under the Objective Listener Statutory Scheme

By utilizing an objective listener as the benchmark for assigning liability to the speaker or harasser, the *actual* effect on the listener is discounted. It might be the case that, due to the nature of the MCE model and the aggregate threatening effect of cyber-harassment, the listener is left feeling threatened, but the court may find that the objective listener would not have felt threatened in that scenario. Plainly, this standard stops the court from assessing incidents of online harassment on a case-by-case basis because rather than considering the *actual* impact on the listener, the law requires that the court look to how the objective, or average listener would have responded under like-circumstances.[142] Unfortunately, due to the ubiquity of threats made online,[143] it is foreseeable that some measure of 'being accustomed' to

maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety . . . . "); MO. REV. STAT. § 565.225(2) (2008) ("[C]ommunicated with the intent to cause the person who is the target of the threat to reasonably fear for his or her safety.").

141 *See, e.g.*, Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72. MO. L. REV. 125, 146–47 (2007).

142 *See* Diana Lamplugh & Paul Infield, *Harmonising Anti-Stalking Laws*, 34 GEO. WASH. INT'L L. REV. 853, 868 (2003) ("[Cyber-harassment] is . . . a crime that depends on perception, particularly that of the victim.").

143 *See* Casey O'Connor, *Cutting Cyberstalking's Gordian Knot: A Simple and Unified Statutory Approach*, 43 SETON HALL L. REV. 1007 (2013).

disagreeable online conduct[144] will be a consideration in the fact finder's assessment of the attendant circumstances. Ultimately, speech that may appear harmless might instill genuine fear within the listener, and a MCE victim is left without any recourse.[145]

3. The MCE Model Under the Subjective Speaker Statutory Scheme

The subjective speaker classification poses particularly grave difficulties in MCE scenarios where the class of speaker$^{n}$ is located a great distance away from the listener, and therefore the individuals involved may not possess the requisite intent or even the ability to carry out the content of the threat.[146] When individual messages are not inherently threatening, it is difficult to derive a subjective intent from an individual message belonging to the class of messages transmitted by speaker$^{n}$. Parenthetically, by being part of the class of speaker$^{n}$, the subjective sender standard fails to legitimately address the victim's subjective understanding of and reaction to the threats.[147] That is to say, by focusing only on the intent of an individual sender, the subjective affect on the listener is unavoidably ignored.

4. The MCE Model Under the Mixed Statutory Scheme

The mixed statutory approach is problematic under the MCE model by virtue of the fact that it includes the speaker's subjective intent as an element of the government's burden of proof.[148] By adopting in part the subjective speaker standard, a seemingly insurmountable burden is established, which shields speakers to the detriment of listeners victimized during an MCE.[149] This is to say that the fear engendered in the listener during an MCE is caused largely by the sheer volume of messages, rather than the speaker's intent. Adopting this model forces prosecutors to show both that: (a) the

144 *See, e.g.*, Alison V. King, *Constitutionality of Cyberbullying Laws: Keeping the Online Playground Safe for Both Teens and Free Speech*, 63 VAND. L. REV. 845 (2010).

145 *See, e.g.*, Amy C. Radosevich, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today's Stalker?*, 2000 U. ILL. L. REV. 1371, 1384 (2000); Keirsten L. Walsh, *Safe and Sound at Last? Federalized Anti-Stalking Legislation in the United States and Canada*, 14 DICK. J. INT'L L. 373 (1996).

146 *See* Radosevich, *supra* note 145, at 1384–85.

147 *Id.* at 1384.

148 *See, e.g.*, DEL. CODE ANN. tit. 11, § 1311(a)(1) (West 2010) ("[W]ith intent to harass . . . another person . . . [who] engages in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to . . . cause a reasonable person to suffer fear, alarm, or distress.").

149 *See Violence Against Women Act of 1999, Stalking Prevention and Victim Protection Act of 1999: Hearing on H.R. 1248 and H.R. 1869 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 228, 228 (1999) ("Specifically, we have mentioned the intent element today during testimony . . . It specifically requires the prosecutor to prove a stalker specifically intended to injure or harass their victim. I think it is this very heavy burden that is the primary reason that we have seen so few . . . prosecutions to date.").

speaker actually intended to cause the listener to feel threatened; and (b) that the speaker intended to be a part of the MCE which caused the fear in question to manifest. This dual-component burden of proof is a very difficult one to meet.

## V. ONE POTENTIAL SOLUTION: THE COURSE OF CONDUCT STANDARD

As evidenced by the inconsistent approaches that the lower courts have adopted in taking on the issue of intent in true threats cases, in addition to the insufficiency of state cyber-harassment statutes, it is clear that there remains a need for a clearly defined approach to MCEs going forward.[150]

The legal devices surveyed thus far have either failed to adequately protect the interests of listeners of an MCE or failed to uphold traditional First Amendment values.[151] While there are certainly some merits to the objective standard, it ultimately falls flat for want of critical elements such as fear of violence, under the three-prong approach articulated in *R.A.V.*[152]: plainly threatening language;[153] context that implicates the scope of the MCE rather than confining analysis to individual instances of speech; and underinclusiveness. Similarly, the subjective intent standard likely fails to provide any legitimate legal recourse, as the element of context is eliminated from the analysis, and any one message submitted by a member of the speaker[n] class, due to the fact that the message is likely non-specific and spontaneous, is unlikely to be found by a fact finder to satisfy the true threat exception to the First Amendment. The recurring theme thus far is that the MCE is a highly specific, unique class of speech that requires certain elements of both the objective and subjective standards. A separate standard that encompasses these elements may well be required to ensure that MCE victims stand a chance of having the tools to protect themselves.

### A. *Developing the Proper Standard*

The United Kingdom's 1997 Protection from Harassment Act embraces an approach that, while not directed at the MCE model, is comprised of the elements that provide a good framework for addressing the speaker[n] to listener communication paradigm.[154] The

150 *See* Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1269 (2006).

151 Virginia v. Black 538 U.S. 343, 358–59 (2003) ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

152 R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2546 (1992).

153 *See supra* note 120 and accompanying text.

154 Protection from Harassment Act, 1997, c.40, § 1 (U.K.).

> (1) A person must not pursue a course of conduct—(a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the

following section will assess the statute's provisions in turn, explaining how their specific criteria readily apply to the MCE model, while pointing out certain terminology that needs re-defining in order for the standard to serve as a comprehensive piece of legislation. What will follow is a version of the statute for purposes of legislative application in the United States. To test the viability of the law, it will be tested against the facts of an actual MCE.

1. Subsection One: Establishing an Instance of Harassment

Though cyberharassment has been considered a potential avenue for plaintiffs to pursue[155] in the absence of a favorable true threat doctrine standard, up until now, harassment statutes have been analytically unfit to address the legal standards required of MCE victims.[156] Subsection (1)(1)(a) of the U.K. Protection from Harassment Act refers specifically to harassment; however, a more fitting approach for purposes of the MCE context event is to alter harassment to "the threatening of another." Subsection (1)(1)(b) does a service to the MCE context, as it includes elements of the subjective speaker standard as well as the reasonable speaker standard.[157] That is, it becomes imperative that elements of *either* standard could be invoked in order for the government to meet its burden of proof against the defendant. As the subjective speaker standard typically does away with the contextual analysis,[158] including language that implicates what the speaker ought to have known reintroduces a reasonableness standard, such that an evaluation of available context, namely the entire scope of the MCE and all messages therein, is back on the table.[159] Moreover, a reasonableness standard puts defendants on fair notice.[160]

2. Subsection Two: Establishing the Parameters of the MCE Model

As a preliminary matter, the phrase "course of conduct" refers back to the initial verbiage of subsection one,[161] which establishes an

other. (2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other. (3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—(a) that it was pursued for the purpose of preventing or detecting crime, (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

155 *See What is Cyberbullying, Exactly?*, *supra* note 133.

156 *See* Radosevich, *supra* note 145, at 1383.

157 *See* Crane, *supra* note 150, at 1235.

158 United States v. Jeffries, 692 F.3d 473, 480 (6th Cir. 2012).

159 United States v. Cassel, 408 F.3d 622, 632 n. 10 (9th Cir. 2005).

160 *See* Merschman, *supra* note 136.

161 *See* Crane, *supra* note 150, at 1235.

implicit acknowledgement of multiple instances of interactions between speaker and listener.[162] As a matter of law, harassment typically refers to continuous action, that is, more than one encounter or instance of speech.[163] In redefining the language of the statute to fit the MCE model, however, a "course of conduct" refers not to contact, but more generally, to a defendant's participation in the MCE, which is the target of the litigation.

Naturally, defining the statute in this way gives rise to certain concerns. For one, there is the issue of how the first sender is to know that she is involved in an MCE. That is to say, how is a first-arriving speaker to know that what she initially perceived as her participation in a speaker to listener model, in fact might be judged ex post as belonging to a speaker$^{n}$ to listener model? Fortunately, the remaining language of subsection two addresses this concern directly. By assessing the defendant's conduct in light of the information available to the defendant at the time of her action, the fact finder must consider important context in making a determination as to whether or not a speaker intended to threaten a listener.[164] Often, the greatest factor in whether a speaker chooses to participate in an MCE is the volume of speakers that have already participated.[165] By holding defendants accountable for their actions in the context of what has already been communicated by others, the "piling on effect" of the MCE will more likely than not be avoided. Although a tweet can be deleted by the user responsible for sending it,[166] records of all tweets sent are saved on Twitter's servers[167] and can thus be obtained for litigation by subpoena.[168]

As a whole, subsection two establishes a two-step procedure: first,

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162 This is the case in almost any jurisdiction. *See, e.g.*, Wash. Rev. Code § 10.14.020 (2011) ("'Course of conduct' means a pattern of conduct . . . over a period of time . . . evidencing a continuity of purpose. 'Course of conduct' includes . . . any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech.").

163 *See* BLACK'S LAW DICTIONARY, *supra* note 130.

164 Relevant context will likely include, though is not limited to: how early on was the message sent, what other types of messages had been sent up until that point, and so on. Interestingly, a fact finder may ultimately decide to determine, ex post, if the reasonable sender *could have determined*, *ex ante*, whether or not the circumstances that led to the speaker's communication occurring were such that an MCE was anticipated or expected.

165 *See* Krikorian, *supra* note 114.

166 *See Deleting a Tweet*, TWITTER, https://support.twitter.com/articles/18906-how-to-delete-a-tweet (last visited Apr. 4, 2014).

167 *See* Mollie Vandor, *Your Twitter Archive*, TWITTER (Dec. 19, 2012), https://blog.twitter.com/2012/your-twitter-archive.

168 *See Guidelines for Law Enforcement*, TWITTER, http://support.twitter.com/articles/41949-guidelines-for-law-enforcement#7 (last visited Apr. 4, 2014) ("In accordance with our Privacy Policy and Terms of Service, non-public information about Twitter users is not released except as lawfully required by appropriate legal process such as a subpoena, court order, or other valid legal process.").

it establishes a baseline of context for defendants based upon existing circumstances at the time of their communication; and second, it promotes good policy by adopting a standard that discourages would-be defendants from participating in a threatening "piling on effect" by applying what information was available to them to the contextual analysis of meeting a reasonableness burden of proof.

#### 3. Subsection Three: Maintaining an Exception for Traditionally Constitutional Speech

Though certain portions of the decision in *Black* are obviously muddied, it is significant that the Court analyzed whether of whether the allegedly threatening speech in question fell under a previously defined example of constitutional expression.[169] Subsection three, for purposes of MCE analysis, is the statutory response to *Black's* regard for constitutional speech. One can imagine circumstances where citizens are outraged by a political event, and take to the Internet, causing an MCE.[170] It might turn out that a seemingly violent, yet functionally political MCE begins to occur on Twitter. It will be important, then, to maintain a carve-out for traditionally protected constitutional speech, including but not limited to core political speech.[171] Sections 3(a)–(b) are mainly innocuous, though there are potential lurking concerns that lie outside the scope of this Note.[172]

### B. *Evaluating the Standard: A Practical, Comprehensive Statutory Solution to the MCE Predicament*

The proposed statutory scheme accomplishes each of the goals of the objective and subjective standards, while also accounting for each of the standards' respective deficiencies: most notably, accounting for a lack of available context analysis and overcoming an impractical burden of proof on behalf of the government. Moreover, the new statutory scheme satisfies the Circuit Courts' worries regarding underinclusiveness. The proposed statute thus reads as follows:

> (1) A person must not pursue the engagement of a mass communication event (a) participation in which amounts to the

169 Virginia v. Black, 538 U.S. 343, 354, 356 (2003) ("Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. . . . Throughout the history of the Klan, cross burnings have also remained potent symbols of shared group identity and ideology.").

170 *See* Stan Schroeder, *SOPA Explodes on Twitter, Generates 2.4 Million Tweets*, MASHABLE (Jan. 19, 2012), http://mashable.com/2012/01/19/sopa-tweets/ (noting that on January 18, 2012, between the hours of 12:00AM and 4:00PM EST, Twitter users sent 2.4 million tweets in protest of the Stop Online Piracy Act).

171 Meyer v. Grant, 486 U.S. 414, 422 (1988) (noting that "interactive communication concerning political change . . . is appropriately described as core political speech.").

172 Regarding Subsection 3(a), for example, one *might* be skeptical about how far law enforcement is able to engage with civilians, though ultimately, online communications between the government and other ordinary users are given a considerable amount of discretion.

> threatening of another, and (b) which he knows or ought to know amounts to the reasonable fear or injury of the other. (2) For the purposes of this section, the person whose engagement in the mass communication event in question ought to know that it amounts to threatening of another if a reasonable person in possession of the same information would think the course of conduct amounted to threatening of the other. (3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—(a) that it was pursued for the purpose of preventing or detecting crime, (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or (c) that in the particular circumstances the engagement of the mass communication event was reasonable, or done so for a constitutional purpose.

### C. *Testing the Standard*

On November 30, 2013, the University of Alabama varsity football team suffered a last second defeat to in-state rival Auburn University, due in part to the uncharacteristically[173] poor performance of placekicker Cade Foster.[174] A senior at the University of Alabama,[175] Foster missed each of his three field goal attempts, and was eventually replaced by a redshirt-freshman.[176] Those nine unclaimed points proved to be the difference, as Alabama's last-second field goal attempt came up short, was fielded by Auburn, and was returned for a touchdown, resulting in a six-point Auburn victory Following the game, Alabama football fans took to Twitter, sending messages of resentment and hatred, including a large number of death threats made towards both Foster as well as his family.[177] Despite the fact that Foster modified his public display name and blacked out his profile photograph, users were still able to locate Foster online and continue the onslaught of violent speech.[178] The threats reached such a critical mass that President George

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173 Prior to the game in question, Foster enjoyed a 91.6% success rate on his field goal attempts. See *Cade Foster: Player Profile*, ESPN, http://espn.go.com/college-football/player/_/id/504026/cade-foster (last visited Apr. 4, 2014).

174 *See Auburn Stuns Alabama with 109-yard Field-Goal Return to End it*, ESPN (Nov. 30, 2013), http://scores.espn.go.com/ncf/recap?gameId=333340002.

175 *See Cade Foster Bio*, ROLLTIDE, http://www.rolltide.com/sports/m-footbl/mtt/foster_cade00.html (last visited Mar. 8, 2014).

176 *See Auburn Shocks Alabama with Game-Winning Missed Field Goal Return TD in Final Second*, FOX SPORTS (Nov. 30, 2013), http://msn.foxsports.com/college-football/story/auburn-shocks-alabama-with-game-winning-missed-field-goal-return-td-in-final-second-113013?related=d46578e1-5d37-94c8-c646-6242ac726736.

177 *See* Tyler Conway, *Alabama Kicker Cade Foster Sent Death Threats and Hateful Tweets After Loss*, BLEACHER REPORT (Nov. 30, 2013), http://bleacherreport.com/articles/1871080-alabama-kicker-cade-foster-sent-death-threats-and-hateful-tweets-after-loss.

178 *See* Samer Kalaf, *Alabama's Kicker Should Stay Off of Twitter for a While*, DEADSPIN (Dec. 1, 2013), http://deadspin.com/alabamas-kicker-should-stay-off-of-twitter-for-a-while-1474270531.

W. Bush personally reached out to Mr. Foster to reassure him of his character and encourage him not to lose confidence.[179]

Applying the proposed statute to this incident reveals the ways in which it captures the subtleties of online discourse that the other standards do not. Take for example the following real tweet sent to Mr. Foster:

> Alabama as a team played awful but Cade Foster if you don't kill yourself I will — (@BIGPOMP56) (December 1, 2013)[180]

The content of the message in question likely satisfies sections 1 (a) and (b) of the proposed statute. For one, the message on its face constitutes a threat, as the sender has indicated that unless Mr. Foster takes his own life, the sender will murder him. Second, though the sender might argue that he did not believe that Mr. Foster would find the Tweet threatening,[181] the objective listener would likely find the message quite threatening, given the magnitude of the underlying event in question,—the missed field goals and lost game— which eliminated Alabama from national championship contention.[182] The microscope put on Mr. Foster in the aftermath of said event was quite significant.

Given that the death threats sent to Cade Foster began on the night of the game, November 30, 2013, it would be easy to argue that the individual who sent the above tweet—one day later—was put on notice that a legal "course of conduct" had thus commenced. Under section 2 of the proposed standard, participation in a course of conduct amounting to the threatening of another is legally proscribable. Lastly, there are no provisions contained within section 3 that shield the conduct pursued by Mr. Foster's threatener.

Given the big-picture context of the event—poor performance in a nationally televised sporting event holding national championship implications—coupled with the intense fandom that Alabama football fans pledge to the university, it is not difficult to see how Cade Foster

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179 *See e.g.*, Chip Patterson, *George W. Bush to Alabama K Cade Foster: 'You Will be Stronger*,*'* CBS SPORTS (Dec. 12, 2013), http://www.cbssports.com/collegefootball/eye-on-college-football/24373522/george-w-bush-to-alabama-k-cade-foster-you-will-be-stronger.

180 *See* Conway, *supra* note 177.

181 As a matter of fact, the individual who sent the above tweet to Mr. Foster maintains the position that his intention was not to inspire fear within Mr. Foster. *See* Tweet of @BIGPOMP56, TWITTER (Dec. 1, 2013, 6:09 PM), https://twitter.com/BIGPOMP56/status/407270164116557825 ("I want to sincerely apologize to Cade Foster, his family, SUNY Cortland and anyone else I offended with my tweets, I realize how ignorant...") (message continued in subsequent tweet); Tweet of @BIGPOMP56, TWITTER (Dec. 1, 2013, 6:10 PM), https://twitter.com/BIGPOMP56/status/407270543424258048 ("... The tweet was and in no way did I mean any harm. I truly am sorry for my actions.").

182 *See* Chris Smith, *The Money Behind the BCS National Championship Game,* FORBES (Jan. 7, 2013), http://www.forbes.com/sites/chrissmith/2013/01/07/the-money-behind-the-bcs-national-championship/

would have reasonably felt threatened following the event. Whereas individuals like Mr. Foster are presently without sufficient legal recourse and are left to fear for their well-being, the proposed standard redirects the proper legal protection to victims of threatening MCEs.

## CONCLUSION

The MCE speech model presents very real problems for lawmakers and judiciaries, as neither the objective nor the subjective standard of the true threat doctrine alone are *quite* comprehensive enough to deal with the subtle nuances of balancing speaker intention with the aggregate impact on the listener As a preliminary matter, it remains the case that the true threat doctrine needs clarifying. Perhaps this process will come about by an eventual caving of the Ninth Circuit to adopt the prevailing approach, or perhaps a third and final pronouncement by the United States Supreme Court will establish a clear standard left unanswered in *Black*.

Elsewhere, state cyberharassment statutes are still some time away from maturing into fully comprehensive pieces of legislation that succeed in foreseeing the "next big thing." Given that the states have designated statutes to deal specifically with cyber-issues apart from ordinary harassment, it is clear that legislatures understand the potential held by Internet technology. Nonetheless, to this point states have been inexplicably unable to draft successful state laws to protect online victims, and have instead seemed to craft laws designed to succumb to their own rigidity.

All the while, however, the MCE remains a very real, very serious threat to online users, and I encourage lawmakers to look very seriously to an improved standard, which begins by considering a more modern approach such as the one taken in this Note. It is up to progressive lawmakers to ensure that Caroline Criado-Perez and Cade Foster are the last of their kind: ill-fated victims of technology's rapid, 140-character advantage over the law.

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