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Comments

Are Courts Taking Internet Threats Seriously Enough? An Analysis of True Threats Transmitted Over the Internet, as Interpreted in *United States v. Carmichael*

Amy E. McCann*

[T]he Internet . . . is a medium for the instantaneous transmission of ideas free of the web of social controls. Ideas on television or radio, or in books and magazines, emanate from corporate offices. Ideas on the Net emanate from a million servers worldwide. Ideas do not get in or out of those corporate offices, let alone make it into the broadcast or the publication, without someone's strict review and approval. Ideas spread across the Internet like viruses through a crowded city.¹

I. Introduction

Imagine that you have acted as an informant for the government in a drug conspiracy and money laundering case. Being an upstanding, law-abiding citizen, you consider it your duty to ensure that the American criminal justice system works and that the streets will be a little safer for your children. While being an informant is always slightly risky and dangerous, imagine how you would feel if you found out that there was a

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1. Jonathan Wallace, *Why the Internet is "Dangerous,"* 1 THE ETHICAL SPECTACLE 11, (Nov. 1995), <http://www.spectacle.org/1195/danger.html>.

website posted on the Internet that had your name and photo on a WANTED poster. The criminal defendant in the case in which you acted as an informant had created a website to look like a WANTED poster, such as those used in the Old West, that featured your name and photo, as well as the names and photos of other informants and Drug Enforcement Agency (DEA) agents involved in the case. How would you feel about testifying in the case now that anyone with Internet access, including those other people involved in the drug conspiracy or personal friends of the defendant, could see that you were the one who “snitched”? Would it make you less likely to testify, as well as less likely to help the government in future cases? Would it make you fear for your safety, as well as the safety of your family?

The United States District Court for the Middle District of Alabama, Northern Division, determined that in that very situation, you would not feel threatened.² In *United States v. Carmichael*, the court allowed such a website to remain on the Internet, holding that it was not a true threat, and therefore constituted protected speech under the First Amendment.³ The court applied the strictly objective test of the Eleventh Circuit to determine that the website was not a true threat.⁴

This Case Note will demonstrate why courts should change their true threat analysis under the First Amendment in the context of the Internet, so as to incorporate a subjective element that focuses on the listener (reader). This new media, which the courts have only recently begun to analyze, is quite different from other traditional media. The Internet can be accessed by virtually anyone around the world, and must be subjected to a different analysis than an advertisement in the local paper. While the speaker’s intent is important to the true threat analysis, the subjective fear caused in the listener or reader of a website should be considered as well.

Part II of this Case Note will examine the history of unprotected speech under the First Amendment, focusing on the tests developed by the United States Supreme Court for evaluating true threats. Part III will focus on the more recent cases that have begun to develop the law of true threats and electronic media, that covers both electronic mail (email) and the Internet. Part IV will discuss the *Carmichael* case and its holding. Part V will discuss the merits of the *Carmichael* decision and why it was wrongly decided, as well as illustrate why a more subjective analysis of

2. *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1270 (M.D. Ala. 2004).

3. *Id.* See *infra* note 5.

4. *Id.* at 1280-81.

true threats in the context of the Internet is necessary. Finally, Part VI will describe the proposed test that should be used to analyze threats over the Internet.

II. The History of Unprotected Speech Under the First Amendment: True Threats

The first significant Supreme Court cases analyzing what speech did not deserve protection under the First Amendment⁵ arose in the early part of the twentieth century. In *Schenck v. United States*,⁶ Justice Oliver Wendell Holmes stated that whether speech is protected depends upon the circumstances in which it is spoken.⁷ Justice Holmes laid out the famous “clear and present danger” test, stating,

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.⁸

The Supreme Court adopted another test in *Gitlow v. New York*,⁹ in which the Court decided that the defendant’s “Left Wing Manifesto” advocating a communist revolution was not protected speech.¹⁰ In establishing the “bad tendency test,” the Court stated that freedom of speech does not protect attempts to subvert the government or disturb the peace.¹¹

A. Developing the True Threat Framework

Over thirty years later, the Supreme Court began interpreting threats under the First Amendment. There are many reasons why true threats are not protected speech. Some of the most important include protecting people from the fear of violence, preventing the disruption that this fear

5. The First Amendment of the United States Constitution states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

6. *Schenck v. United States*, 249 U.S. 47 (1919).

7. *Id.* at 52.

8. *Id.*

9. *Gitlow v. New York*, 268 U.S. 652 (1925).

10. *Id.* at 672.

11. *Id.* at 667.

of violence causes, preventing crimes by incarcerating those who have made threats that they are likely to carry out, and to prevent people from being forced to act against their will in response to threats.¹²

The first case to address the "true threat" issue was *Watts v. United States*.¹³ During a public rally at the Washington Monument on August 27, 1966, Watts, an 18-year-old man, stated, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."¹⁴ The Supreme Court reversed his conviction for threatening the President because this kind of "political hyperbole" did not fit into the statute,¹⁵ which required a willful intent to carry out the threat.¹⁶ When the threat is one that would be carried out by the speaker, the Court looks to the context, the nature of the statement, and the reaction of the listeners to determine if the speech is a true threat.¹⁷ In holding that "a threat must be distinguished from what is constitutionally protected speech," the Court established the principle that true threats constitute an exception to First Amendment protection.¹⁸

After *Watts*, the Court examined a slightly different type of threat in *Brandenburg v. Ohio*:¹⁹ when the speech incites others to commit violence, rather than simply the speaker carrying out the threat.²⁰ In *Brandenburg*, the defendant, a leader of a local Ku Klux Klan group, advocated hate crimes at a rally of other group members.²¹ A large wooden cross was burned at the rally and several attendees had firearms in their possession.²² The Court held that the First Amendment protects advocacy of illegal and violent action unless it is intended to produce, or is likely to cause, "imminent lawless action."²³ Here, the speech was protected because it was mere abstract teaching of violence, and not the actual preparation for impending violence.²⁴

12. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 290-91 (2001).

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

14. *Id.* at 706.

15. See 18 U.S.C. § 871 (2000) (dealing with threats made against the President).

16. *Watts*, 394 U.S. at 707-08.

17. *Id.* at 708.

18. *Id.* at 707.

19. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

20. *Id.* at 447.

21. *Id.* at 445-46.

22. *Id.* at 445.

23. *Id.* at 447.

24. *Id.* at 448.

In the 1975 case of *Rogers v. United States*,²⁵ the Supreme Court was presented with another true threat case, but again declined to establish a clear test for their analysis. In *Rogers*, the defendant was convicted under 18 U.S.C. § 871(a) for making threats against the life of President Richard Nixon.²⁶ Rogers, an alcoholic, had stumbled into a Holiday Inn while intoxicated and, after accosting some of the customers, stated that he was “going to go to Washington to ‘whip Nixon’s ass’ or to ‘kill him in order to save the United States.’”²⁷

Although the Court had originally granted certiorari in *Rogers* in order to resolve the circuit split in dealing with true threats, the Court never reached that issue.²⁸ Because the Court found that a prejudicial error had occurred at the trial level in regard to communications with the jury, the conviction was reversed without discussion of the threat.²⁹ In fact, it was only discussed in Justice Marshall’s concurring opinion.³⁰ Justice Marshall’s concurrence, joined by Justice Douglas, called for a subjective element in the true threat analysis.³¹ Justice Marshall’s analysis focused on whether the defendant intended that his statement be taken as a threat, even if the defendant had no intent of actually carrying out the threat.³² Justice Marshall felt that a completely objective test would endanger free speech rights when there was no indication that the speaker meant the words to convey a threat.³³

B. Defining “True Threat”

The Supreme Court has clearly established that true threats comprise unprotected speech. However, the question remains as to what exactly a true threat is. The Supreme Court has never established a definition of true threat,³⁴ and the circuits are split on what test should be used to analyze true threats.³⁵ Most circuits have an objective test that

25. *Rogers v. United States*, 422 U.S. 35 (1975).

26. *Id.* at 36.

27. *Id.* at 41-42.

28. *Id.* at 36.

29. *Id.*

30. *Id.* at 41 (Marshall, J., concurring).

31. *Id.* at 47.

32. *Id.*

33. *Id.* at 47-48.

34. *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1280 (M.D. Ala. 2004).

35. Scott Hammack, *The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 78 (2002).

focuses on the listener's interpretation of the speech; the Second, Third, Fourth, Fifth, Seventh, and Tenth Circuits have held that a true threat exists when a reasonable person would construe the speech to be a threat.³⁶ The Eleventh Circuit also employs an objective test³⁷ that will be discussed in greater detail in Part IV. Two circuits, the First and Ninth, employ a more subjective test,³⁸ holding that the test is whether a reasonable speaker would foresee that the listener would interpret the speech as a threat of violence.³⁹

III. Free Speech and the Internet

According to 2004 estimates there are over 700 million Internet users in the world, and approximately 287,500,000 of those users are native English speakers.⁴⁰ The Internet provides almost unlimited access to communication of all kinds, at a low cost.⁴¹ Virtually anyone with access to the Internet can publish their ideas, no matter how outrageous, with few economic barriers or editorial control. Although this relatively new media reaches so many people around the world, the Supreme Court has held that speech broadcast over the Internet falls within traditional, mainstream First Amendment analysis.⁴² In holding that the Internet was not so dissimilar from other media, the Court stated, "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual

36. *Id.* It should also be noted that these "objective" tests may vary slightly from each other based on who exactly the "reasonable listener" is. The reasonable person could be the speaker, the hearer, or the recipient. The recipient is the intended target of the speech, while the hearer is simply someone who heard the speech although it was not intended to target them. The hearer can be, but is not required to be, the recipient. See *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994); *United States v. Kosma*, 951 F.2d 549 (3d Cir. 1991); *United States v. Darby*, 37 F.3d 1059 (4th Cir. 1994); *United States v. Bozeman*, 495 F.2d 508 (5th Cir. 1974); *United States v. Fuller*, 387 F.3d 643 (7th Cir. 2004); *United States v. Welch*, 745 F.2d 614 (10th Cir. 1984).

37. *United States v. Alaboud*, 347 F.3d 1293 (11th Cir. 2003).

38. Hammack, *supra* note 35, at 78. See *United States v. Nishnianidze*, 342 F.3d 6 (1st Cir. 2003); *United States v. Orozco-Santillan*, 903 F.2d 1262 (9th Cir. 1990).

39. Hammack, *supra* note 35, at 78.

40. Global Reach, <http://global-reach.biz/globstats/index.php3> (last visited Apr. 18, 2006).

41. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

42. *Id.* at 868-69. The Court stated that none of the special justifications that support increased regulation of broadcast media by the government are present on the Internet. *Id.* at 869. The Internet is not as "invasive" as television or radio. *Id.*

can become a pamphleteer.”⁴³ So although the Court acknowledged the Internet’s ability to augment any message, it held that the Internet should be treated the same as a newspaper.⁴⁴

But is this the correct holding? Shouldn’t the Court be concerned with the factors that distinguish the Internet from any other previous media, including a larger audience, faster communication of information, ease and low-cost of access, and the anonymity of both the speakers and the recipients of the speech? Is it not reasonable to think that threats would be amplified on the Internet because so many people can see them?

In *Planned Parenthood v. American Coalition of Life Activists*,⁴⁵ the Ninth Circuit determined that information published on a website could be a true threat.⁴⁶ On January 25, 1995, the American Coalition of Life Activists (ACLA), an anti-abortion group, revealed its “Deadly Dozen” poster, along with a similar website, featuring the names, pictures, and home addresses of certain doctors who perform abortions.⁴⁷ The poster and website also offered a \$5,000 reward for information that could lead to their arrests.⁴⁸ In response to the poster and website, the FBI offered protection to the doctors listed.⁴⁹ Numerous other posters and websites followed. All resembled WANTED posters, with the words “WANTED,” “unWANTED,” “Nuremberg Files,” or “GUILTY . . . OF CRIMES AGAINST HUMANITY” at the top.⁵⁰ Many of the doctors pictured were killed sometime soon after the posters began circulating, and the surviving doctors testified that they feared for their lives.⁵¹

The Ninth Circuit determined that a statement is a true threat “when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to [cause] bodily harm or assault.”⁵² Since ACLA was aware that a “wanted”-type poster appearing on a

43. *Id.* at 870.

44. *Id.* at 868-69.

45. *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

46. *Id.* at 1088.

47. *Id.* at 1064.

48. *Id.* at 1065.

49. *Id.*

50. *Id.*

51. *Id.* at 1066.

52. *Id.* at 1080 (agreeing with the court’s prior decision in *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990)).

website would likely be interpreted as a serious threat by a doctor identified on the poster, because of the history of doctors being murdered soon after their photos appeared on the posters, the court was satisfied that the posters and websites constituted true threats.⁵³ Since the speakers knew that the speech would be threatening to the recipient, and understood the significance of singling out certain doctors, the speech was not protected.⁵⁴

IV. Case History of *United States v. Carmichael*

A. Facts

In November 2003, Gary Wayne George and Robert Patrick Denton were arrested for marijuana distribution.⁵⁵ They informed DEA agent Raymond David DeJohn that Leon Carmichael, Sr. had hired them to assist him with marijuana distribution; later that day, Carmichael's residence was searched, and eleven duffel bags of marijuana were found.⁵⁶ Carmichael was arrested for drug conspiracy and money laundering,⁵⁷ and later charged with one count of conspiracy to possess marijuana with the intent to distribute and one count of conspiracy to commit money laundering.⁵⁸

53. *Id.* at 1063.

54. *Id.* at 1088. It should be noted, however, that there were three dissenting opinions written, with a total of five justices joining in them. Justice Reinhardt simply pointed out that the anti-abortion posters were political hyperbole, vital to our democratic system, and should be protected. *Id.* at 1088-89 (Reinhardt, J., dissenting). Justice Kozinski felt that the court had the right test for true threats, but used it incorrectly; the posters should be protected because there was no indication that the speaker, ACLA, would be the one to commit or control the violence. *Id.* at 1089 (Kozinski, J., dissenting). Justice Berzon felt that the majority let the wrenching facts in this case sway them too much. He stated, "This case is proof positive that hard cases make bad law, and that when the case is very hard—meaning that competing legal and moral imperatives pull with impressive strength in opposite directions—there is the distinct danger of making very bad law." *Id.* at 1101 (Berzon, J., dissenting).

55. *United States v. Carmichael*, 326 F. Supp. 2d. 1267, 1270-71 (M.D. Ala. 2004).

56. *Id.* at 1271.

57. *Id.* at 1271. A detailed summary of the events leading up to the arrest of Carmichael and his employee Freddie Williams can be found in the District Court's decision upholding the warrantless search of Williams' home. *United States v. Williams*, No. 2:03CR259-T, 2004 WL 936340 (M.D. Ala. Apr. 8, 2004).

58. *Carmichael*, 326 F. Supp. 2d. at 1271. Carmichael was charged under 21 U.S.C. §§ 841 and 846, as well as 18 U.S.C. § 1956(h). *Id.* The relevant section of 21 U.S.C. § 841(a)(1) states, "[I]t shall be unlawful for any person knowingly or intentionally to manufacture . . . distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1)

A website about the case, <http://www.carmichaelcase.com>,⁵⁹ appeared in December 2003.⁶⁰ In or around April 2004, the website was altered to its current format, which is that of a WANTED poster.⁶¹ Below the word "WANTED" are the words, "Information on these Informants and Agents."⁶² The informants listed were Denton, George, Sherry D. Pettis, and Wallace Salery; the agents listed were DeJohn, Thomas Halasz, Devin Whittle, and Robert Greenwood.⁶³ Photos of all eight people appeared above their names.⁶⁴

Beneath the eight photos was the statement, "If you have any information about these informants and agents, regardless of how insignificant you may feel it is, Please contact," followed by contact information for Carmichael's attorney.⁶⁵ There was also a disclaimer at the bottom of the website in smaller letters, indicating that the website's purpose was simply to obtain information.⁶⁶ The content of the website also appeared at least once as a full-page advertisement in two local newspapers.⁶⁷ Carmichael's attorney, Steve Glassroth, stated that the purpose of the website was for Carmichael to gather information on his case, and that the website yielded calls to his office from "time to time."⁶⁸

(2000). 21 U.S.C. § 846 states, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846 (2000). 18 U.S.C. § 1956(h) states, "Any person who conspires to commit any offense defined in this section [money laundering] or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h) (2004).

59. At time of publication, the page was no longer available; however, a printed copy of the website is on file with the author.

60. *Carmichael*, 326 F. Supp. 2d at 1271. The district court determined, without question, that Carmichael had control over the website. *Id.*

61. *Id.* at 1272.

62. *Id.*

63. *Id.*

64. *Id.* It should be noted that during the six months that this paper was being written, the website changed in appearance several times.

65. *Id.*

66. *Id.* The disclaimer read, "This website, or any posters and advertisements concerning the Carmichael Case, is definitely not an attempt to intimidate or harass any informants or agents, but is simply an attempt to seek information. The Carmichael Case will not be a 'closed door' case." *Id.*

67. *Id.* The newspapers which ran the advertisement were the *Montgomery Westside Weekly* and the *Montgomery-Tuskegee Times*. *Id.* at 1275.

68. Jessica M. Walker, *Carmichael Can Keep Website*, MONTGOMERY ADVERTISER, (July, 21, 2004) available at <http://www.montgomeryadvertiser.com> (follow link to

On February 4, 2004, the government filed a motion for a protective order, to prevent Carmichael from using the website to post statements about evidence and harass witnesses in the case.⁶⁹ The magistrate judge denied the order because there was insufficient evidence of harassment or criminal intent.⁷⁰

After a third version of the website appeared, the government renewed its motion for a protective order based on the website's intimidating and obstructive content; this time, an evidentiary hearing was granted.⁷¹

B. Reasoning of the District Court

At the hearing, two of the informants pictured on the website testified, as did a few DEA agents.⁷² Sherry D. Pettis claimed that the website made her "fearful of what people might do to her," and that fear had made her leave Alabama.⁷³ Pettis further testified that although Carmichael himself never threatened her, she had received threats from other sources.⁷⁴ Robert Patrick Denton testified that the website and newspaper advertisement had "changed his life dramatically."⁷⁵ He stated that a stranger had approached him at a restaurant and informed

newspaper archives).

69. *Carmichael*, 326 F. Supp. 2d at 1273. The government cited 18 U.S.C. § 1514(b)(1) as its authority, which states,

A United States district court, upon motion of the attorney for the Government, shall issue a protective order prohibiting harassment of a victim or witness in a Federal criminal case if the court, after a hearing, finds by a preponderance of the evidence that harassment of an identified victim or witness in a Federal criminal case exists or that such order is necessary to prevent and restrain an offense under section 1512 of this title, other than an offense consisting of misleading conduct, or under section 1513 of this title.

18 U.S.C. § 1514(b)(1) (2004).

The government claimed that the protective order was necessary to restrain Carmichael's harassment of witnesses to prevent their testimony under 18 U.S.C. § 1512(b)(1), which states, "Whoever knowingly uses intimidation, threatens or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to influence, delay or prevent the testimony of any person in an official proceeding."

18 U.S.C. § 1512(b)(1) (2004).

70. *Carmichael*, 326 F. Supp. 2d at 1274.

71. *Id.* at 1274-75.

72. *Id.* at 1275.

73. *Id.*

74. *Id.*

75. *Id.*

him that Carmichael was trying to kill him; in addition, he had been scared to let his children leave the house.⁷⁶

DEA agents also testified as to the many detrimental effects of the website.⁷⁷ They stated that photographs of agents could put them in peril, as well as compromise their ability to work undercover.⁷⁸ Agents also testified that the website created an “atmosphere of intimidation” surrounding the case, making witnesses less likely to come forward to testify.⁷⁹ DEA agent DeJohn specifically mentioned three witnesses who informed the government of their decision not to testify after the website was posted on the Internet.⁸⁰

In his defense, Carmichael called one witness.⁸¹ Dr. Mark Hickson, a professor of communications at the University of Alabama at Birmingham, testified that, in his opinion, there was nothing threatening about the website.⁸² He stated that in his opinion, the website was merely a way for Carmichael to get attention.⁸³

The issue presented to the district court was whether the court may order the defendant to take down an Internet website that the government contends is threatening and harassing its witnesses and agents, when the defendant contends that the website is a permissible exercise of his First Amendment right to discuss his case.⁸⁴ The district court ruled that it has the authority to shut down a website by virtue of both the federal statute⁸⁵

76. *Id.* Note, however, that the majority of Denton’s testimony concerned the newspaper articles. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1275-76.

81. *Id.* at 1276.

82. *Id.*

83. *Id.* Additionally, Carmichael objected to some of the government’s arguments, including the suggestion that he had threatened potential witnesses against him in the past. *Id.* Apparently, in 1997, one of Carmichael’s employees had been arrested while driving a truck carrying 200 pounds of marijuana, and after paying his bond, inquired from the bail bondsman whether he could get his money back if the employee were killed. *Id.* The court refused to give the government’s assertion any consideration, due to the vague facts of the incident and the fact that Carmichael’s comment was introduced through triple hearsay. *Id.* This past history of threats from Carmichael directed at potential witnesses against him should be important in considering whether the current speech is a threat. If a subjective element were added to the true threat analysis, that incident may have contributed to the fear of those pictured on the website.

84. *Id.* at 1270. Additionally, the issue of whether the website was permissible since Carmichael had a Fifth and Sixth Amendment right to investigate his case and prepare a defense was presented. *Id.* This issue will not be addressed in this Note.

85. *Id.* at 1277. See discussion of 18 U.S.C. § 1514(b)(1), *supra* note 69.

and the court's inherent power.⁸⁶ However, Carmichael's website was held to be a permissible exercise of his First Amendment freedom of speech, not a true threat, and therefore the court refused to issue the protective order to the government.⁸⁷

The court first addressed the federal statute, 18 U.S.C. § 1514(b)(1) to determine whether the website was a threat.⁸⁸ There are two prongs under this statute: the harassment prong and the 18 U.S.C. § 1512 prong.⁸⁹ 18 U.S.C. § 1514(c)(1) defines harassment as "a course of conduct directed at a specific person that[:] (A) causes substantial emotional distress in such person; and (B) serves no legitimate purpose."⁹⁰ Although the continuing presence of the website could arguably be considered a course of conduct, the court determined that Carmichael's right to investigate his case serves some legitimate purpose.⁹¹ Thus, the court concluded that the website was not harassment under the first prong of the test.⁹²

Turning to the second prong, to establish a violation under 18 U.S.C. § 1512, the government must prove that Carmichael knowingly intimidated or threatened another person and that he did so with the intent to influence, delay, or prevent that person from testifying.⁹³ However, the court's authority to act under § 1512 is restricted by the First Amendment; the government may only shut down a website if it is

86. *Carmichael*, 290 F.3d 1058. The Court's inherent power comes from *United States v. Noriega*, which stated,

[I]t is the trial judge's primary responsibility to govern judicial proceedings so as to ensure that the accused receives a fair, orderly trial comporting with fundamental due process. The trial judge is therefore granted broad discretion in ordering the daily activities of his court. "A trial judge should have the authority to adopt reasonable measures to avoid injury to the parties by reason of prejudicial or inflammatory publicity." Within this discretion, therefore, the district judge can place restrictions on parties, jurors, lawyers, and others involved with the proceedings despite the fact that such restrictions might affect First Amendment considerations. Sixth Amendment rights of the accused must be protected always.

United States v. Noriega, 917 F.2d 1543, 1548 (11th Cir. 1990) (internal citations omitted).

87. *Carmichael*, 326 F. Supp. 2d at 1301.

88. *Id.* at 1277-78.

89. *Id.*

90. 18 U.S.C. § 1514(a), (b), (c)(1) (2004).

91. *Carmichael*, 326 F. Supp. 2d at 1278. The court held that the website "may . . . only barely" advance "a legitimate purpose." *Id.*

92. *Id.*

93. 18 U.S.C. § 1512(b)(1) (2000).

a constitutionally unprotected true threat.⁹⁴ If the website is found to be protected speech, the court may only issue the protective order if the government can do two things: demonstrate that its interest in protecting its witnesses and agents outweighs Carmichael's right to free speech, and satisfy the constitutional requirements for imposing prior restraints.⁹⁵

Since the United States Supreme Court has never defined "true threat," the district court relied on the Eleventh Circuit's definition.⁹⁶ In *United States v. Alaboud*,⁹⁷ the Eleventh Circuit set out the following standard for evaluating true threats: A communication is a threat when "in its context [it] would 'have a reasonable tendency to create apprehension that its originator will act according to its tenor.'" In other words, the inquiry is whether there was "sufficient evidence to prove beyond a reasonable doubt that the defendant intentionally made the statement under such circumstances that a reasonable person would construe them as a serious expression of an intention to inflict bodily harm. . . ."⁹⁸ Thus, the offending remarks must be measured by an objective standard.

Additionally, there are three factors to consider in order to determine whether speech is a threat: (1) the language itself, (2) the context in which the communication was made (i.e., would a reasonable person construe it as a serious intention to inflict bodily harm?), and (3) testimony by the recipient of the communication.⁹⁹

In considering the first factor, the court examined the website itself and determined that there was no explicit threat on the website, nor was there anything threatening or intimidating about the request for information.¹⁰⁰ The court also noted that there was an explicit disclaimer stating that the website was not intended to harass or intimidate,¹⁰¹ and although the term "informant" used on the website has a negative

94. *Carmichael*, 326 F. Supp. 2d at 1279.

95. *Id.* "[P]rior restraint' is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.' M. NIMMER, NIMMER ON FREEDOM OF SPEECH § 4.03, p. 4-14 (1984) (emphasis added). Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. 544, 550 (1993).

96. *Carmichael*, 326 F. Supp. 2d at 1280. The court noted that its objective standard is similar to the objective tests used by a majority of the circuits. *Id.*

97. *United States v. Alaboud*, 347 F.3d 1293 (11th Cir. 2003).

98. *Id.* at 1296-97. (alteration in original) (internal citations omitted).

99. *Carmichael*, 326 F. Supp. 2d at 1281.

100. *Id.*

101. *Id.*

connotation, “[t]he First Amendment, however, does not prohibit name-calling.”¹⁰² Finally, the court distinguished the Seventh Circuit decision of *United States v. Khorrami*,¹⁰³ in which a WANTED poster was held to be a true threat. The court held that Carmichael’s website was not nearly as threatening as the poster in that case.¹⁰⁴

In examining the context of the website, the second factor in the court’s assessment, the court contrasted Carmichael’s website with the WANTED posters in *Planned Parenthood v. American Coalition of Life Activists*.¹⁰⁵ The court quoted some of the language in the *Planned Parenthood* decision to show how context is important:¹⁰⁶

[I]t is use of the “wanted”-type format in the context of the poster pattern—poster followed by murder—that constitutes the threat. . . . None of these “WANTED” posters contained threatening language either. . . . “wanted”-type posters were intimidating and caused fear of serious harm to those named on them In the context of the poster pattern, the posters were precise in their meaning to those in the relevant community of reproductive health service providers. They were a true threat.¹⁰⁷

The court determined that because Carmichael’s website was not put up in the context of numerous murders of witnesses and government agents linked to similar publications, the website was too dissimilar from the WANTED posters and website in *Planned Parenthood* to be considered a true threat.¹⁰⁸

102. *Id.* at 1282.

103. *United States v. Khorrami*, 895 F.2d 1186 (7th Cir. 1990).

104. *Carmichael*, 326 F. Supp. 2d at 1281. *Khorrami* involved a WANTED poster that was sent to the Jewish National Fund (JNF), a non-profit organization associated with Israel. *Khorrami*, 895 F.2d at 1187-88. Numerous threatening phone calls and letters were received by JNF over a six-month period, specifically mentioning killing Jews. *Id.* at 1188. During this time, JNF received a WANTED poster featuring the pictures of Israeli officials and JNF officials, with captions such as “Must be killed” next to the photographs. *Id.* at 1189. The Court of Appeals for the Seventh Circuit emphasized the importance of the context of a statement in determining whether it is a true threat. The Seventh Circuit examined whether the statement was made in a context wherein a reasonable person would foresee that the statement would be interpreted by the listener as a serious expression of an intention to inflict harm. *Id.* at 1193. In the context of six months of harassing and threatening phone calls and letters, the WANTED poster was determined to be a true threat, because a reasonable jury could conclude that JNF would interpret the poster as a serious intention to inflict harm upon them. *Id.*

105. *Carmichael*, 326 F. Supp. 2d at 1282. See discussion of *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc), *supra* Part III.

106. *Carmichael*, 326 F. Supp. 2d at 1283-84.

107. *Planned Parenthood*, 290 F.3d at 1085.

108. *Carmichael*, 326 F. Supp. 2d at 1284.

The court went on to acknowledge that the website looks more like a threat when viewed in light of the general history of informants being killed in drug-conspiracy cases,¹⁰⁹ and when noting the historical connotation of WANTED posters, which suggested that the person pictured was wanted “dead or alive.”¹¹⁰ However, when applying the reasonable person standard, these acknowledgments were insufficient to make the website a true threat; the government presented insufficient evidence that Carmichael had actually threatened any of the witnesses or that there was a context in which the court could infer a threat.¹¹¹ It was also noted briefly that the fact that the WANTED poster was on the Internet was not enough to make it a threat; the court used the United States Supreme Court’s ruling that speech on the Internet is subject to the same constitutional protection as all other media, and the general rule that speech broadcast to a larger audience is less likely to be a true threat.¹¹²

It should be noted that, in a footnote, the court discussed how Carmichael himself is a convicted murderer.¹¹³ The record of the hearing was almost devoid of facts about the conviction, except that he was eventually pardoned.¹¹⁴ Therefore, since it had little to go on, the court refused to rely heavily on the murder conviction in the analysis of whether the website was a threat in the context of the speech.¹¹⁵ Perhaps if the court had employed a more subjective test, this murder conviction would have played a more substantial role determining if those pictured on the website would actually feel threatened.

For the most part, the court disregarded the testimony of the victims of the website, those agents and informants pictured.¹¹⁶ While the court acknowledged that the testimony of Denton and Pettis, two of the informants pictured, was “certainly some evidence that the www.carmichaelcase.com website is a threat,”¹¹⁷ the fact that there was evidence of other causes of their fear overshadowed that evidence.¹¹⁸ Apparently, the existence of other possible witnesses who were *not*

109. *Id.* at 1285.

110. *Id.* at 1286.

111. *Id.* at 1288.

112. *Id.* at 1288-89.

113. *Id.* at 1285 n.42.

114. *Id.*

115. *Id.*

116. *Id.* at 1289-90.

117. *Id.* at 1289.

118. *Id.*

pictured on the website, yet still refused to testify, indicated that there was a general atmosphere of intimidation around the case.¹¹⁹ Also, the court noted that, “[I]t seems likely in any big drug-conspiracy case like this that witnesses would be anxious and possibly afraid.”¹²⁰ So in essence, the court disregarded the testimony of Denton and Pettis regarding their fear because they were expected to be afraid, with or without the website. Agent DeJohn’s testimony about three other pictured witnesses refusing to cooperate was also disregarded because none of them indicated that their decision was related to the website, even though they expressed concern about its existence.¹²¹

The testimony of various DEA agents was even less persuasive to the court, since the agents’ main concern was whether the website would compromise their safety and ability to work undercover, which the court held is not evidence of a threat.¹²² The court stated that the testimony of witnesses, agents, and informants was not determinative because the test it must employ is an objective one.¹²³ This is the wrong test to be using when it forces the court to completely disregard the fear caused in the recipient.

The court concluded that the government did not satisfy its burden of showing that Carmichael’s website is unprotected speech, and therefore the website is presumptively speech protected by the First Amendment.¹²⁴ The court concluded that the website was not a true threat, was outside of the reach of 18 U.S.C. § 1512, and denied the government’s motion for a protective order.¹²⁵ Additionally, the court refused to order Carmichael to take down his website because the government had not met its burden of proving that a prior restraint on Carmichael’s speech was warranted.¹²⁶

Two days after the *Carmichael* decision was handed down, the district court issued a second opinion on the matter, this time concerning newspaper advertisements containing the same content as the websites.¹²⁷

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1289-90.

124. *Id.* at 1290.

125. *Id.*

126. *Id.* at 1270. Further analysis of the prior restraint issue may be found in Part III (B)(2) of the *Carmichael* decision, but will not be discussed in detail here.

127. *United States v. Carmichael (Carmichael II)*, 326 F. Supp. 2d. 1303, 1304 (M.D. Ala. 2004).

The government had renewed its motion for the protective order to apply to the full-page advertisement in the *Montgomery Westside Weekly* and other newspapers, but the district court maintained that the same analysis given to the website applies to the print ads as well.¹²⁸ The district court stated in its opinion, "There is no reason to reach a different conclusion regarding Carmichael's newspaper advertisements because the First Amendment analysis does not turn on the medium involved. The [district] court explicitly declined to find the fact that a website was at issue constitutionally significant."¹²⁹ The newspaper advertisement was determined not to be a true threat either, and the motion was once again denied.¹³⁰

V. Analysis of *United States v. Carmichael*

The purpose of the objective test is clear: to prevent a jury from considering a listener's unique sensitivity when evaluating language under the true threat framework. The policy reasons behind this test are valid, and there are certainly arguments to be made that protected speech would cease to exist if a jury were allowed to consider subjective feelings of the listener in every threat case that appears. But maybe this test is outdated in regard to this new medium. Perhaps the Internet should not be considered under a traditional First Amendment analysis, because in reality, it is very different from other media.¹³¹ Courts need to recognize that the Internet is significantly different from a local newspaper or a statement from one person to another. And as such, the subjective feelings of the listener should not be disregarded completely.

The Internet is a vast marketplace for ideas, making strong First Amendment protection important. However, this marketplace also provides huge potential for abuse, by allowing threats to be heard by a much larger audience. The *Carmichael* court erred when it determined that speech broadcast to a larger audience is less likely to be a true

128. *Id.*

129. *Id.*

130. *Id.* at 1304-05.

131. Traditional mediums of mass communication fall under the regulation of the Federal Communications Commission, but there is very little formal governmental regulation of the Internet. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868-69 (1997). The Internet is primarily regulated by Internet Service Providers themselves, which have much discretion in editing or censoring what is being broadcast on their servers. *Id.* at 850-51.

threat.¹³² Although this statement makes sense in the context of a political speech addressed to thousands of people,¹³³ the same does not apply in the context of the Internet.

In *People v. Neuman*,¹³⁴ the California Court of Appeal held that a WANTED-style website was indeed a true threat.¹³⁵ Alan Russell Neuman had created a website about Ventura Police Officer Rodney Giles after he was cited for several traffic violations and his car was impounded.¹³⁶ The website featured a description of Officer Giles and the included the words "WANTED! Dead or Alive! (Reward) . . ." ¹³⁷ Using the test that the Ninth Circuit has adopted, the court found that a reasonable person would foresee that the context and import of the words would have caused Officer Giles to believe that he would be subject to physical violence, and therefore the website was not protected speech.¹³⁸

By using this test, the court was able to consider the fact that "[w]hen Giles learned about the 'WANTED' notice, and was informed that appellant had posted it, he became concerned for his and his family's safety."¹³⁹ The court found that the website was an unequivocal threat aimed at harming Giles, and the threat resembled the WANTED website addressed in *United States v. Khorrami*.¹⁴⁰

Neuman argued that the threat was not adequately communicated to Officer Giles because it was buried in an obscure website, and therefore could not be a delivered threat under the statute.¹⁴¹ The court responded by making special note of the fact that a WANTED poster on the Internet cannot be considered "buried" when it is prominently posted on a

132. *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1289 (M.D. Ala 2004).

133. *See Watts v. United States*, 394 U.S. 705 (1969), in which the Supreme Court held that the speech was mere political hyperbole addressed to a large audience rather than a true threat.

134. *People v. Neuman*, No. CR46739, 2002 WL 800516, at *1 (Cal. Ct. App. Apr. 30, 2002).

135. *Id.* at *4.

136. *Id.* at *1.

137. *Id.*

138. *Id.* at *3-5. The website was altered by Neuman two times, both after being contacted by Ventura Police Department employees using assumed names, inquiring about the website. *Id.* at *4-5. The second modification included the removal of the "Dead or Alive" language, and the addition of a disclaimer that the website was "a political statement designed to shock the People of Ventura" and was not intended to promote violence against Officer Giles." *Id.* at *2 (quoting from defendant's website).

139. *Id.* at *1.

140. *Id.* at *4. For a discussion of the *Khorrami* case, see *supra* note 104.

141. *Neuman*, 2002 WL 800516, at *4. The statute at issue is CAL. PENAL CODE § 422 (West 1999), prohibiting threats by means of electronic communication. *Id.*

website “accessible to millions of Internet users.”¹⁴² This is a more realistic interpretation of speech on the Internet, in contrast with the views of the *Carmichael* court. Rather than telling a few friends about his feelings for Officer Giles, he made a website that had the potential to be seen by millions of people.

Although *Neuman* has a number of factual differences from *Carmichael*, such as the addition of the words “Dead or Alive!” and the promise of a reward, the premise is basically the same. By putting someone’s name, picture, and personal information on a WANTED poster, there is the inference that the person must be brought to justice, with force if necessary. Anyone who sees themselves on such a website would be concerned and feel threatened, as Officer Giles was here, and as Denton and Pettis testified that they were in the *Carmichael* case. By acknowledging that the Internet is a vast medium that reaches millions of people, and by using a test that considers whether the victim would feel threatened, the California court came to the proper conclusion in the *Neuman* case.

The anonymity of the Internet allows people to threaten and harass when they actually have no intention of acting on their statements; however, the recipients of these messages can rarely distinguish the real threats from the jokes. People feel that they can get away with more using the medium of the Internet, but the victims of online harassment probably feel just as threatened as they would if the threats were made in person. Victims may even feel more threatened because the threats can be more widely dispersed.

From a simple Internet search, it became apparent that the *Carmichael* case was important news to many people. It was referenced in many online discussion forums, as well as in websites concerning other subject matters, most relating to drugs.¹⁴³ This alone demonstrates

142. *Id.* A computer expert for the prosecution had testified that the website had been indexed on three Internet search engines, which referenced the site when key words such as “liberty” and “freedom” were entered. *Id.* The website was also part of a webbring, the “Christian Common Law Webbring,” which allowed Neuman’s website to be linked to other websites belonging to the group. *Id.*

143. One such website was <http://www.thcseeds.com>, a website devoted to the sale of marijuana seeds and other marijuana paraphernalia. This website featured an article about the *Carmichael* case, with commentary stating the hope that this trend of exposing “two-faced narcs” continues. THC Seeds.com, *USA: It’s O.K. to Expose Snitches and Narcs on Your Website, Court Rules!!!* (Sept. 24, 2004), <http://www.thcseeds.com/modules.php?name=News&file=article&sid=998>. It seems that the case has found much support with the pro-drug community, as numerous other drug-related websites featured articles about the *Carmichael* case, and all seemed to hail it as a victorious battle in the

the far-reaching effects of the Internet; people all over the United States, as well as the world, are now aware of Carmichael's website and the people who are pictured on it. Had the WANTED poster simply appeared in the local Montgomery, Alabama newspaper, people all over the United States would have no interest in, and no knowledge of, the names and photographs of the informants and agents involved, unless, of course, the story was picked up by CNN. But since the controversy has been embraced by the anti-drug-war organizations, the website and the court decisions have been published on many other websites. This has exponentially increased the number of people who would have simply seen Carmichael's website.

Another example of how this type of website can have far-reaching effects is demonstrated by the website entitled "Who's a Rat."¹⁴⁴ This website claims to be the largest online database of informants and agents.¹⁴⁵ Interestingly enough, the website has a section of the home page entitled "Rats of the Week." At one point in time, Robert Denton, one of the informants in the *Carmichael* case, was pictured in that section.¹⁴⁶ His picture and information was posted on the website by Carmichael himself.¹⁴⁷ While the stated purpose of this website is to provide information to assist attorneys and criminal defendants with few

ongoing war against the so called "War on Drugs." See Suburbia Website, *Newsbrief: Defendant Can Post Pictures of Narcotics Agents in Info Search, Federal Court Says* (Aug. 6, 2004), <http://staticfiends.com> (follow "suburbia message boards" hyperlink; then follow "news to me" hyperlink); Stop the Drug War Website, *Two Web Sites Now Online Are Naming Names and Seeking Info on Narcs and Snitches* (Aug. 27, 2004), <http://stopthedrugwar.org/chronicle/351/names.shtml>.

144. Who's a Rat Website, <http://www.whosarat.com> (last visited Mar. 23, 2006).

145. *Id.* The website also includes the following disclaimer:

THIS WEBSITE DOES NOT PROMOTE OR CONDONE VIOLENCE OR ILLEGAL ACTIVITY AGAINST INFORMANTS OR LAW ENFORCEMENT OFFICERS. IF YOU POST ANYTHING ANYWHERE ON THIS SITE RELATING TO VIOLENCE OR ILLEGAL ACTIVITY AGAINST INFORMANTS OR OFFICERS YOUR POST WILL BE REMOVED AND YOU WILL BE BANNED FROM THIS WEBSITE, IF YOU ARE IN LAW ENFORCEMENT OR WORK FOR THE GOVERNMENT AND YOU HAVE PRIVILEGED INFORMATION THAT HAS NOT BEEN MADE PUBLIC AT SOME POINT TO AT LEAST 1 PERSON OF THE PUBLIC DO NOT POST IT. ALL POSTS MADE BY USERS SHOULD BE TAKEN WITH A GRAIN OF SALT UNLESS BACKED BY OFFICIAL DOCUMENTS. PLEASE POST INFORMANTS THAT ARE INVOLVED WITH NON-VIOLENT CRIMES ONLY.

Who's a Rat Website, <http://www.whosarat.com/aboutus.php> (last visited Feb. 2, 2006).

146. Who's a Rat Website, <http://www.whosarat.com> (last visited Feb. 2, 2006).

147. Who's a Rat Website, http://www.whosarat.com/preview_informant.php?id=MTE (last visited Feb. 2, 2006).

resources,¹⁴⁸ there is something bothersome about posting pictures of people under the moniker “rat.” While both this website and Carmichael’s website claim that they do not advocate the use of violence against those pictured, this does not mean that no violence will befall these people. The chance of family, friends, or even loyal followers of convicted criminals seeking revenge increases with every new website that makes it easier for them to find out on whom to seek revenge.

The Sixth Circuit has ruled that unless a threat is objectively viewed as transmitted for the purpose of intimidation, then it is unlikely that the recipient will actually feel threatened himself.¹⁴⁹ The court also stated “Although it may offend our sensibilities, a communication . . . cannot constitute a threat unless the communication also is conveyed for the purpose of furthering some goal through the use of intimidation.”¹⁵⁰ Viewed alone, Carmichael’s website could easily pass this objective intimidation test. Indeed, the *Carmichael* court concluded from the testimony of the informants and agents that there was an “atmosphere of intimidation” surrounding the case.¹⁵¹ And when the website is viewed along with websites such as “Who’s a Rat,” it is clear that by posting the pictures, Carmichael wanted to dissuade these people from testifying against him. Because Carmichael was using the website as a means to further his own goals through intimidation, this should factor in the determination that his website is a true threat.

The *Carmichael* court did not believe that Carmichael was going to carry out any violence against those pictured on the website,¹⁵² but perhaps the court did not give enough weight to the harm that threats cause listeners. United States Supreme Court Justice Marshall, concurring in the *Rogers* decision, stated,

Plainly, threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out. Like a threat to blow up a building, a serious threat on the President’s life is enormously disruptive and involves substantial costs to the Government. A threat made with no present intention of carrying it out may still restrict the President’s movements and require a reaction from those charged with

148. Who’s a Rat Website, <http://www.whosarat.com/disclaimer.php> (last visited Feb. 2, 2006).

149. *United States v. Alkhabaz*, 104 F.3d 1492, 1496, 1997 Fed.App. 0036P (6th Cir. 1997).

150. *Id.* at 1495.

151. *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1289 (M.D. Ala. 2004).

152. *Id.* at 1281.

protecting the President.¹⁵³

Although those pictured on Carmichael's website were certainly not the President of the United States or other people who require Secret Service protection, the point is that threats, even ones that the speaker has no intention of carrying out, disrupt the lives of the recipient. Threats are harmful to society, and the burdens that they cause, such as when they may prevent an undercover DEA agent from performing his duties, need to be prevented.

The *Carmichael* court did not place enough weight on the context of the situation. In *Planned Parenthood*,¹⁵⁴ despite the shocking facts detailed above, an ordinary person may have found that that material on the website was not threatening. But because the court allowed the context to be considered, including the alarming amount of abortion clinic violence and murders of abortion doctors, the ordinary person was able to see how these Internet threats could have been particularly threatening to those abortion doctors pictured on the website.¹⁵⁵ Had the *Carmichael* court given serious consideration to the testimony of the agents and informants pictured on Carmichael's website demonstrating their fear of harm, to the evidence of the atmosphere of intimidation surrounding the case, and to the fact that Carmichael was not only a well-connected drug-dealer but also a convicted murderer, the result in the case may have been different.

In making its decision, the *Carmichael* court claimed that it was relying on an over-protective analysis, stating,

If the court permits the site to remain up and a witness or agent is harmed, the court will be blamed for predicting incorrectly. However, if the court restricts or prohibits Carmichael's site, few will even be able to judge whether the court predicted accurately because the site will no longer be available in the same form, if at all. Thus, the safest course for the court is to over-predict the danger posed by Carmichael's site. Indeed, when confronted with a conflict between the public safety and an individual's rights, it is almost always going to be most comfortable to err on the side of public safety.¹⁵⁶

But this is not what the court did. If the court really "over-predicted" the danger of the website, it would have determined that it

153. *Rogers v. United States*, 422 U.S. 35, 46-47 (1975) (Marshall, J. concurring).

154. *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc).

155. *Id.* at 1088.

156. *Carmichael*, 326 F. Supp. 2d at 1301.

was a threat. Erring on the side of public safety should not have resulted in allowing the website to remain as is. At the very end of its opinion, the court noted that "a few differences in Carmichael's site could have changed the court's calculus,"¹⁵⁷ but the court does not specifically state what these differences were. When a "few differences" would have made the court determine that the website was a true threat, and the court claimed that it was going to favor public safety over individual rights, the result here does not make sense. If the court wanted to protect public safety it should have determined that Carmichael's website, which caused numerous informants and agents to fear for the safety of themselves and their families, was a true threat. Such an "over-protective" analysis should have resulted in a more conservative result.

VI. The Proposed Test

Although it is important that free speech rights not be chilled on the Internet, it is also important that this new medium not be used as a method of threatening others. If threats are allowed to be delivered in cyberspace, this will inevitably lead to a decline in the exercise of free speech; if those who speak fear retaliation for their beliefs, they will be less likely to contribute to the marketplace of ideas that comprises the Internet. This is precisely the opposite goal of the crusaders of the First Amendment.

As the District Court for the Eastern District of Michigan stated in *United States v. Baker*, "[N]ew technology such as the Internet may complicate analysis and may sometimes require new or modified laws"¹⁵⁸ A new test for true threats, one that incorporates a subjective component, should be used in the context of the Internet. A more subjective test would allow for the fear caused in the proposed victim to be taken into account. Other circuits, as well as the Supreme Court, should take notice of the test used by the First and the Ninth Circuits. These circuits have ruled that the test is whether a reasonable speaker would foresee that the listener would interpret the speech as a threat of violence. Regardless of whether the speaker actually intended to carry out the threat, a jury will be able to inquire as to whether a

157. *Id.*

158. *United States v. Baker*, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995). In *Baker*, the defendant was convicted of transmitting threats to injure or kidnap another through e-mail messages transmitted via the Internet. *Id.* at 1378-79. The e-mails expressed an interest in sexual violence against women and girls. *Id.* at 1379.

reasonable person would hear the words (or read them on the Internet) and believe that a threat was made against them.¹⁵⁹ The focus is on whether a threat was made, not whether there was intent to actually execute the threat. This test will allow for free speech rights to continue, with greater protection for those against whom Internet threats are made.

The Supreme Court should follow the lead of the First Circuit, which has ruled that in true threat cases, the test allows evidence of the recipient's reaction to demonstrate the likely reaction of a reasonable listener.¹⁶⁰ In *United States v. Fulmer*, the First Circuit stated, "[S]tate-of-mind evidence will be most relevant to th[e] question [of whether there was an attempt to frighten] where the defendant knew or reasonably should have known that his actions would produce such a state of mind in the victim."¹⁶¹ The reaction of the actual recipient is probative of whether the speaker might reasonably foresee that the statement would be interpreted as a threat.¹⁶² Additionally, the court noted that even though the reaction is relevant, it may sometimes be excluded under Rule 403 of the Federal Rules of Evidence¹⁶³ if it causes unfair prejudice.¹⁶⁴ The court in *Fulmer* correctly decided that it is helpful to consider the recipient's reaction as evidence of how someone involved in the situation would have interpreted the threat.

To employ a more subjective test is not to revisit times in our early history when people were prosecuted for their thoughts alone.¹⁶⁵ This

159. In *Lovell v. Poway Unified School District*, the Court of Appeals for the Ninth Circuit considered a number of factors in analyzing speech under the objective-subjective standard of a reasonable person in the speaker's position foreseeing that the statement would be interpreted as a true threat. *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir. 1996). The court considered the entire factual context of the alleged threats, which included the surrounding events and the reaction of listeners, as well as whether the threat was unconditional, unequivocal, specific, and immediate enough to demonstrate the gravity of the purpose. *Id.* In this case, the court determined that when a 10th grade student had threatened to shoot her guidance counselor if the counselor did not make her requested changes to her schedule, that statement was indeed a true threat. *Id.* This decision was reached by considering the comment in the context of the increasing amount of violence in schools at the time. *Id.*

160. *United States v. Fulmer*, 108 F.3d 1486, 1500 (1st Cir. 1997).

161. *Id.* (quoting *United States v. Goodoak*, 836 F.2d 708, 712 (1st Cir. 1988)).

162. *Fulmer*, 108 F.3d at 1500.

163. Rule 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

164. *Fulmer*, 108 F.3d at 1500.

165. See *Watts v. United States*, 394 U.S. 705, 710 (1969) for a discussion of the Alien and Sedition Acts.

test is not intended to apply to political speech. When speech is obviously political, aimed at public figures or the government in general such as the speech in the *Watts*¹⁶⁶ case, a reasonable person would not interpret the speech as a threat of violence because of the hyperbolic nature of political speech. But when the speech is aimed at particular people, such as the informants on Carmichael's website, the subjective element will allow these people the protection that they deserve.

This test will address important public policy concerns about free speech, such as preventing unjustified inhibition of free speech. It will not have a chilling effect on free speech, because when addressed to an audience at large and not intended to target particular individuals and entities, statements that border on being interpreted as threats would be protected because no specific listeners would perceive the statements as threats.¹⁶⁷

The Supreme Court must establish a test to be used uniformly among the circuits. Increased use of the Internet will give rise to more and more litigation based on threatening websites and emails. Having a consistent standard to use will facilitate the conclusion of such cases.

VII. Conclusion

The Internet is arguably the most powerful and influential media outlet in the world. Any given website is available for viewing by anyone in the world with a computer. A threat transmitted over the Internet can be read by many more people than a threat placed in a newspaper or spoken on the radio.¹⁶⁸ For many reasons, the Internet is completely different from any other form of media, and it should not be treated the same. Because the threats on Carmichael's website were accessible by so many people, the district court erred by not taking into account whether the victims would interpret the website as a threat. There was an atmosphere of intimidation surrounding the case, which involved a drug dealer who had previously been convicted of murder. The clear purpose of the website was to harass those testifying against

166. See *Watts*, 384 U.S. 705.

167. Anna S. Andrews, *When is a Threat "Truly" a Threat Lacking First Amendment Protection? A Proposed True Threats Test to Safeguard Free Speech Rights in the Age of the Internet*, THE UCLA ONLINE INSTITUTE FOR CYBERSPACE L. AND POL'Y (May 1999), <http://www.gseis.ucla.edu/iclp/aandrews2.htm>.

168. Jennifer L. Brenner, Note, *True Threats—A More Appropriate Standard for Analyzing First Amendment Protection and Free Speech When Violence is Perpetrated Over the Internet*, 78 N.D. L. REV. 753, 783 (2002).

Carmichael, and the court should not have determined that the website was protected speech under the First Amendment. By using a strictly objective test and not giving much weight to the context in which the website was viewed, the court reached the wrong conclusion.

Treating threats transmitted over the Internet differently, by applying a hybrid objective-subjective test rather than the pure objective test that most circuits use to analyze true threats, will allow the Internet's unique characteristics to be taken into consideration. This way, when someone you have angered puts your name, picture, and personal information on a website, accessible by millions of people who may agree with those who hold a grudge against you, the court will be able to take your interpretation of the threat into consideration.