LAVINE, J., dissenting. As the majority notes, speech that communicates a "true threat" is not protected, nor should it be, because it has no communicative value and involves no exchange of ideas. Given highly publicized attacks on both public figures and private citizens, and the pervasiveness of violence in our society, protecting people from physical harm—as well as the *fear* of physical harm—is an issue of urgent importance. The invective used by the defendant in this case, Stephen J. Krijger, referencing Nicholas Kepple's injured son, is particularly offensive and outrageous. But all of this does not minimize the need to analyze dispassionately, and scrupulously, the precise language used and circumstances present when criminal prosecution is based on words. I accept the majority's recitation of the facts but not the conclusions it draws from them. Because I believe that the majority opinion wrongly concludes that the defendant communicated a "true threat," I respectfully dissent.

Speech can be caustic, crude, venomous or vicious without conveying a serious expression of intent to physically harm another. The question in this case is not whether the defendant's words were reprehensible, which they clearly were; or cruel, which they just as assuredly were; or whether they were calculated to cause psychic harm, which they unquestionably were; but whether they were *criminal*. Analysis of the words used, and the context in which they were uttered, persuades me that the defendant's fulminations amounted to a spontaneous, angry outburst, which, offensive as it was, did not constitute a "true threat" under our law.

I begin by reiterating what is, and what is not, a "true threat." A "true threat" is more than a vaguely menacing statement or hyperbole or venting. As the majority notes, the United States Supreme Court made it clear in *Virginia* v. *Black*, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003), that "[t]rue 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."[1] (Emphasis added; internal quotation marks omitted.) Id., 359.

"In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a threat is governed by an objective standard—whether a reasonable person *would foresee* that the statement *would* be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . A true threat, where a reasonable person *would* foresee that the listener *will believe* he will be subjected to physical violence upon his person, is unprotected by the first

amendment." (Emphasis added; internal quotation marks omitted.) *State* v. *DeLoreto*, 265 Conn. 145, 156, 827 A.2d 671 (2003). "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." (Internal quotation marks omitted.) *State* v. *Cook*, 287 Conn. 237, 247, 947 A.2d 307, cert. denied, 555 U.S. 970, 129 S. Ct. 464, 172 L. Ed. 2d 328 (2008), citing *Virginia* v. *Black*, supra, 538 U.S. 358–60.

Of course, words carry various shades of meaning depending on how they are uttered and used, and a threat can be implicit as well as explicit. But words such as those used by the defendant must be interpreted contextually "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

In cases implicating free expression, appellate courts have a heightened duty to ensure that the free expression of ideas, even noxious ones, is fully protected. "Whether a statement constitutes a true threat . . . prohibited by [General Statutes] § 53a-181 (a) (3) is a question of law subject to de novo review." *State* v. *Gaymon*, 96 Conn. App. 244, 248, 899 A. 2d 715, cert. denied, 280 Conn. 906, 907 A.2d 92 (2006). "Whether language constitutes a true threat is an issue of fact for the trier of fact in the first instance. However . . . a rule of independent appellate review applies in First Amendment speech cases." (Citations omitted.) *State* v. *Johnston*, 156 Wn. 2d 355, 365, 127 P.3d 707 (2006). This is not because of the intrinsic value of speech such as that uttered by the defendant, but because history teaches us the dangers involved when government limits free expression. Such review requires the court to undertake "an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." (Internal quotation marks omitted.) *DiMartino* v. *Richens*, 263 Conn. 639, 662, 822 A.2d 205 (2003), quoting *New York Times Co*. v. *Sullivan*, supra, 376 U.S. 285. In cases similar to this one, our Supreme Court has made clear that "the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 153.

State and federal cases have looked to a number of

factors in determining whether words used constituted a "true threat," or something else worthy of first amendment protection.[2] Analysis of these factors persuades me that defendant's words did not constitute a "true threat."

I

THE WORDS USED WERE VAGUE AND AMBIGUOUS, NOT EXPLICIT AND DEFINITE

The statement, "[m]ore of what happened to your son is going to happen to you," followed by, "I'm going to be there to watch it happen," does not, in my view, convey a "true threat." Quite clearly, it does not contain an explicit threat of any kind. Nonetheless, the majority asserts that these statements, testified to by Kepple, the town attorney for Waterford, would cause a reasonable person to foresee that they would be interpreted by Kepple as "a serious expression of intent to harm or assault." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 156. The majority accepts the state's contention that the words, "I'm going to be there to watch it happen," support the argument that the defendant himself would be the person *causing* the accident and/or injury. The majority concludes that these statements are implicitly threatening.

I agree with the majority that in the absence of any contrary indication, for purposes of appellate review, it must be assumed that the jury credited the above iteration of the words used by the defendant, the more threatening of the two versions that are recounted in the evidence. At trial, however, Kepple and Michael Glidden, a zoning enforcement officer for the town of Waterford, provided two very different recountings of what the defendant said, one of which was significantly less bellicose than the other.

Kepple testified that when he, Glidden and the defendant walked out of the courthouse onto the adjacent plaza, the defendant said, "[m]ore of what happened to your son is going to happen to you," and then said, "I'm going to be there to watch it happen." Kepple testified: "His face was red. You could see spit on his—on the corner of his mouth. He was hot. He was upset." Glidden, the only witness to the exchange other than Kepple and the defendant, testified that the defendant instead stated in relevant part, "I hope misfortune happens to you and your family just like what occurred to your son, and I'll be there to witness it." On cross-examination, Glidden affirmed that the defendant had used the words "wish or hope" when discussing the harm he wanted to befall Kepple. Additionally, Glidden testified that he wrote notes of the incident two to three hours after it occurred. Glidden was asked to read out loud a paragraph of the notes, marked as exhibit C, at trial, and did so. The paragraph read as follows: "Upon arriving outside the court house, we were confronted by [the

defendant]. He began calling Nick Kepple a liar and a piece of shit. Another verbal exchange began then [the defendant] told Attorney Kepple, that he [the defendant] wished harm and misfortune upon him and his family just like what happened to Mr. Kepple's son. [The defendant] then told us that he hoped that he would be present when such misfortune befalls the Kepples."

Although a "true threat" need not convey an intention to act imminently; *State* v. *DeLoreto*, supra, 265 Conn. 159; even accepting Kepple's version of what was said, the statements attributed to the defendant are ambiguous, and, more importantly, subject to varying interpretations. As noted, the majority contends that the statement, "I'm going to be there to watch it happen," should be understood to mean that the defendant is asserting that he will be the one who will *cause* "[m]ore of what happened to your son . . . to . . . happen to you." Apparently, the majority believes this open-ended statement should be construed as a threat to injure the defendant, presumably by rendering his car unsafe. I find this interpretation problematic.[3] Tragically, several years before the incident at issue, Kepple's son suffered a spontaneous intracranial hemorrhage and then, after blacking out, was involved in a car crash. Does the majority conclude that the defendant was threatening that he would cause Kepple to suffer an intracranial hemorrhage? Or to experience a car accident, presumably caused by the defendant's sabotaging of the vehicle? Or some other sort of physical harm? We are left to speculate as to precisely what he meant.

I conclude that the defendant's words were instead the rough, inarticulate equivalent of stating, "I hope harm befalls you, and I hope I am there to witness it," or, "I hope I am there to see bad things happen to you." I read the statement, "I'm going to be there to watch it happen," to mean, roughly, "I hope I have the opportunity to watch you suffer," rather than, "I intend to *make* you suffer." It simply requires too much surmise, too much reading into the statements, and too much interpretation to conclude beyond a reasonable doubt that a reasonable person would view this misguided vitriol as a serious threat to do physical violence under all the circumstances present.

I agree that a reasonable person conceivably *could* purport to "foresee that the listener will believe he will be subjected to physical violence upon his person"; (internal quotation marks omitted) *State* v. *DeLoreto*, supra, 265 Conn. 156; upon evaluating the defendant's conduct and hearing the defendant's words. But the test set out in *Virginia* v. *Black*, supra, 538 U.S. 343, and adopted in controlling Connecticut cases; see, e.g., *State* v. *DeLoreto*, supra, 145; requires not that the listener *could* foresee that the listener will believe he will be subjected to physical violence, but rather that a reasonable person *would* foresee that the listener will

believe he will be subjected to physical violence. Many ambiguous statements *could* be viewed as truly threatening, but the requirement that a reasonable person *would* foresee a physically violent outcome requires that that outcome be more than a theoretical possibility. The difference between convicting someone of threatening because words *could* be viewed as truly threatening, and convicting someone because the words *would* be viewed as threatening, is the difference between providing adequate breathing room for free expression, even noxious free expression with little communicative value, and not.

II

CONNECTICUT AND FEDERAL PRECEDENTS

Research has not produced a single Connecticut case in which someone has been convicted of threatening for such ambiguous words, which did not explicitly communicate a "true threat," in the absence of accompanying threatening conduct.[4] A brief, nonexhaustive review of *DeLoreto* and subsequent cases places into proper context the language used in this case. Dante DeLoreto was convicted of two counts of breach of the peace in the second degree based on two incidents.[5] Id., 147–48. The first incident occurred on June 9, 2000. Id., 148. Robert Labonte, a Wethersfield police officer, was jogging when a car drove slowly beside him. Id. DeLoreto was driving the car, and he lowered the window and stated, "Faggot, pig, I'll kick your ass." (Internal quotation marks omitted.) Id. DeLoreto then sped past the jogging officer and stopped his car in the middle of the road. Id. DeLoreto opened the car door, stating, "I'm going to kick your ass, punk . . . ." (Internal quotation marks omitted.) Id., 149. DeLoreto again sped past the officer, parked his car in the road, pumped his fists and stated, "I'm going to kick your ass." (Internal quotation marks omitted.) Id.

The second incident occurred on June 15, 2000, when Wethersfield police Sergeant Andrew Power entered a convenience store. Id. DeLoreto entered soon after. Id. Following an exchange of words, DeLoreto followed Power out of the store and stated: "I'm going to kick your punk ass." (Internal quotation marks omitted.) Id., 150. When Power got out of his cruiser to pick up the newspaper he had purchased off the newspaper stand at the store, the defendant kept yelling at him. Id. The threats made in *DeLoreto* were explicit and unmistakable.

In *State* v. *Gaymon*, supra, 96 Conn. App. 244, a probation officer and two Bridgeport police officers went to Gregory Gaymon's house to arrest him on a charge of probation violation. Id., 245. After being handcuffed, Gaymon told the probation officer, " 'I'm going to kick your fucking ass,' " and then spit in his face. Id. This court affirmed Gaymon's conviction of breach

of the peace in the second degree in violation of § 53a-181 (a) (3). Id. In that case, an explicit threat was made, accompanied by assaultive conduct.

In *State* v. *Cook*, supra, 287 Conn. 237, Daniel Cook was convicted of carrying a dangerous weapon in violation of General Statutes §§ 53-206 and 53a-3,[6] stemming from an incident involving a tenant who lived in the same building who had started a petition drive to have Cook evicted. Id., 239–40. Cook went to the victim's floor waving a table leg, which, the victim testified, had a piece of metal sticking out of it. Id., 240. Cook said, in response to a statement by the victim, that "[t]his is for you if you bother me anymore." (Internal quotation marks omitted.) Id. That threat, while conditional, is more explicit than the threat made in this case and was accompanied by threatening conduct.

This court reversed Diana L. Moulton's conviction for breach of the peace in the second degree in violation of § 53a-181 (a) (3) and harassment in the second degree in violation of General Statutes § 53a-183 (a) (3)[7] in *State* v. *Moulton*, 120 Conn. App. 330, 332, 991 A.2d 728, cert. granted, 297 Conn. 916, 996 A.2d 278 (2010). Moulton, a United States Postal Service employee, had made reference to a recent incident in which a postal service employee in California had shot several workers at the postal facility where she worked. Id., 333. Moulton, who was unhappy about being placed on leave from her employment, stated to a supervisor during a telephone call: "[T]he shootings, you know, the shootings in California. I know why she did that. They are doing the same thing to me that they did to her, and I could do that, too." (Internal quotation marks omitted.) Id. This court reversed the conviction of both charges, concluding that the trial court had erred by not giving an instruction that Moulton could be convicted of breach of the peace only if her views constituted a "true threat" rather than mere puffery, bluster, jest or hyperbole. Id., 344.

In this case, there (1) is no explicit threat to do bodily harm, (2) is one confined outburst but no repeated threatening words or conduct and (3) are no threatening actions or movements. Although the defendant did follow Kepple and Glidden out of the courthouse, there is nothing in the record to indicate that the defendant made threatening gestures of any kind.

III

THE CONTEXT

As one court has noted, "context is critical in a true threats case"; *Planned Parenthood of Columbia/Willamette, Inc.* v. *American Coalition of Life Activists*, 290 F.3d 1058, 1078 (2002), cert. denied, 539 U.S. 958, 123 S. Ct. 2637, 156 L. Ed. 2d 655 (2003); because "without context a burning cross or dead rat means nothing." Id., 1079. The incident in the present case occurred in

a public place following a public event, and was directed at a town official. The defendant was angry and vented his outrage at Kepple in an egregiously inappropriate way. The statement was clearly unplanned, a spontaneous reaction to the upset and anger he felt following the court hearing. Spontaneous language can of course communicate a "true threat," but the fact that language is spontaneous is one relevant factor in evaluating whether the words in fact represent a "true threat," or something else.

When considering the context of speech, courts have found that other, more explicitly threatening language failed to constitute a "true threat." In *Watts* v. *United States*, 394 U.S. 705, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969), for example, Watts, eighteen years old, was present at a rally at the Washington Monument during the Vietnam War. Id., 706. He joined a small discussion group and stated: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." (Internal quotation marks omitted.) Id. The defendant was charged under 18 U.S.C. § 871 (a); id., 705; which prohibits any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States . . . ." Id., 705 n.*. In a per curiam decision, the United States Supreme Court reversed his conviction, stating as follows in relevant part that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech. . . . We do not believe that the kind of political hyperbole indulged in by [the] petitioner [can be considered to be a true 'threat']. For we must interpret the language Congress chose against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." (Citations omitted.) Id., 707–708. The court focused its attention on the context of Watts' words, stating: "The language of the political arena, like the language used in labor disputes . . . is often vituperative, abusive, and inexact. We agree with the petitioner that his only offense here was 'a kind of very crude offensive method of stating a political opposition to the President.' Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." Id., 708. The statement in *Watts*, while conditional, was significantly more threatening than the language at issue in this case.

National Assn. for the Advancement of Colored People v. *Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), is also instructive. In this civil case, an injunction and damages were sought against the National Association for the Advancement of Colored People and Charles Evers, the field secretary of the National Association for the Advancement of Colored People in Mississippi, in connection with Evers' activities in support of a boycott of white merchants in Claiborne County, Mississippi. Id., 889–90. In the record was a finding that Evers had told an audience he was addressing that "any uncle toms who broke the boycott would have their necks broken by their own people." (Internal quotation marks omitted.) Id., 900 n.28. Reversing the judgment against Evers and the National Association for the Advancement of Colored People, Justice Stevens, writing for the majority, stated: "The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech . . . . The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. . . . Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. . . . When such appeals do not incite lawless action, they must be regarded as protected speech." Id., 928.

IV

THE HISTORY BETWEEN THE DEFENDANT AND KEPPLE

Despite the fact that the defendant and the town had been involved in a long-standing dispute over a period of years,[8] Kepple testified that he and defendant had always gotten along well. Specifically, Kepple testified that the defendant "had never acted like he did that day outside the court building." During the forty or fifty times Kepple had been to the defendant's house, "he was always pleasant and cooperative in his demeanor. . . . [G]enerally, he was fine to deal with." The absence of any history of acrimony whatever suggests that the defendant's statements evidenced a spontaneous act of frustration rather than a true threat.

V

VICTIM'S RESPONSE

Kepple's immediate response to the defendant's statements was not fully consistent with someone who felt truly threatened. His immediate response was to be stunned by the verbal assault leveled at him, particularly because it included a reprehensible reference to his son, and to respond with angry words of his own. Kepple's response was more akin to "trash talk" than the response of someone who felt truly threatened. After the incident, Glidden commented to Kepple, "I think

he just threatened you," but Kepple failed to concur with that assessment by stating that he felt threatened. Of course, Kepple had every right to mull over what had happened and discuss it with his wife and colleagues before acting. But he did not report the incident to a judicial marshal, or the police, immediately after the incident occurred. Approximately two days later, after discussing the matter with a law partner, a state's attorney and his wife, he filed a complaint.

VI

NO THREATENING ACTIONS, WORDS OR MOVEMENTS ACCOMPANIED THE STATEMENT

While the defendant did follow Kepple and Glidden out of the courthouse and swear at Kepple prior to uttering the words resulting in the defendant's arrest, nothing in the record indicates that he engaged in any threatening conduct, thereby distinguishing this case from *Gaymon* and *Cook*. Furthermore, he did not brandish any weapons or make any gestures indicating that he intended to inflict physical harm on Kepple. This prosecution was based on pure speech.

VII

CONCLUSION

I repeat my belief that invoking the image of the victim's injured son was particularly reprehensible and would arouse the passions of any parent. But as noted, it must be determined whether a "reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault . . . ." (Internal quotation marks omitted.) *State* v. *DeLoreto*, supra, 265 Conn. 156. Under prevailing law, the words must be evaluated from the viewpoint of a reasonable person. But this test must not become a license to view words through the most threatening, or most offensive, lens. There is intrinsic tension between the strict application of this test and recognition that the First Amendment requires words to be evaluated within a framework that values free expression. Even when no clear political point is being made, as in *Watts*, criminalizing words that represent extemporaneous venting, or hyperbole, invites abuse by government and creates dangers of its own, including prosecution of citizens who are—however inappropriately—merely venting their frustration or anger. Moreover, while the need to provide protection to persons is of paramount importance given the many horrific acts of violence that society has witnessed, this need must not vitiate one of the most fundamental principles of our law—that criminal defendants be judged based on their acts, not unrelated acts performed by other people at other times.

Assuming that our Supreme Court reviews this case,

it may want to consider whether the present test, articulated in *DeLoreto*, which focuses on what the speaker would foresee, and how the victim would be expected to understand the words spoken, should be modified or refined. One can, of course, take the visceral view that if a person is irresponsible enough to utter words that might reasonably be viewed as threatening, he or she should have to live with the consequences of his or her actions, including criminal prosecution. In matters implicating free expression, however, whatever legal test is utilized must be tailored to guarantee protection to the full range of expression.

In his concurring opinion in *Rogers* v. *United States*, 422 U.S. 35, 47–48, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975), Justice Marshall discussed his concerns about how 18 U.S.C. § 871 was being construed. In *Rogers*, a thirty-four year-old unemployed carpenter with a ten year history of alcoholism wandered into a coffee shop, became loud and obstreperous, and stated that he was Jesus Christ. Id., 41. He said he was opposed to President Richard Nixon going to China because the Chinese had a bomb that only he knew about, which might be used against this country. Id., 41–42. He announced that he was going to go to Washington to "whip Nixon's ass" or "kill him in order to save the United States," and, after police were summoned, made more threatening statements. (Internal quotation marks omitted.) Id., 42. A five count indictment was returned against him, and he was convicted on all counts of threatening the president. Id.

Justice Marshall, who was joined by Justice Douglas, concurred with the majority in affirming the conviction under prevailing law but stated his concerns about the legal tests used in such cases: "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 protecting the President. Because § 871 was intended to prevent not simply attempts on the President's life, but also the harm associated with the threat itself, I believe that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President. This construction requires proof that the defendant intended to make a threatening statement, and that the statement he made was in fact threatening in nature. Under the objective construction by contrast, the defendant is subject to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker's intention. In essence, the objective interpretation embodies a negligence standard, charg-

ing the defendant with responsibility for the effect of his statements on his listeners. We have long been reluctant to infer that a negligence standard was intended in criminal statutes . . . [and] we should be particularly wary of adopting such a standard for a statute that regulates pure speech. . . .

"I would therefore interpret § 871 to require proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out. The proof of intention would, of course, almost certainly turn on the circumstances under which the statement was made: if a call were made to the White House threatening an attempt on the President's life within an hour, for example, the caller might well be subject to punishment under the statute, even though he was calling from Los Angeles at the time and had neither the purpose nor the means to carry out the threat. But to permit the jury to convict on no more than a showing that a reasonably prudent man would expect his hearers to take his threat seriously is to impose an unduly stringent standard in this sensitive area." (Citations omitted.) Id., 46–48.

I believe Justice Marshall's words are well worth considering in cases such as this, given the fact that the defendant did not make an explicit threat, made no threatening gestures, and that his statement was a spontaneous hyperbolic outburst. Requiring that the state prove that the defendant *intended* to make a threatening statement in cases of this variety would add additional modest, but meaningful, breathing room for protected speech. See, e.g., *State* v. *Indrisano*, 228 Conn. 795, 801, 640 A.2d 986 (1994) (gloss applied to General Statutes § 53a-182, disorderly conduct statute, to protect vague statutory language from constitutional attack). As explosive as the defendant's charged words were, under the circumstances, I conclude that they fell short of a serious expression of an intent to commit an unlawful act of physical violence. Protecting persons from true threats, while not unduly restricting free expression, is a difficult balancing act, but it is one the first amendment requires us to undertake. In this case, I conclude that the balance tips in favor of the defendant.

For all of the foregoing reasons, I respectfully dissent.

[1] For in-depth discussions of the law relating to threats and free speech, see generally J. Elrod, "Expressive Activity, True Threats, and the First Amendment," 36 Conn. L. Rev. 541 (2004); J. Martin, "Deconstructing 'Constructive Threats': Classification and Analysis of Threatening Speech After Watts and Planned Parenthood," 31 St. Mary's L.J. 751 (2000); and G. Blakey & B. Murray, "Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law," 2002 BYU L. Rev. 829 (2002).

[2] See, e.g., *United States* v. *Khorrami*, 895 F.2d 1186, 1192–93 (7th Cir.) (among multiple factors judge may review are words themselves, time of making alleged threat, maker's manner of speaking, format of alleged threat, (spoken or written), tone of voice of speaker, prior or current relationship—if any—between maker and target and any other relevant facts that provide more complete overview of circumstances in which threatening statement made), cert. denied, 498 U.S. 986, 111 S. Ct. 522, 112 L. Ed. 2d 533 (1990).

[3] Kepple did, however, testify that he took the defendant's words to be a

threat to him and his family, and a threat to intimidate him and curb him from doing his job. He also testified that he took the defendant's words to mean that he was going to do things that led to a car accident.

[4] Much of the federal case law on threatening relates to cases brought pursuant to 18 U.S.C. § 871 (a), which prohibits "knowingly and willfully . . . [making] any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States," or 18 U.S.C. § 875 (c), which prohibits the transmission of threats in interstate commerce. Various United States Circuit Courts of Appeals have adopted different approaches to determining what the elements of the offense are and what mental state must be proven.

In *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir.), cert. denied, 429 U.S. 1022, 97 S. Ct. 639, 50 L. Ed. 2d 623 (1976), for example, the court concluded, in a prosecution pursuant to 18 U.S.C. § 875 (c) for making threatening statements against Yasser Arafat; id.; that the threat must be "unequivocal, unconditional, immediate, and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution . . . ." Id., 1027. But the *Kelner* court rejected the defendant's request for a ruling that the government would be required to prove the subjective intent to carry out the threat, rather than merely intending to threaten. Id., 1026–27.

In *United States* v. *Twine*, 853 F.2d 676 (9th Cir. 1988), the court held that a threat prosecution under 18 U.S.C. § 875 (c) requires a finding of specific intent. Id., 680–81. But a mens rea requirement of general intent was deemed sufficient in *United States* v. *Myers*, 104 F.3d 76, 81 (5th Cir.), cert. denied, 520 U.S. 1218, 117 S. Ct. 1709, 137 L. Ed. 2d 834 (1997). For a detailed analysis of the federal circuit courts of appeals' jurisprudence on "true threats," see G. Blakey & B. Murray, "Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law," 2002 BYU L. Rev. 829, 937–1010 (2002). The Court of Appeals for the Second Circuit, notably, has ruled that the question of whether a defendant's communication is a "true threat" is a threshold question of law for the court. See *United States* v. *Francis*, 164 F.3d 120, 123 n.4 (2d Cir. 1999).

[5] DeLoreto was convicted of violating § 53a-181 (a) (1), (3) and (5). Section 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property . . . ."

[6] General Statutes § 53-206 (a) provides in relevant part: "Any person who carries upon his or her person any BB. gun, blackjack, metal or brass knuckles, or any dirk knife, or any switch knife, or any knife having an automatic spring release device . . . any police baton or nightstick, or any martial arts weapon or electronic defense weapon . . . or any other dangerous or deadly weapon or instrument, shall be fined not more than five hundred dollars or imprisoned not more than three years or both. . . ."

General Statutes § 53a-3 (7) provides: " 'Dangerous instrument' means any instrument, article or substance which, under the circumstances in which it is used or attempted or threatened to be used, is capable of causing death or serious physical injury . . . ."

[7] General Statutes § 53a-183 (a) provides: "A person is guilty of harassment in the second degree when . . . (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

[8] Kepple testified that the town had dealt with the defendant on zoning issues as early as 1995. Kepple said his own dealings with the defendant went back to 2000.