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Freedom of Speech and True Threats

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FREEDOM OF SPEECH AND TRUE THREATS

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I. INTRODUCTION

Consider the following scenarios:

You are a physician at a local Planned Parenthood clinic. As part of your job you perform abortions. There have been protests outside the clinic and you have heard about the murders of several doctors around the country who were killed because they performed abortions. One day a colleague calls you and tells you that an anti-abortion group has put up a website which lists the names and home addresses of doctors who perform abortions. When you look at the website you find your name and address on the list along with strong language saying that you and the others on the list will one day be held accountable for your crimes against humanity. Some of the doctors' names have black lines through them. You recognize

these names as people who have been murdered by anti-abortion fanatics. Can you successfully sue the creators of the website for threatening you and causing you severe emotional distress, or is this website protected by the First Amendment?[1]

Now imagine yourself a woman in college. You hear from a friend that a classmate has posted a story about you on the Internet with a newsgroup called "sex stories." You read the posting and find a gruesome and detailed story of the narrator torturing and raping you. The story culminates in a description of you being doused with kerosene and lit on fire. The posting uses your real name. You are scared and call the police. Should your classmate be convicted of threatening you?[2]

You attend a rally in support of a boycott of white-owned stores whose owners will not hire African American employees. You are aware of several violent acts against blacks who have ignored the boycott including the firing of shots into the house of one boycott violator. The leader of the boycott speaks at the rally and warns boycott violators that "their necks will be broken." You had been considering returning to some of the white-owned stores but are frightened by the leader's words. Should the leader of the boycott be arrested for threatening boycott violators or is his speech protected by the First Amendment?[3]

As a child you grew up watching the Lone Ranger on television. From this show you picked up the phrase "the silver bullets are coming" which signified to you that the Lone Ranger was on his way to save the day. Many years later, after

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1. This hypothetical is based on *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001) [hereinafter Planned Parenthood IV], *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999) [hereinafter Planned Parenthood III], *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 23 F. Supp. 2d 1182 (D. Or. 1998) [hereinafter Planned Parenthood II], and *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 945 F. Supp. 1355 (D. Or. 1996) [hereinafter Planned Parenthood I]. This case is more commonly referred to as the "Nuremberg Files" and is discussed at length in Parts IV, V, and VI.

2. This hypothetical is based on *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997) and *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995), *aff'd sub nom. United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). This case is commonly referred to as the "Jake Baker" case. It is discussed further in Parts IV, V, and VI.

3. This hypothetical is based on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), discussed at greater length in Parts III, V, and VI.

an acrimonious divorce, you contact an FBI agent with newfound evidence that implicates your ex-father-in-law in an illegal bankruptcy scheme. On your voice-mail message to the FBI agent, rather than just saying you found new evidence, you use your favorite childhood phrase: "the silver bullets are coming!" Shortly after leaving this message, you are arrested for threatening a federal officer. Should you be convicted?[4]

As the above situations show, there are many different contexts in which statements might be considered threatening. Many courts and scholars have focused only on one or two situations individually. The problem with not considering a broad spectrum of scenarios is that too often scholars and courts rely on gut judgments rather than on a clear and predictable test. The main purpose of this article is to create a test for determining when a statement is a "true threat" not deserving of First Amendment protection.

The law surrounding threats has gained recent attention from commentators after decades of virtual anonymity and unaddressed confusion among the lower courts. The sudden interest in threats has been sparked primarily by the proliferation of widely disseminated Internet speech.[5] In particular, two high-profile cases have shined the spotlight on threats: the so-called Nuremberg File case[6] and the Jake Baker

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4. This hypothetical is based on *United States v. Fulmer*, 108 F.3d 1486 (1st Cir. 1997), which I will discuss in more detail in Parts V and VI.

5. *See* John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement That Threatens*, 8 TEX. J. WOMEN & L. 207, 240-41 (1999) (describing the greater impact of threats law on the Internet as opposed to on other mediums); 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*, UCLA ONLINE INSTITUTE FOR CYBERSPACE LAW AND POLICY, *available at* http:// www.gseis.ucla.edu/iclp/aandrews2.htm (May 1999) (describing the proliferation of the Internet and the unique ease of conveying threats over the Internet); Melanie C. Hagan, Note, *The Freedom of Access to Clinic Entrances Act and the Nuremberg Files Webs Site: Is the Site Properly Prohibited or Protected Speech?*, 51 HASTINGS L.J. 411, 424-25 (2000) (describing the expansion of the Internet and its power to disseminate speech); Jeremy C. Martin, Note, *Deconstructing "Constructive Threats": Classification and Analysis of Threatening Speech After* Watts *and* Planned Parenthood, 31 ST. MARY'S L.J. 751, 779-80 (2000) (describing the unique potential for the Internet to be a vehicle to convey threats and harassment). *See generally* ACLU v. Reno, 929 F. Supp. 824, 831-44 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) (describing the widespread use of the Internet and the ease of widely disseminating speech).

6. The facts of this case and the Ninth Circuit's opinion are discussed *infra* Part IV.A. *See generally* Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 541-42 (2000).

case,[7] both of which I used in the above hypotheticals. Despite this recent interest, the three major hornbooks and treatises on the First Amendment and the Constitution still do not have an index listing for true threats.[8]

Various federal statutes make it a crime to convey threats by mail or through interstate commerce, to intimidate or threaten anyone involved in reproductive services, and to threaten the President and other government officials as well as law enforcement officers.[9] Many state statutes also prohibit the making of threats.[10] Outside the arena of criminal law, threats are punished primarily as torts under theories of intentional or reckless infliction of emotional distress.[11]

Defendants in both criminal and civil cases can use the First Amendment as a defense, arguing that their speech should be protected. However, the free speech clause of the Constitution has never been read to protect all speech.[12] Speech such as obscenity, fighting words, child pornography, incitement, and "true threats" is considered outside the protections of the First

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7. For a discussion of the facts of this case and the Sixth Circuit's opinion, see *infra* Part IV.D.

8. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (5th ed. 1995); RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH (3d ed. 1996); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

9. *See, e.g.*, 18 U.S.C. § 115(a)(1)(B) (1994); 18 U.S.C. § 248(a)(1) (1994); 18 U.S.C. § 844(e) (1994 & Supp. 1996); 18 U.S.C. § 871 (1994); 18 U.S.C. § 875 (1994); 18 U.S.C. § 876 (1994). *See also* FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 217-18 (1981) [hereinafter HAIMAN, SPEECH AND LAW] (describing various federal statutes related to threats).

10. *See, e.g.*, CAL. PENAL CODE §§ 26, 76, 422 (Deering 1985 & Supp. 2001); FLA. STAT. ch. 836.05 (2001); HAW. REV. STAT. §§ 707-716 (1993); N.Y. PENAL LAW § 240.25 (McKinney 2000); *see also* HAIMAN, SPEECH AND LAW, *supra* note 9, at 218 (discussing state statutes related to threats).

11. *See, e.g.*, Tompkins v. Cyr, 202 F.3d 770 (5th Cir. 2000); Lane v. Cole, 88 F. Supp. 2d 402 (E.D. Pa. 2000); Simpson v. Burrows, 90 F. Supp. 2d 1108 (D. Or. 2000); Planned Parenthood II, 945 F. Supp. 1355 (D. Or. 1996); Wolfson v. Lewis, 924 F. Supp. 1413 (E.D. Pa. 1996); Cotton v. Duncan, 1993 WL 473622 (N.D. Ill. 1993); *see also* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 291-92 (1989). *See generally* Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Severe Emotional Distress*, 85 COLUM. L. REV. 1749 (1985).

12. I will not address in detail the justifications or values behind the First Amendment because many scholars have discussed this at great length. For those who wish to read some background information on the subject see NOWAK & ROTUNDA, *supra* note 8; SMOLLA & NIMMER, *supra* note 8; TRIBE, *supra* note 8. *See also* GREENAWALT, *supra* note 11, at 16-34; FRANKLYN S. HAIMAN, SPEECH ACTS AND THE FIRST AMENDMENT 7-9 (1993) [hereinafter HAIMAN, SPEECH ACTS]; ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16-19 (1948); WOJCIECH SADURSKI, FREEDOM OF SPEECH AND ITS LIMITS 8-35 (1999); Gey, *supra* note 6, at 551.

Amendment.[13]

Even though the Supreme Court has made clear that true threats are punishable, it has not clearly defined what speech constitutes a true threat. The only Supreme Court case to elaborate on the true threats exception to the First Amendment is *United States v. Watts*,[14] a per curiam decision which made clear that a law "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."[15] However, the Supreme Court did not provide a specific test for making this distinction.

To determine when speech is protected by the First Amendment, and therefore not punishable as a threat, most circuits have adopted either a reasonable speaker or a reasonable listener test. Both these tests essentially amount to an evaluation of whether or not a reasonable recipient of the statement would believe it constituted a true threat.[16] The Supreme Court has never reviewed the differing circuit court tests to determine their constitutionality or the validity of the circuits' interpretations of *Watts*.

Most circuits have allowed the admission of the alleged victim's reaction as evidence of how a reasonable person would interpret the statement. Combined with the reasonable speaker/listener test this makes it possible for people who did not purposely, knowingly, or even recklessly make a threat to be punished for making one. For example, even where the speaker had no expectation that the alleged victim would hear the statement, the speaker can be held liable or convicted, in most courts, of making a threat.

Another flaw of the current reasonable speaker/listener test is that it allows for the punishment of "warning threats," which are offered to protect the listener from harm, or to scare the listener by accurately relaying a danger that exists, but which the speaker has no direct control or influence over. Such warnings should be protected under the First Amendment not

13. *See* R.A.V. v. St. Paul, 505 U.S. 377, 382-90 (1992).

14. 394 U.S. 705 (1969).

15. *Id.* at 707.

16. For a detailed discussion of why the two tests essentially are the same, see discussion *infra* Part VI.A.

only because they have inherent value when offered to alert an individual of danger, but also because they are necessary for the free expression of ideas.

The failure of the reasonable speaker/listener test to protect warning threats is inconsistent with the holding in *NAACP v. Claiborne Hardware*,[17] the other major Supreme Court case besides *Watts* directly to address true threats. As I will discuss in detail, the application of the reasonable speaker/listener test would likely lead to a conviction of the defendant in *Claiborne Hardware*, when in fact the Supreme Court held that the defendant's speech was protected by the First Amendment.

This article proposes a new test for determining what is a true threat. The reasonable speaker/listener test, adopted by a majority of circuits, is useful but incomplete. I add two additional elements to my test: (1) a subjective *intent prong* which requires the prosecution or plaintiff to prove that the speaker purposely, knowingly, or recklessly intimidated, frightened, or coerced the target; and (2) an *actor prong* which requires proof that the speaker explicitly or implicitly suggest that he or his co-conspirators will be the ones to carry out the threat. In addition, I develop in more detail the factors that a fact-finder should consider when applying the *reasonable listener prong*.

The addition of the actor prong is wholly novel and has not been discussed by courts or scholars to date.[18] This prong is crucial to my test, and crucial to the protection of speech under any test for determining whether a true threat has been made. By requiring that there be, at the very least, some implication that the speaker or his associates will be the ones to carry out the threat, greater latitude is given to speakers to use, without fear of punishment, the strong language that the First Amendment allows.

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17. 458 U.S. 886 (1982).

18. The recent Ninth Circuit decision in *Planned Parenthood IV* is the first case to even suggest the importance of showing that the defendant must threaten that he or his co-conspirators will act. *See* Planned Parenthood IV, 244 F.3d 1007, 1015-16 (9th Cir. 2001) (holding that the First Amendment protects the defendants' speech unless they threatened that they would personally act), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001). Consideration of who will act seems to be a subset of the reasonable speaker/listener test adopted by the circuit rather than a separate prong for a true threats test. I will discuss this Ninth Circuit opinion in more detail in Part IV.

Part II of this article examines the policy behind the First Amendment exception for true threats. Part III traces the Supreme Court's treatment of threats. Part IV explores the federal circuit courts' differing opinions of what the Supreme Court intended. Part V criticizes the current tests applied by the lower courts, as well as some of the alternatives suggested by other commentators. Finally, Part VI presents my proposed test and applies it to both hypothetical and actual cases in what I call a "test suite."[19] By applying the proposed test to a variety of situations, I avoid the pitfalls of other tests that only work in a few instances or that have been molded by scholars to reach the desired result in a particular case.

II. WHY PUNISH THREATS?

In order to discuss more easily the justifications for making a true threats exception to the First Amendment, it is necessary to establish a rudimentary definition of what speech could be considered a threat. At a basic level, threats are speech which communicates the possibility of future use of physical force or violence against the intended victim or those close to the victim, or unlawful damage of valuable property.[20]

There are four main reasons why true threats are not protected speech: (1) to protect people from the fear of violence; (2) to prevent the disruption that this fear engenders; (3) to incarcerate people who have identified themselves as likely to carry out a threatened crime before they have the opportunity to perpetrate the crime; and (4) to prevent people from being

19. I borrow this term from Eugene Volokh who adopted the term from computer programmers as a way to evaluate any proposed test using tough scenarios to challenge the test's validity. *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 599-600 & n.8 (1999). Viewing a variety of factual situations allows the development of a test that works in a broad spectrum of situations regardless of the political or individual preferences of the scholar, jury, or jurist. *See id.* at 599-600.

20. There is no need to punish threats of minor crimes because there is little harm from waiting to act until the illegal action is carried out. *See* GREENAWALT, *supra* note 11, at 101. I have limited my discussion primarily to threats of illegal action. Threats of legal action are also sometimes made illegal under blackmail and extortion laws where the speaker seeks compensation in exchange for keeping quiet about something or in exchange for the recipient taking certain action against his will. Although I use blackmail and extortion in my analysis of the policy behind punishing threats, I do not include blackmail or extortion (except where the threat is of violence or destruction of property) in my proposed test or test suite because of the different statutes involved.

coerced into acting against their will.[21]

The psychological fear created by a threat to oneself or one's family or the threat of serious property damage (such as the threat to burn down a person's home) is unquestionably a disturbing experience. People who are forced to live under the shadow of such threats suffer a myriad of psychological and health problems including nightmares, heart problems, inability to work, loss of appetite, and insomnia.[22] In some cases, these emotional and physical effects outweigh free speech concerns and demand that threatening speech be limited.

Threats can cause major disruptions not only in a victim's life, but also by requiring either public or private resources to be spent on protecting the target from the threatened action.[23] One of the main reasons that threats against the President are punished, even when the likelihood of the threat being carried out is remote, is that the Secret Service must take each threat seriously and spend many hours investigating each person who makes a threat.[24] Justice Marshall elaborated on this danger in his concurring opinion in *Rogers v. United States*:[25]

> 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

21. The first three of these harms are listed in *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992).

22. *See* Arne Ohman, *Fear and Anxiety as Emotional Phenomena: Clinical Phenomenology, Evolutionary Perspectives, and Information—Processing Mechanisms, in* HANDBOOK OF EMOTIONS 512-14 (Michael Lewis & Jeanette M. Haviland eds., 1993); *see also* Tompkins v. Cyr, 202 F.3d 770, 782 (5th Cir. 2000); United States v. Alkhabaz, 104 F.3d 1492, 1498 (6th Cir. 1997); Simpson v. Burrows, 90 F. Supp. 2d 1108, 1121 (D. Or. 2000); Tompkins v. Cyr, 995 F. Supp. 664, 673-74 (N.D. Tex. 1998).

23. *See, e.g.*, GREENAWALT, *supra* note 11, at 290 ("When direct threats to high government officials are made, extensive social resources are devoted to ascertaining whether a genuine danger exists and preventing actual attacks.").

24. As the Third Circuit in *United States v. Kosma*, 951 F.2d 549 (3d Cir. 1991), pointed out: "Not only is [the federal statute criminalizing threats against the President] meant to protect the President's life, but it is also meant to prevent the disruptions and inconveniences which result from the threat itself, regardless of whether there is any intention to execute the threat." *Id.* at 556.

25. 422 U.S. 35 (1975).

> and require a reaction from those charged with protecting the President.[26]

One does not have to be the leader of the country to experience such disruptions. Many people have spent a fortune paying for private security to protect themselves.[27] One example is the abortion providers around the country who are forced to wear bulletproof vests and hire bodyguards for both themselves and their families.[28] The disruptions are not just financial but also include changes in behavior, such as not being able to leave one's house or going into hiding to avoid the threatened danger.

The third justification for restricting speech is crime prevention. By punishing a threat we can incarcerate a criminal before he has the opportunity to act. The expression of the threat does not make the threatened action necessarily more likely to be carried out, but it helps law enforcement by identifying the likely perpetrator of a crime. When people are threatened, there should be a mechanism for protecting them prior to the commission or attempt of a violent act.

Finally, threatening speech may cause the target of that speech to be coerced into acting against his will.[29] For example, imagine you are a gynecologist who performs abortions and other medical services. You are used to protesters and picketers, but when you receive a call from an anti-abortion fanatic who states that he knows where your daughter goes to school and will kill her if you do not stop providing abortions, you are much more likely to stop giving abortions than you

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26. *Id.* at 46-47 (Marshall, J. concurring).

27. *See, e.g.*, Wolfson v. Lewis, 924 F. Supp. 1413, 1422-23 (E.D. Pa. 1996); *see also infra* note 28 regarding measures taken by abortion providers as a result of threats against their lives.

28. *See, e.g.*, Tompkins v. Cyr, 202 F.3d 770, 777 (5th Cir. 2000); United States v. Dinwiddie, 76 F.3d 913, 918 (8th Cir. 1996); Planned Parenthood II, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998). In the Nuremberg Files case, the Federal Bureau of Investigations and United States Department of Justice offered around-the-clock protection to the doctors on the Deadly Dozen List (a series of posters of twelve doctors offering a reward for information leading to arrest, conviction, and revocation of license to practice medicine). *See id.*

29. *See generally* Steven J. Breckler, *Emotion and Attitude Change, in* HANDBOOK OF EMOTIONS, *supra* note 22, at 464-65 (describing the coercive effect of threats). Kent Greenawalt calls such speech "situation-altering" because it changes what the threatened party does from what he naturally would have done. *See* GREENAWALT, *supra* note 11, at 67. For further discussion of coercive threats see *id.* at 92-94.

would be if no threats had been made. Statutes that punish threats protect people from just this sort of coercion. A statement that causes someone to act against his free will by threatening illegal action should not be protected by the First Amendment.

However, any test for determining which statements are true threats must recognize that some coercive speech is legal and often valuable even if it produces fear or is intimidating. For example, boycotts, strikes, and threats of filing lawsuits are all legal forms of coercion.[30] As the Supreme Court in *NAACP v. Claiborne Hardware Co.* emphasized:

> [s]peech does not lose its protected character . . . simply . . . because it may embarrass others or coerce them into action. . . . The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.[31]

If we punish speech merely because it is coercive we will stifle the "uninhibited" and "robust" discussion that the First Amendment protects.[32] For example, Martin Luther King Jr. threatened in a 1963 letter from the Birmingham Jail that if blacks were not allowed to protest nonviolently using boycotts and marches, violence would break out.[33] This sort of rhetoric helps to foment important social change and should be tolerated despite the suggestion of threatened future violence. This is in accordance with statements from the Supreme Court that some speech that is threatening on its face must be tolerated.[34] Persuasive oratory often becomes heated and is

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30. *See, e.g.*, Jeffrey F. Webb, *Political Boycotts and Union Speech: A Critical First Amendment Analysis*, 4 J.L. & POL. 579 (1988) (discussing the acceptance of pickets and strikes that have a coercive effect).

31. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910-11 (1982) (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

32. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

33. *See* MARTIN LUTHER KING JR., LETTER FROM A BIRMINGHAM JAIL (Harper S.F. ed., 1994), *available at* http://www.mlkonline.com/jail.html; *see also* discussion *infra* Part V.C.

34. *See* Watts v. United States, 394 U.S. 705 (1969) (per curiam); *Claiborne Hardware*, 458 U.S. at 886. The Court in *Claiborne Hardware* was explicit that

often purposely directed towards coercing, intimidating, and even frightening speakers.

It is necessary to develop a test that distinguishes these types of threats from those which are more harmful than they are valuable. The challenge is to distinguish a true threat from an idle threat, political hyperbole, a jest, misconstrued speech, allowable coercion, or legitimate political advocacy.[35] The line is crossed between acceptable and unacceptable coercion when the speaker intentionally, or at least recklessly, threatens that he or his associates will commit an act of violence or serious property damage against the victim or someone close to the victim.[36]

The following section will explore the small amount of guidance that the Supreme Court has given lower courts on determining when a true threat has been made.

III. THE SUPREME COURT'S VIEW OF THREATS

The only Supreme Court case to provide specific guidance for evaluating true threats is *Watts v. United States*,[37] a per curiam opinion from 1969. In *Watts*, the defendant, an eighteen-year-old man, spoke out during a public rally against police brutality at the Washington Monument in 1966.[38] The defendant said the following to the crowd:

> They always holler at us to get an education. And now I have already received my draft classification . . . 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. . . .[39]

In response to this statement the crowd laughed.[40]

The defendant was convicted of violating 18 U.S.C. § 871, which makes it a crime to knowingly and willfully make any threat to take the life of or to inflict bodily harm upon the

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speakers should not be required to turn "strong and effective extemporaneous rhetoric" into "nicely channeled . . . dulcet phrases." *Id.* at 928.

35. This list is primarily comprised of language from *Watts* that distinguishes a true threat from these other modes of speech. *See Watts*, 394 U.S. at 707-08.

36. This is a brief and incomplete summary of my test, which will be presented in detail in Part VI.

37. 394 U.S. 705 (1969).

38. *See id.* at 706.

39. *Id.*

40. *See id.* at 707.

President of the United States.[41] The Supreme Court reversed and held that the defendant had not made a true threat because his statement was political hyperbole.[42]

Given the political backdrop of the rally, the Court recalled the statement from *New York Times Co. v. Sullivan* that "debate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[43] The Court believed that the defendant's statements, rather than constituting a threat, were merely a "crude" way of expressing "political opposition to the President."[44] Even though the Court did not elaborate a test for determining when a threat was protected speech, the Court made clear that Watts' statements—given the context, the conditional nature of the statement (a condition that the speaker had vowed would never come true), and the reaction of the listeners—were not a true threat.[45]

Thus, the Court in *Watts* suggested several factors which a court should consider in determining whether or not a statement is a true threat: (1) whether or not the speech constitutes political hyperbole; (2) the overall context in which the statement is made; (3) the reaction of the listeners; and (4) whether or not the statement was conditional, especially if it was conditional on an event that was unlikely to occur. No other Supreme Court case has elaborated on or even applied the factors from *Watts*.[46]

The only other Supreme Court case that confronted true

41. *See id.* 18 U.S.C. § 871(a) makes it a crime to "knowingly and willfully" make "any threat to take the life of . . . or to inflict bodily harm upon the President . . ., the President-elect, the Vice President or other officer next in the order of succession to the office of President . . . ." *Watts*, 394 U.S. at 708.

42. *See Watts*, 394 U.S. at 708.

43. *Id.* (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

44. *Id.* at 708.

45. *See id.*

46. In *Rogers v. United States*, 422 U.S. 35 (1975), the Supreme Court granted certiorari to determine whether a showing of the speaker's intent was a necessary element under 18 U.S.C. § 871. However, after full briefing and argument, the Court declined to decide the issue, reversing the conviction on other grounds. *See id.* at 36. In a concurring opinion, Justice Marshall argued that conviction for a threat under § 871 should require subjective intent on the part of the defendant. *See id.* at 44-48 (Marshall, J., concurring in the judgment). I will discuss Justice Marshall's opinion in *Rogers* in more detail in Part V.

threats is *NAACP v. Claiborne Hardware Co.*[47] Unlike *Watts*, *Claiborne Hardware* gave no direct guidance on what constitutes a true threat beyond holding that the defendant's speech was not a true threat. The events of *Claiborne Hardware* took place in Claiborne County, Mississippi during a boycott by black citizens of white merchants.[48] A group of men called the Black Hats stood watch over the stores and took down the names of African Americans who violated the boycott.[49] These names were then read aloud at meetings and published in a newspaper.[50] There were approximately ten violent acts associated with the enforcement of the boycott including the simple trampling of a flowerbed, the making of threatening phone calls, and even the spraying of bullets into the house of one boycott violator.[51]

There were several issues at stake on appeal, but the one relevant to this discussion is whether Charles Evers' public speeches constituted threats. Evers was the field secretary for the NAACP in Mississippi.[52] In a speech on April 1, 1966, before a group of black supporters, Evers allegedly told those assembled that any "'Uncle Toms' who broke the boycott would 'have their necks broken' by their own people. Evers' remarks were directed to all 8,000-plus black residents of Claiborne County . . . ."[53]

In a similar speech given on April 19, 1969, before an assembled group at a church, Evers stated:

> [Y]ou better not be caught on these streets shopping in these

47. 458 U.S. 886 (1982).

48. *Claiborne Hardware*, 458 U.S. at 888. The boycott was called after the failure of white officials in Claiborne County to address adequately a list of demands from the black citizens of the county concerning issues of racial equality and integration. *See id.*

49. *See Claiborne Hardware*, 458 U.S. at 903-04. The Black Hats were also called the Deacons and the Enforcers. *See id.*

50. *See Id.*

51. *See id.* Of ten purportedly related incidents of violence the Supreme Court pointed to only four that demonstrated the "atmosphere of fear" and were "convincingly" determined to be retribution for breaking the boycott. *Id.* at 904.

Several other incidents of violence were reported, but the Court was not convinced that they were related to the boycott. In addition, there was no evidence of any acts of violence after 1966, and therefore the violence had died down by the time Evers, in 1969, made the speech in which he allegedly said "we're gonna break your damn neck." *See id.* at 902-06.

52. *See id.* at 890.

53. *Id.* at 900.

> stores until these demands are met. . . . Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none (That's right.) He ain't going to offer to sleep with none of us men, I can tell you that. (Applause).[54]

On April 21, 1969, Evers gave another speech to several hundred people and stated something along the lines of "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[55]

The Supreme Court of Mississippi found Evers' statements to constitute true threats.[56] The United States Supreme Court reversed, in an opinion by Justice Stevens, and found that Evers' comments were protected speech.[57] The opinion emphasized that just because "expressions were intended to exercise a coercive impact on respondent [that] does not remove them from the reach of the First Amendment."[58] At the same time, the Court made clear that violence and threats of violence are not shielded by the First Amendment.[59]

The Court suggested that Evers' speeches could be considered either as threats or as speech tending to incite unlawful action.[60] The Supreme Court decided without much discussion that Evers' speeches could not be considered true threats and dropped a footnote to *Watts*.[61] On its face Evers' speech seems like the very "threats of violence" that the Court stated are unprotected. However, given that this was a unanimous decision of the Supreme Court, it is important to examine what the Justices uniformly agreed was non-threatening about Evers' statements.

The context of the speech suggests that the words were

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54. *Id.* at 938-39. (Words in parentheses are audience responses). The exact words of this speech are known because it was recorded.

55. *Id.* at 902. In contrast to the prior quoted speech, no one is sure exactly what was said because no audio recording was made of this speech.

56. *See NAACP v. Claiborne Hardware Co.*, 393 So.2d 1290, 1301 (Miss. 1980), *rev'd*, 458 U.S. 866 (1982). The Mississippi Supreme Court believed the entire boycott was illegal because of the backdrop of violence and threats, and therefore did not investigate in depth whether Evers' statements constituted true threats in and of themselves. *See id.* at 1299-1300.

57. *See Claiborne Hardware*, 458 U.S. 886.

58. *Id.* at 911.

59. *See id.* at 917-18, 925-26.

60. *See id.* at 927.

61. *See id.* at 928 n.71.

meant more as rhetorical hyperbole than as direct, serious threats. The Court pointed to the fact that in each instance Evers was making a "public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment."[62] Although the Court never explicitly says as much, it seems that the speech could be viewed as the very sort of political hyperbole that the Court in *Watts* found protected.[63]

The Supreme Court tends to construe restrictions to the First Amendment narrowly. This is especially true in the context of picketing and boycotts where such speech is often viewed as political speech.[64] Although political speech is not protected as a special or separate class of speech, the political backdrop of a speech suggests that the alleged threats are more likely to be rhetorical devices for persuasion rather than serious efforts to threaten listeners with violence. Evers' alleged threats were issued in the context of much longer speeches rallying his supporters behind the civil rights boycott.[65] In fact, two days before the speech in which Evers allegedly said "we're gonna break your damn neck," Evers gave a recorded speech in which he counseled blacks to use nonviolent, political action.[66]

Another factor in the Supreme Court's decision may have been the fact that Evers' audience was not the primary target of the threat. The record is not explicit, but it seems that the majority of the attendees were supportive of the boycott. The audience's approval of Evers' speeches suggests that the people did not view it as a threat to themselves, much as the audience in *Watts* laughed when the defendant suggested that he would shoot L.B.J. There is no evidence that anyone in the audience

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62. *Id.* at 926-27.

63. *See id.* at 928 (finding that a speaker is not required to turn "strong and effective extemporaneous rhetoric" into "nicely channeled . . . dulcet phrases").

64. For a discussion of the history of the Supreme Court's and the United States' approval of boycotts and protests, see Brief Amici Curiae of the American Civil Liberties Union and the National Organization for Women at 7-8, *Claiborne Hardware*, 458 U.S. 886 (1982) (No. 81-202); Brief Amici Curiae of the American Jewish Congress at 6-7, 9-12.

65. *See* Appendix to the opinion of the Court, *Claiborne Hardware*, 458 U.S. at 934-40. The April 19th speech was given in the context of a rally to energize the boycotters. In addition, this speech was made in the aftermath of the killing of a black youth by a white policeman, which provided a context for the heated rhetoric. *See* Cutler, Oral Arguments in *Claiborne Hardware* at 16.

66. *See* Brief for Petitioners at 8, *Claiborne Hardware*, 458 U.S. 886 (1982) (No. 81-202).

was threatened by Evers' speech.[67] Mr. Cutler, the attorney for Evers and the NAACP, pointed out that:

> 22 black witnesses were called by the merchants and asked about whether they had ever heard of the Evers remark about breaking necks. Sixteen of them said that they had never heard of it at all, and six said they had heard of it only in 1969,[68] three years after the boycott began, and none of the many black witnesses called by these merchants testified as to any fear of physical violence because of the Evers speeches.
>
> ....
>
> The Respondents have only cited to you four instances in which anyone testified about fear of punishment or discipline, and the context of at least two of those statements show that they were speaking of fear of denunciation and ostracism.[69]

Admittedly, it is likely that some potential boycott violators were in the audience and people who did not attend might have later heard Evers' rhetoric recounted in the small black community of Claiborne. However, Evers did not specifically target individuals and, in particular, did not target the people who were directly in front of him. The Supreme Court's holding in *Claiborne Hardware* suggests that threats towards groups rather than towards specific individuals are more deserving of First Amendment protection.[70]

Several clues in the parties' briefs and the Court record

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67. The Supreme Court and other courts have recognized that how the audience of a speech reacts may be indicative of whether or not the speech was meant as a threat. The issue of whether the reaction of the recipient of threats should be admissible is discussed in more depth in Part V.

68. Recall that no incidents of violence related to the boycott were documented after 1966.

69. Cutler, Oral Arguments in *Claiborne Hardware* at 17-18.

70. *See* ACLU Foundation of Oregon *Amicus Curiae*, Planned Parenthood II, 23 F. Supp. 2d 1182 (D. Or. 1998) (No. 95-1671-JO), *available at* http://www.aclu-or.org/ppbrief.htm.

> [A] 'true threat' must be directed against a specific and identifiable victim or victims. A threat directed generally against a group at large is not a 'true threat.' In fact, this distinction between focused threats that are directed against specific individuals and unfocused 'threats' that are directed against a large group generally, which in the heat of the moment can often be a part of the advocacy of ideas, may be helpful to understanding the Supreme Court's decision in *NAACP v. Claiborne Hardware.*

Id.

suggest an additional explanation for the Court's findings. As Mr. Cutler stated in his oral arguments, it was never clear exactly when Evers made the statement about breaking necks, and it was never clear exactly what was said.[71] One witness believed that what Evers actually said was: "If you break the boycott your own people will break your necks." This language suggests more of a warning of what others might do than a direct threat from Evers. I will discuss warning threats in more detail in Part V, but as I stated earlier, warning threats should be a protected part of legitimate advocacy and expression.

Evers believed that he did not say he personally would break anyone's neck. Instead he believed that he said: "their necks needed breaking."[72] It is quite possible that the Supreme Court was hesitant to find Evers' words threatening when the record was so full of uncertainty regarding what really happened in Claiborne County and what Evers really said, especially given the possible racial bias of Claiborne County officials and the lower courts.[73]

In addition, there was no credible belief that Evers or his associates would be the ones to act. There was no evidence that Evers carried out any prior violent acts, nor was there evidence that he had ever directed any one else to commit violent acts. In fact, the Supreme Court held that Evers could not be held liable for the actions of others because they found that he was not involved in the commission or the planning of the violence.[74] The fact that Evers was known for preaching nonviolence supports the proposition that no one would believe that Evers meant that he or his associates would act.[75]

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71. *See* Cutler, Oral Arguments in *Claiborne Hardware* at 14-15; *see also* Appendix to Petition for Writ of Certiorari at 66, 83, 111, 184, *Claiborne Hardware*, 459 U.S. 886 (1982) (No. 81-202).

72. Appendix to Petition for Writ of Certiorari at 185, *Claiborne Hardware*, 459 U.S. (1982) (No. 81-202).

73. *See* Brief Amicus Curiae of the AJC at 4, *Claiborne Hardware*, 458 U.S. 886 (1982) (No. 81-202) (discussing the obvious bias of the local Sheriff and the trial court).

74. *See Claiborne Hardware*, 458 U.S. at 929; *see also* Planned Parenthood IV, 244 F.3d 1007, 1014 (9th Cir. 2001) (suggesting that the key to the Supreme Court decision in *Claiborne Hardware* was the Supreme Court's belief that Evers had not "authorized, ratified, or directly threatened acts of violence") (quoting *Claiborne Hardware*, 458 U.S. at 929), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001).

75. *See* Appendix to Petition for Certiorari at 194. Evers was known for being a fervent follower of the teachings of Martin Luther King Jr., including King's strong belief in nonviolent means of producing change. *See id.*

The Supreme Court's holding that Evers' statements were not true threats makes sense because: (1) his speech was a political speech given in the context of boycotts before a large crowd and most likely was given for rhetorical effect; (2) the audience of the speech was not the primary target of the alleged threat and there was little or no evidence that anyone was in fact threatened by the speeches; (3) the Court could not be certain what Evers said in the 1969 speech which contained the only statement that was on its face threatening; and (4) there was no suggestion either implicitly or explicitly that Evers or his associates suggested that they would take violent action against boycott violators—in fact, the bulk of Evers' 1969 speech related to his support for nonviolent action.

The Court analyzed in more depth whether or not Evers' speeches met the requirements of the *Brandenburg* test for incitement.[76] Under this test, the Court found that Evers had not incited imminent lawlessness because no acts of violence followed his speech.[77] The Court emphasized that "[a]n advocate must be free to stimulate his audience with spontaneous and emotional appeals . . . . When such appeals do not incite lawless action, they must be regarded as protected speech."[78] The Court therefore found that without further evidence there was no proof that "Evers authorized, ratified, or

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76. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam), a Ku Klux Klan ("KKK") leader was convicted under the Ohio Criminal Syndicalism statute for "advocating . . . violence, or unlawful means of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembling [to] advocate the doctrines of criminal syndicalism." *Id.* at 444-45. Specifically, Brandenburg led a KKK rally that was filmed by a member of the press. The film showed KKK members in robes and hoods, many of whom carried rifles. Brandenburg liberally peppered his speech with racial epithets against blacks and Jews. *Id.* at 445-47. He suggested that the KKK should "send the Jews back to Israel" and "Bury the niggers." *Id.* The Court held that the Ohio Syndicalism Act, under which Brandenburg was punished, was unconstitutional. *See id.* at 448-49. The Court articulated the *Brandenburg* test, which still applies today. In order to punish someone for inciting unlawful activity, the test requires that the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

77. *See Claiborne Hardware*, 458 U.S. at 928. This seems strange because the *Brandenburg* test makes the fact that violence did or did not occur after a speech irrelevant. The test was about whether or not Evers' words were intended to incite imminent violence and whether or not they were likely to do so. The Court must have decided either that Evers was not likely to incite imminent violence or that he did not intend to do so, but the Court never makes clear on which basis Evers' speeches fail the *Brandenburg* test other than the lack of violence following his speech.

78. *Id.*

directly threatened acts of violence."[79]

Claiborne Hardware, like *Watts*, does not provide a clear test to guide the lower courts. The Court has not granted certiorari in a case on threats since then, leaving the lower courts in the dark as to what test is appropriate.

IV. CIRCUIT COURT DIVISION

The Supreme Court's minimal guidance has left each circuit to fashion its own test.[80] The majority of circuits have developed a version of a reasonable person test, but are split over whether the test should be from the perspective of the speaker or the listener. The Second Circuit has split from the pack and adopted a test that adds a requirement of imminence. Some judges on the Ninth and Fourth Circuits think that courts and juries should, in certain circumstances, consider the speaker's intent. A recent Ninth Circuit panel has added consideration of who will carry out the threat to the reasonable speaker/listener test.

There is no justification for regional variations on what speech is punished as a threat. Unlike obscenity law, this is not an area where community standards are particularly relevant. In addition, inconsistent and conflicting standards will chill more speech than would a single, clear, and predictable national standard.

A. The Reasonable Speaker/Reasonable Listener Test

Most circuits employ either a reasonable speaker or reasonable listener test for determining when a true threat has been made. One example of the speaker-centered test is set

79. *Id.* at 929.

80. For a discussion of circuit court confusion see ACLU Foundation of Oregon *Amicus Curiae*, in Planned Parenthood II, *supra* note 70 ("[T]he Supreme Court . . . has not yet offered any extensive analysis of the 'true threats' doctrine."); Gey, *supra* note 6, at 544-45, 571-72 (arguing that the Supreme Court has clearly articulated a test—the *Brandenburg* test for threats—but that the circuit courts have ignored it and have instead struggled to come up with their own, conflicting standards); Ashley Packard, *Threats or Theater: Does* Planned Parenthood v. American Coalition of Life Activists *Signify that Tests for "True Threats" Need to Change?*, 5 COMM. L. & POL'Y 235, 238, 248-49 (2000); Martin, *supra* note 5, at 756, 766; Leigh Noffsinger, Note, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 WASH. L. REV. 1209, 1215-18 (1999); Robert Kurman Kelner, Note, *United States v. Jake Baker: Revisiting Threats and the First Amendment*, 84 VA. L. REV. 287, 289 (1998).

forth in the First Circuit's *United States v. Fulmer*:[81] "The appropriate standard under which a defendant may be convicted for making a threat is whether he should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made."[82]

The court in *Fulmer* also described why it distinguished between a reasonable speaker and a reasonable listener test:

> This standard not only takes into account the factual context in which the statement was made, but also better avoids the perils that inhere in the "reasonable-recipient standard," namely that the jury will consider the unique sensitivity of the recipient. We find it particularly untenable that, were we to apply a standard guided from the perspective of the recipient, a defendant may be convicted for making an ambiguous statement that the recipient may find threatening because of events not within the knowledge of the defendant. Therefore, we follow the approach of several circuits by holding that the appropriate focus is on what the defendant reasonably should have foreseen.[83]

Although the *Fulmer* court makes much of the difference between a reasonable speaker and a reasonable listener test, I believe the distinction is specious. Both tests are essentially a reasonable listener test, because that is how the jury will decide whether a threat was made, regardless of whether they put themselves in the shoes of the speaker or the listener. The only way a jury can evaluate whether the speaker would "have reasonably foreseen that [his statement] would be taken as a threat" by the listener is by considering how a listener would view that statement. To foresee how a *listener* would react to a threat, the only frame of reference a reasonable speaker would have is how the *speaker* would react if he had *heard* the statement directed towards himself—that is, if he were himself a *listener*. Thus, a reasonable speaker's assessment will boil down to how a reasonable listener would react.

Furthermore, many courts, such as the one in *Fulmer*, admit testimony about the reaction of the recipient, which makes the reasonable speaker test even more like the reasonable listener test because the jury will rely on how the specific recipient

81. 108 F.3d 1486 (1st Cir. 1997).
82. *Id.* at 1491-92.
83. *Id.*

reacted.[84] The reasonable listener test is not more attuned to the eccentricities of the particular recipient of the threat because the reaction must be a reasonable one. Therefore, in an ideal application of the reasonable listener test a particularly sensitive listener's reaction would not be considered "reasonable." Because there is no practical difference between the reasonable speaker test and the reasonable listener test, I will consider the circuits that use either one of these tests together.

The Third Circuit uses a reasonable speaker test and like all of the circuits has no requirement that the person intended to carry out the threat.[85] The Fourth Circuit uses a reasonable recipient test in which a jury decides if "an ordinary reasonable recipient who is familiar with the context . . . would interpret [the statement] as a threat."[86] The Fifth Circuit has also adopted a reasonable recipient test.[87] The Sixth and Seventh Circuits have adopted a reasonable speaker test.[88]

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84. *See id.* at 1499-1500. *See also* United States v. Saunders, 166 F.3d 907, 913 (7th Cir. 1999); United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996); United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990).

85. *See* United States v. Kosma, 951 F.2d 549, 557 (3d Cir. 1991). In *Kosma*, the court held that the reasonable speaker test:

> requires that the defendant intentionally make a statement, written or oral, in a context or under such circumstances wherein 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 an intention to inflict bodily harm upon or to take the life of the President, and that statement not be the result of mistake, duress, or coercion.

Id.

86. United States v. Roberts, 915 F.2d 889, 891 (4th Cir. 1990); *accord* United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973). However, the Fourth Circuit in *United States v. Patillo* suggests that where the speaker's threat is highly unlikely to reach the target, the courts should use a subjective standard in which the prosecution must show that the speaker had a present intention to injure, incite others to injure, or restrict the victim's movements. *See* United States v. Patillo, 438 F.2d 13 (4th Cir. 1971). *See also* discussion *infra* Part IV.C.

87. *See* United States v. Daugenbaugh, 49 F.3d 171, 173-74 (5th Cir. 1995); United States v. McMillan, 53 F. Supp. 2d 895, 904 (S.D. Miss. 1999).

88. United States v. Miller, 115 F.3d 361, 363 (6th Cir. 1997) (holding that a true threat against the President can be made even when the speaker is incarcerated and unable to carry through the threat) (citing United States v. Smith, 928 F.2d 740, 741 (6th Cir. 1991)); United States v. Saunders, 166 F.3d 907, 912 (7th Cir. 1999) (quoting United States v. Khorrami, 895 F.2d 1186, 1192 (7th Cir. 1990)) ("'[I]n a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates a statement as a serious expression of an intention to inflict bodily harm upon or to take the life of' another."); *accord* United States v. Glover, 846 F.2d 339, 344 (6th Cir. 1988); United States v. Cox, 957 F.2d 264, 266 (6th Cir. 1992)

The Eighth Circuit focuses on the listener and "whether an objectively reasonable recipient would view the message as a threat."[89] The Ninth Circuit uses the reasonable speaker test.[90] The Tenth Circuit has not outlined as elaborate a test as some of the other circuits, but has agreed that the determination of whether a true threat has been made lies with whether "those who hear or read the threat reasonably consider that an actual threat has been made."[91] Although the Eleventh Circuit has not heard many cases on threats, it also has adopted a reasonable recipient test.[92] The D.C. Circuit has heard only a few cases on threats after being reversed by the Supreme Court in *Watts*, and in those cases, it appears to have adopted the reasonable recipient test.[93]

(holding that the reasonable person standard applies but making no distinction between the recipient versus speaker version of the test).

89. United States v. J.H.H., 22 F.3d 821, 827-28 (8th Cir. 1994). The reasonable listener's evaluation is determined given the "entire factual context" and "whether the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.'" United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (quoting Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983)). The Eighth Circuit also uses several factors to aid in the determination of whether a true threat was made. These include: 1) the reaction of the listeners, including the recipient of the threat; 2) whether the threat was communicated directly to its victim; 3) whether the threat was conditional; 4) whether the maker of the threat had made similar statements to the victim on other occasions; and 5) whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence. *See Dinwiddie*, 76 F.3d at 925; *see also* United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) The court in *Dinwiddie* makes clear that the list is not exhaustive and that the factors do not constitute elements that must be met for the offense to have been made. *See Dinwiddie*, 76 F.3d at 925.

90. *See* Roy v. United States, 416 F.2d 874, 877-78 (9th Cir. 1969). The Ninth Circuit has held, as have most other circuits, that alleged threats must "be considered in light of their entire factual context, including the surrounding events and reaction of the listeners." United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) (citing United States v. Mitchell, 812 F.2d 1250, 1255 (9th Cir. 1987)). There is some confusion in the Ninth Circuit about whether the subjective intent element has been added or not for several federal threats statutes. *See* Planned Parenthood IV, 244 F.3d 1007, 1015 n.9 (9th Cir. 2001) (approving of the reasonable speaker test but noting the conflict over whether the intent of the speaker should be considered), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001). For a more in-depth discussion of the Ninth Circuit's treatment of these statutes see discussion *infra* Part IV.C.

91. United States v. Viefhaus, 168 F.3d 392, 396 (10th Cir. 1999).

92. *See* United States v. Callahan, 702 F.2d 964, 965 (11th Cir. 1983); Lucero v. Trosch, 928 F. Supp. 1124, 1129 (S.D. Ala. 1996).

93. *See* United States v. Adams, 73 F. Supp. 2d 2, 3 (D.D.C. 1999).

B. The Kelner *Test—Second Circuit*

The Second Circuit in *United States v. Kelner*[94] interpreted *Watts* to mean that "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied."[95] The imminence requirement dramatically raises the threshold before speech is considered threatening.[96] This requirement is also combined with a reasonable listener test.[97]

In other words, *Kelner* requires two elements to be met: (1) the satisfaction of the reasonable listener test; and (2) that the listener believed that the threat would be carried out *imminently*. In addition, like other circuits, the Second Circuit makes clear that it does not matter whether or not the speaker intended to threaten the listener.[98]

The defendant in *Kelner* was convicted of violating 18 U.S.C. § 875 (c) for transmitting an interstate threat to injure someone.[99] On November 11, 1974, Yasser Arafat, the leader of the Palestine Liberation Organization, planned to be in New York attending a session at the United Nations.[100] The Jewish Defense League organized a demonstration outside the hotel where Arafat and the PLO delegation were scheduled to stay.[101] The defendant, a member of the JDL, was interviewed by a television news crew.[102] The defendant sat behind a desk

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94. 534 F.2d 1020 (2d Cir. 1976).

95. *Id.* at 1027. Although referring to 18 U.S.C. § 875(c), the court relied on the Supreme Court's holding in *Watts v. United States*, 394 U.S. 705 (1969), where the Court evaluated the parameters of the First Amendment exception for true threats under 18 U.S.C. § 871.

96. *See Kelner*, 534 F.2d at 1027.

97. *See id.*

98. *See id.* at 1023.

99. 18 U.S.C. § 875 (c) makes it illegal to transmit "in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another." There is no explicit mens rea requirement in this statute, however, all circuits have read in at least a general intent requirement—i.e. that the accused knew he transmitted the statement in question and that he knew its contents. The defendant does not need to know or plan that the statement will be taken as a threat. *See, e.g.*, United States v. Francis, 164 F.3d 120, 120-21 (2d Cir. 1999); United States v. Whiffen, 121 F.3d 18, 20 (1st Cir. 1997); *accord* United States v. Davis, 876 F.2d 71, 73 (9th Cir. 1989).

100. *See Kelner*, 534 F.2d at 1020-21.

101. *See id.* at 1021.

102. *See id.*

at the JDL headquarters wearing military fatigues and holding a .38 caliber gun in front of him.[103]

During the interview the defendant said: "We have people who have been trained and who are out now and who intend to make sure that Arafat and his lieutenants do not leave this country alive."[104] When asked specifically if he intended to kill Arafat, the defendant answered "We are planning to assassinate Mr. Arafat."[105] In response to a question about who would carry out the assassination, the defendant answered "[e]verything is planned in detail."[106] This interview aired on the ten o'clock WPIX Channel 11 news.[107]

There was no evidence before the court of whether or not Arafat had any knowledge of the broadcast.[108] At the time of the trial, both the defendant and several witnesses testified that neither he nor any other JDL member had any plans to assassinate Arafat.[109] The defendant claimed that he merely wanted to show the PLO that "we [as Jews] would defend ourselves and protect ourselves."[110]

The Second Circuit rejected the defendant's arguments that his speech was protected by the First Amendment and affirmed his conviction.[111] Specifically, the court rejected the defendant's claim that no communication had been made because the threat had been disseminated to "an indefinite and unknown audience." Instead, the court thought the threat clearly was directed at Arafat.[112] The court also found that there was imminent danger since the defendant said "we have people who have been trained and who are out *now* . . . ."[113] Despite the defendant's arguments to the contrary, the court did not believe that the defendant's statements constituted political hyperbole.[114]

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103. *See id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *See id.*
108. *See id.* at 1022.
109. *See id.* at 1021-22.
110. *Id.* at 1022.
111. *See id.* at 1028.
112. *Id.* at 1023.
113. *Id.* at 1028 (emphasis added).
114. *See id.* at 1024.

Even though district courts from other circuits have applied the imminence requirement, no other circuit has explicitly adopted *Kelner*.[115]

C. Consideration of the Speaker's Intent

Only the Ninth Circuit and the Fourth Circuit have required a showing that the speaker intended to threaten the target.[116] However, it is not entirely clear that these decisions have been fully adopted by either circuit. Only two cases in the Ninth Circuit have required specific intent by the speaker to threaten. Neither one of them mentioned the First Amendment or *Watts*. Each based its holding entirely on statutory interpretation of the relevant federal statutes. Even though these holdings are not based explicitly on the First Amendment, the policies behind the courts' interpretations of the statutes are illustrative of doubts among the circuits about the fairness of the reasonable speaker/listener test.

In *United States v. Twine*,[117] the Ninth Circuit held that there must be a higher threshold for convicting individuals of threatening private citizens or even other public officials than that for the President. Thus, the court in *Twine* held that §§ 875(c) and 876 require a specific, subjective intent,[118] even though § 875 does not have any mens rea requirement written into the statute.[119]

In *United States v. King*, the Ninth Circuit reaffirmed the holding in *Twine*;[120] however, every other true threats case

115. The use of the *Kelner* test in *United States v. Baker*, 890 F. Supp 1375, 1381-82 (E.D. Mich. 1995) was not relied on by the Sixth Circuit in *United States v. Alkhabaz* which affirmed for different reasons the district court holding in *Baker*. *See* Alkhabaz, 104 F.3d 1492 (6th Cir. 1997).

116. *See* United States v. Francis, 164 F.3d 120, 122 (2d Cir. 1999) (commenting that all circuits except for the Ninth Circuit have interpreted 18 U.S.C § 875 as being a general intent crime); *see also* United States v. Patillo, 438 F.2d 13, 15-16 (4th Cir. 1971) (holding that a showing of specific intent is required where there is little likelihood that a statement will be received by the threatened target).

117. 853 F.2d 676 (9th Cir. 1988).

118. *Id.* at 680-81. The court in *Twine* highlighted the substantial harm present in a threat against the President that is "qualitatively different from a threat against a private citizen or other public official." The reason for this is that '[a] President's death in office has worldwide repercussions and affects the security and future of the entire nation." *Id.* at 681. *See also* United States v. King, 122 F.3d 808 (9th Cir. 1997) (holding that *Twine* is still good law and that the district court erred in not giving a specific intent instruction to the jury).

119. *See supra* note 99.

120. *See King*, 122 F.3d at 809.

heard by the circuit has relied solely on the reasonable speaker test.[121] Scholars and practitioners for the most part have not even noticed *Twine* and *King* as precedents, and it seems that much of the Ninth Circuit also has forgotten about these cases. Thus, it is unclear, at least under these statutes, what the Ninth Circuit's test for a true threat is.

Similarly, in *United States v. Patillo*,[122] a case interpreting 18 U.S.C. § 871 (a statute criminalizing threats against the President), the Fourth Circuit required proof of intent to threaten when there was little likelihood that the President would receive the alleged threat.[123] *Patillo*, unlike *Twine* and *King*, specifically addresses the holding in *Watts* and the Supreme Court's guidance on what constitutes true threats under First Amendment analysis. *Patillo* is the only case to hold that 18 U.S.C. § 871 and the First Amendment require not only the specific intent of the speaker to threaten, but also the "present intention" to carry out the threat where there is no communication or attempted communication of a threat to the President.[124] However, no other case in the Fourth Circuit has used this requirement. Despite the infrequency of other courts' reliance on *Patillo*, *Twine*, and *King*, neither the Fourth nor the Ninth Circuit has ever explicitly overruled these cases.

D. Requirement that Threat be Directed at Attainment of a Goal

The Sixth Circuit in *United States v. Alkhabaz*[125] (the "Jake Baker" case) held that speech can only be a punishable threat if it is directed at the achievement of a specific goal or coercive impact on the target.[126] Jake Baker was tried for sending threatening communications in interstate commerce,[127] by exchanging e-mails with an Internet pen pal "which expressed

121. *See, e.g.*, United States v. Davis, 876 F.2d 71, 73 (9th Cir. 1989). *Planned Parenthood IV* did not resolve this issue because the panel decided that the defendants could not be liable even under the lower negligence standard. *See* Planned Parenthood IV, 244 F.3d 1007, 1015 n.9 (9th Cir 2001), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001).

122. 438 F.2d 13 (4th Cir. 1971).

123. *See id.* 15-16.

124. *See id.*

125. 104 F.3d 1492 (6th Cir. 1997).

126. *See id.* at 1495-96

127. *See id.* at 1493.

a sexual interest in violence against women and girls."[128] Baker had initially also been charged with making a threat by posting a story on a popular newsgroup website called "alt.sex.stories."[129] This story described the brutal torture, rape, and murder of a woman who he gave the same name as one of his University of Michigan classmates.[130] The court did not directly address the posted story because the government did not pursue this claim in the district court.[131]

The Sixth Circuit affirmed the district court's exoneration of Baker.[132] The Sixth Circuit argued that "[a]t their core, threats are tools that are employed when one wishes to have some effect, or achieve some goal, through intimidation."[133] Specifically, the court pointed to "extortionate or coercive" threats.[134] Thus, in addition to the reasonable listener test, the Sixth Circuit added a requirement that the threat be perceived as "communicated to effect some change or achieve some goal through intimidation."[135]

The holding of the *Alkhabaz* court is unclear. The language of the case suggests that the goal of merely frightening the target is not sufficient to constitute a threat. However, because the communication at issue was not likely to be received, it is possible that the court found that no goal, including one of frightening anyone, could be realized.[136] The holding makes sense to the extent that the court meant to include frightening a recipient as a goal—although the court could unquestionably have expressed itself more clearly.

If frightening a victim is not enough to constitute a goal, the logic of the holding is deeply flawed. Often a threat's sole purpose is to scare the listener, rather than to convince the

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128. *Id.* For the text of some of the e-mails see *id.* at 1499-1501 (Krupansky, J., dissenting) and United States v. Baker, 890 F. Supp. 1375, 1387-90.

129. *See id.* at 1493.

130. *See id.* at 1493, 1497 (Krupansky, J., dissenting) (recounting text of story).

131. *See* United States v. Baker, 890 F. Supp. 1375, 1380 n.6 (E.D. Mich. 1995), *aff'd sub nom.* United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997).

132. *See Alkhabaz*, 104 F.3d at 1495. The district court relied on the *Kelner* test and decided that the threatened action was not imminent. *See Baker*, 890 F. Supp. at 1381-91. The Sixth Circuit did not rely on the *Kelner* imminence requirement in its holding in *Alkhabaz*. *See Alkhabaz*, 104 F.3d at 1496.

133. *Alkhabaz*, 104 F.3d. at 1495.

134. *Id.*

135. *Id.*

136. *See id.* at 1496.

listener to take certain actions. As I discussed in Part II, fear causes two of the main harms from threats: the psychological and physical effects, and the disruption caused by taking preventative measures. The holding in *Alkhabaz* has yet to be applied in another case in the Sixth Circuit, so it is not even clear how the Circuit itself will interpret the holding.

E. Requirement That the Speaker Threaten That He or His Associates Will Act

The recent Ninth Circuit decision reversing the district court in *Planned Parenthood of the Columbia/Williamette v. American Coalition of Life Activists* ["ACLA"], is the first to suggest that the reasonable speaker test requires a reasonable belief that the speaker or his co-conspirators are threatening that one of them will carry out the threat rather than a third party may take action.[137]

In *Planned Parenthood II*, a federal jury in Oregon awarded Planned Parenthood $107 million in damages because of the ACLA's dissemination of two anti-abortion posters (the so-called Wanted Ads) and its creation of an anti-abortion website now commonly referred to as the Nuremberg Files.[138]

The Internet site listed the names of people who provided or supported abortion services including doctors, nurses, clinic workers, police, politicians, and judges.[139] Along with the names, the website included personal information and photographs for some of the abortion providers.[140]

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137. This decision has been vacated pending rehearing en banc. *See* Planned Parenthood of the Columbia/Williamette v. ACLA, 268 F.3d 908 (9th Cir. 2001).

138. *See* Gey, *supra* note 6, at 541-42. The original website was taken down as was a mirror site. Although there is no way to access the original website, Neal Horsley, the creator of the first site, posted a new version of the Nuremberg Files which is very similar to the original. *See* www.christiangallery.com/atrocity. (accessed on December 29, 2001).

The Wanted Ads had two forms. One was a poster called the Deadly Dozen which listed the names, addresses, and phone numbers of abortion providers, labeled them guilty of crimes against humanity, and offered a $5000 reward for information leading to arrest, conviction, and revocation of license to practice medicine. *See* Planned Parenthood II, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998). The other was a poster of a doctor that offered a reward to any ACLA organization that successfully persuaded the doctor to turn from his "child killing" ways. *Id.* at 1186-87.

139. In total more than 200 names were listed. *See Planned Parenthood II*, 23 F. Supp. 2d at 1188.

140. *See id.*

The list was prefaced with rhetoric stating that the listed people would one day be tried for their "crimes against humanity" much as the Nazi war criminals were tried before the court at Nuremberg.[141] The webmasters also drew lines through the names of abortion providers who had been murdered or wounded.[142] Neither the website nor the posters contained any explicit threats.[143] The District Court of Oregon held that the jury could find the site to be a true threat and denied a motion for summary judgment on the pleadings.[144]

The Ninth Circuit vacated the jury award and district court opinions.[145] The Ninth Circuit held that the Nuremberg Files and the posters could not be considered threats and remanded with an order to enter judgment for the defendants.[146] The opinion relied heavily on *Claiborne Hardware* in its holding that the defendants could only be held liable if they "'authorized, ratified, or directly threatened' violence."[147] The crucial element in the Ninth Circuit opinion is that the threat cannot come in the form of increasing the likelihood that others will act. In order to qualify as a true threat, a statement must suggest that *the speaker or his co-conspirators* will act.

Planned Parenthood IV stands apart from all other Ninth Circuit opinions in its consideration of whether or not the speaker threatened action by himself or his associates. The opinion tries to align itself with other Ninth Circuit precedents by distinguishing the facts in this case and incorporating its holding into the reasonable speaker test.[148] The opinion emphasizes that in other threat cases the threats were direct

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141. *See* Gey, *supra* note 6, at 555-56. The rhetoric included such language as "'baby butchers' who deliver 'Satan' his daily diet of slaughtered babies,'" and the site had lines of dripping blood. However, as Gey points out, images of blood and aborted fetuses do not make the expression any more of a threat. *See id.*

142. *See* Planned Parenthood IV, 244 F.3d 1007, 1013 (9th Cir. 2001), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001).

143. *See id.*

144. *See Planned Parenthood II*, 23 F. Supp. 2d at 1194-95.

145. *See Planned Parenthood IV*, 244 F.3d at 1020.

146. *See id.*

147. *Id.* at 1014 (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 929 (1982)). It is worth noting that this language taken from *Claiborne Hardware* did not relate specifically to whether or not true threats were made, but rather to whether or not Charles Evers could be civilly liable for the acts of others when he did not encourage, assist, or support their actions. *See Claiborne Hardware*, 458 U.S. at 929. *See also* discussion *supra* Part III.

148. *See Planned Parenthood IV*, 244 F.3d at 1016 n.11.

and the speakers made "perfectly clear that they would be the ones to carry out the threats."[149]

In particular, the court criticized one of the jury instructions which stated 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 bodily harm or assault."[150] The court pointed out that this instruction would allow a finding that the speech is unprotected, if the publication of the doctors' names made it more likely that the doctors would be harmed by third parties.[151] "Were the instruction taken literally, the jury could have concluded that [the defendants'] statements contained 'a serious expression of intent to harm,' not because they authorized or directly threatened violence, but because they put the doctors in harm's way."[152] The court found that such an instruction can only be valid in instances where the threat was explicit.[153]

The Ninth Circuit went further than merely remanding for a new trial and ruled as a matter of law that the facts, as stated, did not constitute true threats.[154] First, the court found that none of the defendants' statements mentioned violence or amounted to an explicit threat of violence.[155] Even the rewards offered were not for killing the doctors, but rather for collection of information and encouraging the abortion providers to stop performing abortions.[156] Furthermore, the court viewed the crossing out of names as a recording of past events rather than as a future threat of violence.[157] Second, given the context of "public discourse" and indirect communications, the court found that no direct threats were made.[158] The public nature of the discourse highlighted for the court the possibility that the speech was hyperbole as well as the value of the speech.[159]

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149. *Id.* at 1016.
150. *Id.*
151. *See id.*
152. *Id* at 1017.
153. *See id.* at 1016
154. *See id.* at 1017.
155. *See id.*
156. *See id.*
157. *See id.* at 1018 n.14.
158. *See id.*
159. *See id.* at 1019.

The impact of the Ninth Circuit decision in *Planned Parenthood IV* is still unclear. A petition for rehearing en banc has been granted and there is substantial political pressure to reverse the decision of the Ninth Circuit panel.[160] In addition, even if the panel decision is upheld, it is unclear how it will be interpreted or applied.

V. CRITICISMS OF CURRENT TESTS

The existing lower court tests are vague—at times insufficiently protective of speech, at other times overprotective of speech—and are inconsistently applied by judges and juries.

A. Failings of the Reasonable Speaker/Listener Test

1. Lack of Adequate Mens Rea Requirement

The absence of a requirement that the speaker intend to threaten, or at least act knowingly or recklessly, leads to a high probability that speech will be punished when it should not be. *United States v. Fulmer*[161] highlights the dangers of using only a reasonable speaker/listener test.

Fulmer was convicted in the District Court of Massachusetts for threatening a federal agent in violation of 18 U.S.C. § 115(a)(1)(B).[162] After an ugly divorce, Fulmer contacted an FBI agent, Egan, regarding alleged pension and income tax fraud

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160. *See, e.g.*, LOS ANGELES TIMES, April 13, 2001 at A3 (describing a friend-of-the-court brief filed by forty-three members of Congress calling for the rehearing); National Briefing, NEW YORK TIMES, April 13, 2001 (describing the belief of senators and congressional representatives that the original Ninth Circuit decision undercut Congress' intent in passing FACE, a 1994 law to protect abortion clinics and providers against violence); Warren M. Hern, "Free Speech that Threatens My Life," NEW YORK TIMES, March 31, 2001 at A27.

161. 108 F.3d 1486 (1st Cir. 1997).

162. 18 U.S.C. § 115(a)(1)(B) provides that whoever:

> threatens to assault, kidnap, or murder, a United States official . . . with *intent* to impede, intimidate, or interfere with such official . . . while engaged in the performance of official duties, or with *intent* to retaliate against such person on account of the performance of official duties . . . shall be punished.

Id. (emphasis added). Despite the use of the word intent in the statute, no court has interpreted this statute as requiring specific intent. The courts have decided that all that the statute requires is that a person knowingly transmit a communication which is then viewed as a threat under the reasonable listener test. *See, e.g., Fulmer*, 108 F.3d at 1491; *accord* United States v. Davis, 876 F.2d 71, 73 (9th Cir. 1989).

by his ex-father-in-law and brother.[163] After some investigation, an Assistant United States Attorney decided not to prosecute the case.[164] Egan told Fulmer of the agency's decision.[165]

There was no further contact until four months later when Fulmer called Egan and left the following voice-mail message:

> Hi Dick, Kevan Fulmer. Hope things are well, hope you had an enjoyable Easter and all the other holidays since I've spoken with you last. I want you to look something up. It's known as misprision. Just think of it in terms of misprision of felony.[166] Hope all is well. The silver bullets are coming. I'll talk to you. Enjoy the intriguing unraveling of what I said to you. Talk to you, Dick. It's been a pleasure. Take care.[167]

The FBI agent, Egan, was "shocked" by this message and found it "chilling" and "scary."[168] He viewed the use of the phrase "the silver bullets are coming" as a threat.[169] Various witnesses testified that Egan was upset and Egan stated that he loaded his gun fearing an attack.[170]

Despite Egan's reaction, evidence showed that Fulmer used the phrase "silver bullets" to describe "a clear-cut simple violation of law"[171]—a phrase similar in usage to the expression, the "smoking gun." Two witnesses stated that the defendant used the phrase to describe specific evidence that he had found implicating his father-in-law and brother.[172]

The First Circuit overturned the conviction based on evidentiary failings and remanded the case, but approved the district court's use of jury instructions describing the reasonable speaker test.[173] Although the defendant eventually was acquitted,[174] reasonable juries might have come to different

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163. *See Fulmer*, 108 F.3d at 1489.

164. *See id.* at 1489-90.

165. *See id.* at 1490.

166. Black's Law Dictionary defines "misprision of felony" as "the offense of concealing a felony committed by another . . . ." BLACK'S LAW DICTIONARY 1000 (6th ed. 1990).

167. *Fulmer*, 108 F.3d at 1490.

168. *Id.*

169. *Id.*

170. *See id.* at 1490, 1499.

171. *Id.* at 1490.

172. *See id.* Fulmer had discovered a check from the bankrupcy estate that had never reached its intended recipient. *See id.* This check was allegedly the impetus for his phone call.

173. *See id.* at 1503.

174. The Court Clerk for the District Court of Massachusetts, Susan Tibo,

conclusions about Fulmer's speech under such a test, based on the FBI agent's subjective testimony or the jurors' own subjective interpretations of how a reasonable person would have understood the phrase "the silver bullets are coming." Thus, there is a danger that ambiguous statements not intended to be threats will be interpreted as threats under the reasonable speaker/listener test.

One of the main failures of having only a reasonable speaker/listener test is that it does not incorporate any consideration of the speaker's actual intent. Justice Marshall highlighted these dangers in his concurring opinion in *Rogers v. United States*,[175] where he criticized the circuit courts' construction of 18 U.S.C. § 871 and *Watts*, which allowed the conviction of anyone whose statement could reasonably be understood as a threat against the President.

Even though Marshall's concurring opinion was based primarily on his view of the statutory interpretation of § 871, the policy behind his views applies to any punishment of speech as a threat. Marshall made clear that the dangers of encroachment on the First Amendment are not limited to the political arena: "Although the petitioner in the present case was not at a political rally or engaged in formal political discussion, the same concern counsels against permitting the statute such a broad construction that there is a substantial risk of conviction for a merely crude or careless expression of political enmity."[176]

Marshall pointed to several harms that come from relying solely on a reasonable listener test. He warned that the reasonable speaker/listener test, or what he called the "objective" standard, punishes people criminally under a negligence standard—something that the Court "has long been reluctant" to do—and emphasized that the Court should be especially reluctant to do so given the fact that the statute regulates pure speech.[177]

Punishing merely negligent speech will chill legitimate speech by forcing speakers to steer clear of any questionable speech. Speakers will have difficulty telling in advance what will be construed as a threat by a jury, and therefore may be

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confirmed that the defendant was found not guilty after his new trial.

175. 422 U.S. 35, 48 (1975).

176. *Id.* at 44.

177. *Id.*

deterred from speaking even where their speech is not negligent. Although some people might be deterred from speaking freely by a standard of recklessness, there will be a less severe chill on speech than under a negligence standard. Furthermore, the goal of deterring threatening speech will not be achieved if a speaker is unaware, in other words negligent, that what he said could be viewed as a threat.[178]

A negligence standard is not enough to protect a speaker's rights. Individuals who communicate poorly or who unknowingly use words that can be misconstrued should not be punished for their lack of oratorical skills when they do not speak with the purpose, knowledge, or reckless disregard of making a threat.[179] To punish the speech without proving the speaker's intent would create a great danger of discouraging speakers from expressing their views even when such views are on important matters of social and political concern.[180] Some may argue that a negligence standard is appropriate because it forces people to think before speaking. However, given the vagueness of the current test and the variations in determinations by juries, a speaker may not be able to predict the jury's determination of what is reasonable.

Furthermore, in most areas of First Amendment law mere negligence is not enough to punish pure speech. For example, the *Brandenburg* test for incitement requires that the speaker intend or "direct" his efforts at inciting imminent lawlessness.[181] The Court in *New York Times v. Sullivan* held that

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178. *See id.*

179. *See* Noffsinger, *supra* note 80, at 1235. Also consider the story of one Walter Walker, told by Justice Douglas in his concurring opinion in *Watts*. Walter Walker was:

> a 15th-century keeper of an inn known as the 'Crown,' [who] was convicted under the Statute of Treasons for telling his son: 'Tom, if thou behaves thyself well, I will make thee heir to the CROWN.' He was found guilty of compassing and imagining the death of the King and was hanged, drawn, and quartered.

United States v. Watts, 394 U.S. 705, 709 (1969) (Douglas, J., concurring) (citing 1 J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 151 (1873)). Even under the reasonable speaker/listener test the speaker in this example might not be found guilty of threatening the King given the context, but the gruesome historical scenario is a clear reminder that words can be misconstrued. This highlights the need to protect speakers from the vagaries of the reasonable person test.

180. *See* New York Times v. Sullivan, 376 U.S. 254, 279 (1964).

181. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). In *Brandenburg*, the Court emphasized the importance of distinguishing abstract teaching of the necessity for violence from the actual intent to prepare a group to commit

in order for a public figure to recover for defamatory falsehood, he must show that the defendant spoke with "actual malice," which requires a showing that the defendant either knew that the statement was false or spoke with a reckless disregard for its truth.[182] Even when the false statement is spoken about a private figure on a matter of public concern, "actual malice" is required to collect punitive and presumed damages.[183] This higher standard is in place because punitive damages are more akin to criminal punishment and should not be awarded for mere negligence on the part of the speaker.[184]

Justice Marshall is not the only jurist to have supported the addition of an intent requirement. As discussed earlier, at least a few judges in the Fourth and Ninth Circuit believe that juries should consider the speaker's subjective intent to threaten under certain statutes and in certain circumstances.[185] Judge Logan's dissent in *United States v. Crews* suggests that where speech is unlikely to be received by the alleged victim, the courts should consider the addition of a subjective intent requirement.[186] Several legal scholars and practitioners also have suggested the addition of subjective intent to the test for true threats. [187]

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violence. Punishment for the former violates the First Amendment. *See id.* at 448.

182. *See Sullivan*, 376 U.S at 279-80.

183. *See* Gertz v. Welch, Inc., 418 U.S. 323, 349-350 (1974). Even though it is true that compensatory damages can be received for negligent false statements of fact about private figures or even potentially any damages on a strict liability basis for false statements on a matter of private concern, the availability of criminal punishment for threats requires a higher threshold. *See id.*; *see also* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985).

184. *See Gertz*, 418 U.S. at 349-50.

185. *See* discussion *supra* Part IV.C.

186. *See* United States v. Crews, 781 F.2d 826, 836 (10th Cir. 1986) (Logan, J., dissenting).

187. The ACLU in an amicus brief filed in *Planned Parenthood II* argued that a subjective, speaker-based test should be added to the threats analysis. Such a subjective test would "require evidence, albeit circumstantial or inferential, that the speaker actually intended to induce fear, intimidation, or terror, namely, that the speaker intended to threaten." *See* ACLU, *Amicus Curiae*, Planned Parenthood II, *supra* note 70, at *13. The ACLU points out that without consideration of the speaker's purpose:

> the risk is substantial that a speaker who did not intend to threaten, but merely intended to communicate an idea in exercise of First Amendment rights, could be criminally prosecuted or held liable for damages, including punitive damages, in a civil action. Because of that risk and the danger to the First Amendment values that it poses, a subjective, speaker-based test should also be required.

Id.

The drafters of the Model Penal Code also include a requirement of specific

One of the main reasons an intent standard has not been adopted by the courts is the fear that a requirement of proving the speaker's subjective intent will make it harder to convict.[188] However, most crimes have a mens rea element that requires that the prosecution prove the defendant's state of mind.[189] Moreover, First Amendment law often requires proof of a specific state of mind before finding a speaker liable or allowing a criminal conviction of the speaker.

2. *Problems with the Use of Subjective Reaction Testimony*

Almost every circuit that uses the reasonable speaker/listener test allows evidence of the target's reaction to demonstrate the likely reaction of a reasonable listener.[190] In *Fulmer*, the court upheld the use of reaction testimony, explaining that "[t]he actual recipient's reaction to the statement shows that the recipient did perceive the message as a threat. This reaction is probative of whether one who makes such a statement might reasonably foresee that such a statement would be taken as a threat."[191]

The admission of such reaction testimony undercuts the supposed objectivity of the reasonable person test by incorporating the reaction of a potentially overly sensitive

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intent in their definition of a terroristic threat, which they define as threatening "to commit any crime of violence with the *purpose* to terrorize another or to cause evacuation of a building . . . or otherwise to cause serious public inconvenience, or in *reckless disregard* of the risk of causing such a terror or inconvenience." *See* MODEL PENAL CODE § 211.3 (1962) (emphasis added).

Steven G. Gey in his article "The Nuremberg Files and the First Amendment" argues that not only should a showing of subjective intent be made, but a complete *Brandenburg* analysis should be required. *See* Gey, *supra* note 6, at 595. *See also* Andrews, *supra* note 5; Noffinsger *supra* note 80, at 1234.

188. *See, e.g.*, United States v. Whiffen, 121 F.3d 18, 21 (1st Cir. 1997) (making clear that a subjective standard should not be used in threats cases because it is not as protective of listeners).

189. *See* DONALD ALEXANDER DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 166 (1985) ("[T]he courts explicitly consider intent . . . in many vital areas of law, including constitutional law and First Amendment cases. The prosecution must demonstrate a defendant's specific intent to break a law in most serious criminal cases (acts mala in se)."); *see also* Noffsinger, *supra* note 80, at 1235 ("While impossible to know a speaker's thoughts and true intent, jurors should consider evidence of intent just as they would assess mens rea for any crime or cause of action requiring specific intent.").

190. *See, e.g.*, United States v. Fulmer, 108 F.3d 1486, 1499-1500 (1st Cir. 1997) (describing the acceptance by other circuits of the admission of recipient's reaction testimony); United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996); *see also* Note, *First Circuit Defines Threat in the Context of Federal Threat Statutes—United States v. Fulmer*, 111 HARV. L. REV. 1110, 1114 (1998).

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

listener.[192] For example, in *Fulmer* the FBI agent's fear that his life was in danger, and his taking of precautionary measures such as loading his gun, was partly responsible for the first jury's conviction of the defendant. It does not make sense to apply tort law's "eggshell skull" plaintiff doctrine[193] in the arena of First Amendment protections; otherwise overly sensitive listeners would be able to suppress all kinds of speech, not just threats.

It may sometimes be useful to consider the recipient's reaction as evidence of how someone close to the situation would have interpreted the speech. However, without the protection of an intent requirement, the admission of recipient reaction testimony would likely be afforded too much weight by jurors. Members of the jury are likely to trust the recipient's characterizations over their own instincts, since the recipient was actually there. Additionally, the emotional impact of the recipient's testimony is likely to heavily influence the jury.

B. Immediacy Requirement

The test elaborated by the Second Circuit in *United States v. Kelner* adds an imminence requirement to the true threats doctrine.[194] The addition of an imminence requirement overprotects threatening speech by requiring the listener to believe that the threat will be carried out almost immediately.[195] This is antithetical to the whole point of punishing threats.[196] The main concerns, as discussed earlier, are the emotional distress caused by threats, the cost of the precautions they engender, and the coercive effect they may have. Regardless of whether the threat will be carried out imminently, the individual's fear and distress will be the same, because the victim will not be able to predict with accuracy when the speaker will strike.[197]

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192. *See First Circuit Defines Threat, supra* note 190 (describing how despite the objective test adopted in *Fulmer*, the test really becomes a subjective one with the admission of reaction testimony).

193. The eggshell skull doctrine allows plaintiffs to recover even though their injuries would not have occurred if not for their unique sensitivity.

194. *See* discussion *supra* Part IV.B.

195. For a criticism of the application of an imminence requirement to threats see Kelner, *supra* note 80, at 296.

196. *See* discussion *supra* Part II (discussing the reasons for punishing threats).

197. *See* United States v. Kelner, 534 F.2d 1020, 1029 (2d Cir. 1976) (Mulligan, J.,

Even though the Supreme Court has used an imminence requirement to evaluate incitement, the use of such a requirement is not warranted when evaluating threats. The use of an imminence requirement to protect a speaker is justified only when the relationship between the speech and the threat of violence is more tenuous. This makes sense because in these instances courts examine not whether a specific threat was made but rather whether the speech would incite others to act unlawfully. Since the speaker is generally not in control of what others who hear his speech do, and is not threatening action of his own, the speaker deserves the added protection of an imminence requirement. In contrast, when a court evaluates whether a true threat has been made, there is a closer relationship between the speaker's statement and the potential for violence; therefore alleged threats do not merit the additional protection of an imminence requirement.

C. Lack of Consideration of Who Will Carry Out Threatened Action

The circuit courts, with the possible exception of the Ninth Circuit,[198] have not explicitly considered in any of their tests whether the speaker or his associates will be the ones to carry out the threatened action. This is a crucial element of my test and is the key to developing a clear and uniform test for true threats which is faithful to Supreme Court precedent. If one does not consider who the speaker suggests will take action, three types of valuable speech may be restricted.

First, strong rhetoric which uses such language as "one oughta have one's neck broken"[199] might be wrongly categorized and punished as a threat. The dangers of suppressing such speech are great. As speeches given by civil rights leaders demonstrate, strong rhetoric, even that which on its face seems threatening, is an invaluable tool of advocacy. Martin Luther King Jr. once wrote:

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concurring).

198. It remains to be seen whether the Ninth Circuit will uphold *Planned Parenthood IV* in the *en banc* rehearing. Even if the decision remains good law, it is not clear how the lower courts will interpret and apply it.

199. This recalls Charles Evers' language used during the Claiborne County boycotts which the Mississippi Supreme Court held to be a true threat. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 900-902 (1982); *see also* discussion *supra* Part III.

> [I]f our white brothers dismiss as 'rabble-rousers' and 'outside agitators' those of us who employ nonviolent direct action, and if they refuse to support our nonviolent efforts, millions of Negroes will, out of frustration and despair, seek solace and security in black-nationalist ideologies, a development that would inevitably lead to a frightening racial nightmare. . . . The Negro has many pent-up resentments and latent frustrations, and he must release them. So let him march; let him make prayer pilgrimages to the city hall; let him go on freedom rides . . . If his repressed emotions are not released in nonviolent ways, they will seek expression through violence; this is not a threat but a fact of history."[200]

Most people would agree that this is the very sort of speech that the First Amendment protects. On its face, however, it could be construed as a threat that if King and his followers are not supported, violence will break out. Such rhetoric plays an important role in all civil rights movements. As *Claiborne Hardware* demonstrates, the Court is willing to accept violent rhetoric, even against a backdrop of violence, in order to preserve robust and unfettered debate.[201] Speech that contains violent rhetoric is more properly considered under incitement law than as a true threat.

Second, warning threats made with altruistic motives might be restricted unless one considers who would carry out the threatened action. An altruistic warning threat informs the listener or target of a danger without threatening that the speaker or his associates will take action against the target. Such threats serve a useful function because they can warn people of danger. For example, consider a warning given to a woman who is entering a bad neighborhood from a man on the street. He might yell out at her: "I wouldn't go that way if I were you. Someone's liable to kill you." The speaker here is not threatening to kill the woman himself, but rather is trying to help her by warning that others in the neighborhood might. Even though this speech might frighten the listener, it is in the listener's interest to be apprised of dangers she may face when those dangers are not a result of actions that the speaker himself will take.

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200. KING, *supra* note 33.

201. *See Claiborne Hardware*, 458 U.S. at 913 (citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964)); Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969).

Third, coercive warning threats which point to potential threats from others with the purpose of persuading the target might be restricted. For example, consider the preceding hypothetical: would it change things if the speaker was white and the woman was black, and the speaker wanted to discourage black people from coming into his all white neighborhood? Such warnings are similar to the more altruistic ones, in that the speaker is trying to coerce rather than aid the target. Such warning threats can constitute permissible political advocacy even if they are not always admirable.

This scenario is more similar to the situation in *Claiborne Hardware* where Evers did want to intimidate and coerce his audience into obeying the boycott, but the Supreme Court found his actions permissible. Coercion and intimidation are acceptable forms of speech so long as they do not directly threaten their intended targets with violence, destruction of property, or extort money or other compensation. To argue otherwise will result in censoring much civil rights advocacy, including statements such as that of Martin Luther King Jr. discussed above.

Even though the Court, in *Claiborne Hardware,* was never explicit about why it decided that Evers' speech was not threatening, one of the most convincing explanations is that Evers and his associates were not the ones committing acts of violence and at least two of his alleged threats did not imply that he or his associates would themselves take action. When Evers suggested that the sheriff would not be able to protect people, he was arguably warning potential boycott violators of what some passionate individuals whom he had no control over might do to an individual who broke the boycott. Similarly, Evers' speech in 1966 that boycott violators would "have their necks broken"[202] by their own people is a warning of what others would do to boycott violators with or without Evers' permission. As such, even if it has a coercive or intimidating effect, the speech was not a true threat. These sorts of statements constitute warning threats which should be allowed under the First Amendment because they are a valuable and necessary part of the advocacy of ideas.

The Nuremberg Files can also be seen as a coercive warning

202. *Claiborne Hardware,* 458 U.S. at 900.

threat. For the purposes of my discussion, I will focus only on the internet site and not on the posters involved in the *Planned Parenthood* case. As evidenced by the district court decision in that case, a reasonable listener test may lead to liability. This might seem like the right conclusion on a gut level, but it does not square with the directives of the First Amendment. The website creators had a First Amendment right as anti-abortion advocates to publicize the names of abortion providers and to encourage people to picket, boycott, and protest against these individuals. The crossing out of names certainly is morbid, but, unless additional evidence is present, it seems to be more in the nature of recording and praising the past death or wounding of abortion providers rather than any type of prediction of who the next victim will be.[203]

It is true that some of the defendants were avowed supporters of violence against abortion providers.[204] However, there was no evidence that the website creator, Neal Horsley, had any history of violent activities and, as the Supreme Court made clear in *Brandenburg*, the mere advocacy of violence without more is not enough to overcome the protections of the First Amendment.[205] Consideration of a backdrop of violence in determining whether or not speech constitutes a threat is dangerous. The fact that there has been violence over a number of years in a certain area should not be sufficient to hold individuals liable. The Supreme Court made clear in *Claiborne Hardware* that an individual who is a member of a group cannot be held accountable for violence committed by others in

203. This might be different if the murders occurred in the order in which the names were listed on the website. But even then the speech might be protected.

204. *See generally Planned Parenthood III*, 41 F. Supp. 2d 1130 (D. Or. 1999) (making findings of fact with regards to each defendant). According to the district court only one of the numerous defendants had been convicted of a violent act -- conspiring to bomb several abortion clinics. *See Planned Parenthood II* 23 F. Supp. at 1188. The district court also pointed to the background of violence in abortion protests. The court listed seven incidents in which abortion providers were either murdered or shot and injured. In none of these instances were any of the defendants involved. *See Planned Parenthood I*, 945 F. Supp. at 1362. The court tried to connect the defendants to these violent acts by referring to the release of wanted posters and speeches given by some of the defendants prior to the violence. *See id.*; *Planned Parenthood II*, 23 F. Supp. at 1185.

205. The ACLA collected the information contained in the Nuremberg Files and sent hard copies to Neal Horsley, who posted the files on the Internet. *See Planned Parenthood IV*, 244 F.3d at 1013. Horsley was not a defendant in the case although the district court found that he was an agent of the ACLA. *See id.*

the group.[206] Our history is full of political movements which had violent fringe groups. To hold nonviolent participants in movements accountable for the actions of violent individuals to whom they have no connection, save a shared viewpoint, is to essentially gag innocent citizens.[207] Where the defendants are not connected directly to any violence, the analysis should fall under the *Brandenburg* test for inciting violence, not under a threat analysis.[208]

There was no evidence that the website creators (or anyone associated with them) had any intention of threatening that they or their associates would take action against the abortion providers.[209] Nor were they reckless as to whether a reasonable person would infer that they would personally take action because there was nothing on the website or elsewhere to signify that they would take any action.

Although it may not be admirable for an anti-abortion activist to be happy that an abortion doctor was murdered, it is certainly his prerogative. This is not very different from the speech protected in *Rankin v. McPherson*, in which the Supreme Court upheld a government employee's right to say, after a failed presidential assassination, that "if they go for him again,

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206. *Claiborne Hardware*, 458 U.S. at 920.

207. *See* Planned Parenthood IV, 244 F.3d 1007, 1018 (9th Cir. 2001) (highlighting the dangers of chilling speech by considering a violent context in which "[a] party who does not intend to threaten harm . . . would risk liability by speaking out in the midst of a highly charged environment"), *reh'g en banc granted*, 268 F.3d 908 (9th Cir. 2001). Judge Kozinski warned of the dangers of relying on too broad a context to determine what constitutes a true threat given that most important political movements in our history have had their extremist elements:

> Extreme rhetoric and violent action have marked many political movements in American history. Patriots intimidated loyalists in both word and deed as they gathered support for American independence. John Brown and other abolitionists, convinced that God was on their side, committed murder in pursuit of their cause. In more modern times, the labor, antiwar, animal rights and environmental movements all have had their violent fringes. As a result, much of what was said, even by nonviolent participants, in these movements acquired a tinge of menace.

Id. at 1014.

208. To this extent, Steven Gey is correct that the Nuremberg Files should have been analyzed using the *Brandenburg* test to determine whether the defendant's speech was intended to incite imminent violence and was likely to do so. However, as discussed at length in Part VI, this is because the defendants were at most inciting violence, rather than threatening that they or their associates would act.

209. *See Planned Parenthood IV*, 244 F.3d at 1017.

I hope they get him."[210] Flipping the politics of the scenario might change some people's perspectives—suppose that a group of abortion rights advocates create a website that lists the names and addresses of radical anti-abortionists. When some of the radicals are murdered, the webmaster crosses out the names and places a happy face beside them. Again, this may be in poor taste, but it should be legal nonetheless.

The makers of the Nuremberg Files may well have intended to intimidate the abortion doctors, but there is no evidence that they intended to do so by threatening that they would take illegal action against the listed individuals. The information posted on the Nuremberg Files seems primarily to have facilitated anti-abortion protests by singling out pro-abortion individuals and doctors who should be targeted for protests. Such speech is an important part of the public debate on a controversial issue, and banning such speech under a threat theory would jeopardize substantial political rhetoric which is found valuable in other contexts. Furthermore, the First Amendment clearly protects threats of picketing and boycotts.[211]

Critics of including an actor prong may argue that it is unnecessary to protect warning threats because most warning threats are not prosecuted. This argument places too much faith in the hands of the prosecutors and their discretion. As highlighted by the Nuremberg Files, where heated rhetoric is used in the name of political advocacy, prosecutors will likely feel political pressure to prosecute such warning threats. In addition, prosecutors may use their own viewpoint-based preferences to decide which warning threats to prosecute and which to ignore. Therefore, the only way to protect First Amendment speech adequately is to establish clearer protections for warning threats.

Even though at first glance warning threats might cause some of the same harms that are sought to be prevented by banning threats, such as producing fear and forcing individuals and officials to take protective measures, warning threats can be, and must be, distinguished from true threats. Just as we must accept the advocacy of some violence under *Brandenburg*,

210. Rankin v. McPherson, 483 U.S. 378, 387 (1987).

211. *See, e.g., Claiborne Hardware*, 458 U.S. at 909-10.

we must accept some coercion in the name of keeping open the channels of public debate.

As seen in the Nuremberg Files and *Claiborne Hardware*, without the requirement of an actor prong there is a danger that ambiguous threats (those which are not explicit) might swallow up much of political advocacy. If any strong rhetoric spoken against a backdrop of violence can be read as a threat, prosecutors and foes of certain viewpoints will be able to suppress much political and controversial speech. It is this type of fear that led the Supreme Court in *Brandenburg* to add an imminence requirement to the incitement doctrine; otherwise the advocacy of an unlawful action exception to the First Amendment would encompass much of public debate and speech. Thus, for the reasons discussed above, use of the actor prong protects speakers from overzealous prosecutors, the tides of public opinion, and the misconstruing of ambiguous rhetoric.

D. Lack of Requirement that Recipient be Likely to Receive the Threat

If a speaker makes a threat that is not likely to be received by the target, this speech should be protected. The fact that the speaker chooses to convey the threat in a forum in which the intended victim would never hear the threat suggests that the speaker did not purposefully, knowingly, or recklessly attempt to intimidate, coerce, or frighten the alleged target.

In *United States v. Crews*,[212] a mental patient said he would kill President Reagan after watching a disturbing television movie about nuclear annihilation.[213] Even though this was a threat against the President, the speaker made no effort to communicate the threat to the President nor to anyone he thought was likely to convey the threat to the President. The Court of Appeals vacated and remanded on other grounds but

212. 781 F.2d 826 (10th Cir. 1986).

213. *See id.* at 829. The nurse alleged that the defendant stated, after taking a large dose of anti-depressants, that "If Reagan came to Sheridan, I would shoot him." *Id.* When later asked by a Secret Service agent what he had said, he denied saying that he would shoot the President and instead said that he had stated that it "would be in the best interest of this nation if that red necked, bigoted, war-mongering mother fucker were shot." *Id.* The patient's version of his statement sounds similar to the protected speech in *Rankin v. McPherson*, 438 U.S. 378, 380 (1987).

found nothing about the situation to prevent the defendant's conviction.[214]

It seems unreasonable to find the defendant guilty in this instance because he was primarily speaking to the television set, or possibly a nearby nurse. He had no awareness that his words would be conveyed to the President or even to the authorities. Furthermore, the Secret Service did not expend much time or money by sending one agent to interview the defendant. The dissent by Judge Logan argued that:

> [w]hen a patient in the psychiatric ward of a hospital utters to a nurse who is treating him a threat against the President, and that patient has been undergoing treatment expressly designed to help him control such outbursts, it is unreasonable to assume that he intended or believed that the threat would be reported to law enforcement authorities.[215]

Similarly, the e-mails in the Jake Baker case should not be considered threats because it was unlikely that they would reach the potentially threatened party given that Baker communicated only with a friend through private email messages. The fact that the speaker chose to convey the alleged threat in a way calculated not to reach the threatened party suggests that the speaker did not intend to threaten the target.

Three of the main harms sought to be prevented by punishing threats do not occur if the recipient never receives the threat because the recipient would not take precautions, be coerced, or be frightened. Even though the goal of preventing crime may be limited by a requirement of likelihood of receipt, the First Amendment case law is clear that the mere expression, or even advocacy, of violence is not a sufficient basis to punish speech. In other words, just because people may have identified themselves as potential criminal actors by expressing a violent thought or threat, they should not be punished for their words, unless there is more evidence against them. Nonetheless, only the Fourth Circuit has held that where there is no likelihood of receipt the courts should consider the

214. *See Crews*, 781 F.2d at 827. Courts seem to universally accept greater restriction of threats against the President. *See also* GREENAWALT, *supra* note 11, at 290-91 (describing the justification for punishing Crews even though if he threatened his sister rather than the President his speech should be protected).

215. *Crews*, 781 F.2d at 837.

defendant's subjective intent.[216]

E. Suggested Alternatives to Current Tests and Their Shortcomings

1. Brandenburg *Test*

There is some confusion among the lower courts about whether incitement law or threats law should be applied to seemingly threatening speech.[217] Even though it is true that courts can apply both doctrines to threatening speech, the two tests are clearly distinct. One scholar, Steven G. Gey, believes that all threats should be analyzed using the *Brandenburg* test. Gey interprets the Supreme Court case law, including *Watts*, to suggest that not only must the speaker intend to act on the threat, but the speaker must also intend to carry out the threat immediately; otherwise, the speech should be protected.[218] This is a controversial interpretation of the case law. The Supreme Court's analysis of threats in *NAACP v. Claiborne Hardware* suggests that the requirements of *Brandenburg* are not the test for threats, but that they apply when no true threat has been shown.[219]

In addition, Gey's suggestion fails to take into consideration the policy behind the punishment of threats. He states that "[t]he expression of a desire that a particular person suffer harm or even death is not enough to support legal action against a speaker if there is no evidence that the speaker is taking action to carry out that desire."[220] Gey is in part correct that the government should not be in the business of punishing people for merely wishing someone were dead. However, a threat to cause someone harm, regardless of whether the

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216. *See* United States v. Patillo, 438 F.2d 13, 15 (4th Cir. 1971) (en banc); discussion *supra* Part IV.C.

217. *See* Kelner, *supra* note 80, at 287, 289 ("[S]ince the line between 'threat' cases under *Watts* and 'incitement' cases under *Brandenburg* is ill-defined, courts occasionally mix and match cases from both lines of precedent as if they were interchangeable.").

218. *See* Gey, *supra* note 6; *see also* Noffsinger, *supra* note 80, at 1209 (suggesting a requirement that the statement pose a likelihood of imminent violence).

219. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-29 (1982).

220. Gey, *supra* note 6, at 558. Gey believed that the Nuremberg Files should be protected speech, not because no threat was made, but rather because there was no proof that the defendants intended to commit acts of violence against the named individuals. *Id.* at 568-69.

speaker has any intention of carrying out the threat (imminently or not), must be punished since it creates fear and may lead to coercion and to the spending of resources to prevent the threatened harm.[221]

2. *Political Speech*

Some scholars have suggested that different levels of protection should be offered for threats depending on whether the threat is uttered in a political context.[222] Even though *Watts* and *Claiborne Hardware* suggest that the Supreme Court provides greater protection for political speech, the Court has never explicitly made such a holding. Furthermore, the use of political speech as a dividing line to determine what is a true threat will unnecessarily complicate rather than simplify threat analysis. First of all, it is difficult to determine what is political speech.[223] It is obvious that a threat from a jilted girlfriend to an ex-boyfriend is not political, but it is not as clear whether cross burning is political speech, which the speaker could be trying to use to make a statement about race relations. Individual judges would have to make arbitrary determinations based on what they think is political or nonpolitical. Valuable expression will be chilled because of speakers' fear that their speech will be categorized by some judges as not sufficiently political to warrant First Amendment protection.

Furthermore, speech that is not political can still be valuable in the exchange of ideas, communication, and self-expression. Other areas of the law, such as obscenity law, allow speech to be protected not only if it has serious political value, but also if it has literary, social, or artistic value.[224] In addition, not all political speech is protected. Consider that many, if not all, threats against the President are political speech, but are

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221. *See* discussion *supra* Part II (discussing the harms threats cause and the justifications for punishing threats).

222. For example, Gey interprets the speech in *Watts* as protected because of the political nature of the speech, and *Brandenburg* as solely a test about political advocacy. Leigh Noffsinger argues that political advocacy should not be punished under a threats analysis, but rather under *Brandenburg*. *See* Noffsinger, *supra* note 80, at 1209. She argues that the first step in analyzing any statement as a threat is to separate out political speech from other speech. *See id.*

223. *See* HAIMAN, SPEECH AND LAW, *supra* note 9, at 18 ("[T]he Supreme Court [has] declined to recognize a categorical distinction between political and private speech . . . .").

224. *See* Miller v. California, 413 U.S. 15, 24 (1973).

generally not protected.

Under the proposed test the same standard applies to all scenarios without arbitrary determinations of what is political speech and what is not. The backdrop of a political rally might suggest that in context a statement was mere rhetoric used for persuasive rather than threatening purposes. This is true because the speaker is often speaking to supporters and may be exaggerating for effect, as was the case in *Watts* and *Claiborne Hardware*. The litmus test, however, cannot be whether or not a statement is related to a matter of political concern.

3. *Internet Speech*

Some commentators and judges have suggested that there should be more stringent or different rules for speech on the Internet.[225] For example, the district court in *United States v. Baker* suggested that the Internet "may sometimes require new or modified laws."[226] However, there is no reason to treat threats differently depending on the medium in which they are conveyed.

As my discussion in Part VI will demonstrate, the same test can be applied for statements made both on and off the Internet. Although the Internet can be used to convey a threat widely and quickly, there is nothing else that makes an on-line threat more threatening. Hence, there is no reason to restrict speech on the Internet any more or less than speech conveyed using other forms of communication.

4. *Other Tests*

A host of commentators have suggested different approaches to evaluating threats. Many create unwieldy tests with so many prongs and factors that one cannot imagine a jury sifting through all of them.[227] Some suggest specious distinctions. For

225. *See, e.g.*, United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995), *aff'd sub nom.* United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997); *see also* Hagan, *supra* note 5, at 424-28 (describing ways of regulating speech unique to the Internet); Andrews, *supra* note 5 (suggesting that because of the unique nature of the Internet a new test for threats is warranted).

226. *Baker*, 890 F. Supp. at 1390.

227. For example, Packard, *supra* note 80, at 261, suggests the application of eight factors, developed by Professor David Crump in an incitement context, to any statement to determine whether or not a threat has been made. These factors are:

example, Donald Downs argues that threats of violence against people based on race and ethnicity should be per se exceptions to the First Amendment.[228] This is an unnecessary complication of the analysis. An adequate test for determining true threats will protect victims regardless of who they are and regardless of the motivations of the speaker.

John Rothchild suggests the creation of a new exception to the First Amendment which would punish "menacing speech," namely speech advocating violence that causes the harms normally associated with true threats but which does not meet the requirements of a true threat.[229] This would allow the government to punish speech that does not qualify as a true threat or meet the *Brandenburg* requirements for inciting violence, but which Rothchild feels should be punished nonetheless. Rothchild does not articulate a specific test but rather suggests either weakening the *Brandenburg* test or the factors from *Watts* to include speech that, though not directly threatening, might cause fear in some listeners. It is only with great trepidation that the courts should read additional exceptions into the First Amendment. The more exceptions that are read into the First Amendment the less power the free speech clause will have. A new exception to the First Amendment should only be created where existing exceptions are wholly inadequate and the harms are very great. Here the exception for threats can take care of menacing speech without limiting more speech than necessary. The creation of another category for menacing speech is essentially a way for Rothchild to allow punishment of speech he does not like, such as the Nuremberg Files.

> (1) the express words or symbols uttered; (2) the pattern of the utterance, including any parts of it that the speaker and the audience could be expected to understand in a sense different from the ordinary; (3) the context, including the medium, the audience, and the seriousness of unlawful results, and whether they actually occurred; (5) the extent of the speaker's knowledge or reckless disregard of the likelihood of violent results; (6) the availability of alternative means of expressing a similar message, without encouragement of violence; (7) the inclusion of disclaimers; and (8) the existence or nonexistence of serious literary, artistic, political or scientific value.

Id. It is difficult to imagine a jury being able to apply all of these factors in any coherent manner. Furthermore, factors are best used in the framework of an actual and clearly delineated test.

228. *See* DOWNS, *supra* note 189, at 156.

229. *See* Rothchild, *supra* note 5, at 224, 231, 238.

Jeremy C. Martin argues that the courts should simply do a better job of applying the factors elucidated in *Watts*.[230] As discussed earlier, however, the factors in *Watts* do not provide enough guidance for courts and lead to confusion. In addition, Martin complicates the analysis of threats by creating different tests depending on whether or not the threat is explicit or implied. Martin further confuses things by restating the reasonable speaker/listener test as a three-prong test: 1) would a reasonable speaker foresee that the expression would cause intimidation or fear; 2) would a reasonable listener be intimidated or afraid; and 3) was the target of the threat actually frightened.[231] The third prong is an addition to the traditional reasonable speaker/listener test, but it will not change the analysis very much given that testimony about the recipient's reaction is nearly universally admitted as evidence of how a reasonable person would react.[232]

These commentators' efforts suggest that neither the lower courts nor legal scholars have been able to develop a workable test for threats.

VI. NEW PROPOSAL

A. The Three-Prong Test

I propose a three-part test for determining whether a "true threat" deserving of punishment has been made. The test elaborates the factors a fact-finder should consider when using the reasonable listener test and adds two new elements: (1) the intent of the speaker; and (2) whether the speaker suggests that he or his associates will be the ones to carry out the threatened action. The test is as follows:

1) *Intent prong*: The speaker must have purposely, knowingly, or recklessly[233] made a statement which would intimidate,

230. *See* Martin, *supra* note 5, at 776-77.

231. *See id.* at 794.

232. *See id.* at 791-92.

233. I use the Model Penal Code's formulations for these terms. Under the Code, a person acts *purposely* when it is his conscious object to engage in certain conduct or to cause a particular result. A person acts *knowingly* when he is aware that his conduct is of a particular nature, or he is aware that it is practically certain that his conduct will cause a particular result. A person acts *recklessly* when he consciously disregards a substantial and unjustifiable risk that he will cause a particular result or meet a material element of the crime. The risk must represent a

frighten, or coerce the victim(s) with the threat of physical force, violence, or destruction of substantial property. It is irrelevant whether the speaker intended to carry out the threat. Factors that aid in determining intent include:

a. Whether it was likely that the threat would reach the target or his associates. Actual receipt is irrelevant;

b. Whether the speaker told others of his intentions;

c. Whether the speaker made prior threats;

d. Whether the alleged threat violates the speaker's known beliefs, such as an avowed belief in nonviolence; and

e. Whether the statement is rhetorical hyperbole. This is often true in political advocacy, where the speaker is exaggerating for effect and there is a suggestion that the speaker's statement was not meant to be taken literally.

2) *Actor Prong*: The speaker must have purposely, knowingly, or recklessly suggested, either explicitly or implicitly, that the threat would be carried out by either the speaker or his co-conspirators rather than by unrelated third parties.

3) *Reasonable Listener Prong*:[234] Considering the entirety of the context, a reasonable person who heard the statement would conclude that the statement was meant to threaten the target or someone close to him with violence or damage to valuable property. The following are factors which are suggestive of such a serious threat:

a. The threat is specific. The less specific the target the less likely it is that the speech is a threat.[235] The more specific the time and method of the action threatened, the more likely the speech is a threat;

b. The statement is taken seriously by the listeners;

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gross deviation from the standard of conduct that a law-abiding person would observe in the same situation. *See* MODEL PENAL CODE § 2.02 (1962).

234. I call this the *reasonable listener prong* because as discussed earlier the reasonable speaker and listener tests both focus on how a reasonable listener would react.

235. If the target is not specific, the court should apply the *Brandenburg* test rather than a threat analysis to determine if the speaker's words are unprotected incitement of violence. This is the approach the Court took in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927-29 (1982); *see also* discussion *supra* Part III.

c. The statement is not conditioned on an unlikely or impossible occurrence; and

d. The statement is made in an atmosphere of violence.

I have discussed the justifications for the proposed test in the prior section, but I will summarize here the basis for each element of the three-prong test. There is a need to add an *intent prong* to protect speakers who are unaware that others might construe their statements as threats.[236] There is also a need to add an *actor prong* to allow speakers to use strong rhetoric for advocacy, as well as to allow warning threats of both varieties—the coercive and the altruistic.[237] My adaptations to the reasonable listener test simplify and clarify the test by making it easier for jurors to apply. I make explicit what seems implicit in the case law by outlining specific factors that should be considered in applying the reasonable listener test. For example, consideration of the specificity of the threat protects speech that is hyperbolic or used for rhetorical effect.

There is some confusion about whether juries or judges are the ultimate arbiters of the application of the test for threats. As in other areas of First Amendment law, independent appellate review should apply to the analysis of what constitutes a true threat.[238] Even though *Bose Corp. v. Consumers Union of United States, Inc.*[239] did not address threats directly, the policy underlying the decision suggests that independent appellate review should be applied when evaluating true threats.[240]

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236. *See* United States v. Fulmer, 108 F.3d 1486, 1493-95 (1st Cir. 1997); discussion *supra* Part V.A.1.

237. *See* discussion *supra* Part V.C.

238. *See* Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 (1984); *see also* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2431-32 (1998).

239. 466 U.S. 485 (1984).

240. Independent appellate review is required when analyzing fighting words and incitement, which are analytically similar to threats as exceptions to the First Amendment. The Court in *Bose* described the fundamental policies behind having independent appellate review when limiting speech:

> [T]he Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to

Allowing judges the final word on whether a threat has been made insures that the law will be consistently applied, affording greater protection for speakers by enabling them to predict what speech will be protected.[241]

I briefly address this very large topic only to clarify the procedural considerations involved in applying my test. The test should be used by trial judges in determining summary judgment motions, motions to dismiss, and judgments not on the verdict, and by appellate judges when conducting de novo review. The test can also be turned into jury instructions for trial juries to apply, but as with other First Amendment questions, the final word should be that of a judge conducting independent appellate review.

The best way to evaluate whether the above test is superior to tests currently used is to apply the test to a suite of cases both real and hypothetical.[242]

B. Test Suite

1. Direct Threats Made in Private Context

All courts agree that a direct threat, which is not said as rhetorical hyperbole or in jest and is not a highly conditional statement, is unprotected.[243] The outcome would be the same

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> narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. The principle of viewpoint neutrality that underlies the First Amendment itself, also imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected.

Bose Corp., 466 U.S. at 505 (footnotes and citations omitted).

Independent appellate review has also been applied to negligent publication of criminal solicitation, government employee speech, commercial speech, content-neutral speech restrictions, and review of other cases arising under the First Amendment. *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 567 (1995); Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 666-67 (1994); Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 108 (1990); Revo v. Disciplinary Bd., 106 F.3d 929, 932 (10th Cir. 1997); Swineford v. Snyder County, 15 F.3d 1258, 1265 (3d Cir. 1994); Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1120-21 (11th Cir. 1992); Luke Records, Inc. v. Navarro, 960 F.2d 134, 138 (11th Cir. 1992); Association of Community Orgs. for Reform Now v. St. Louis County, 930 F.2d 591, 595-96 (8th Cir. 1991); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1021 (5th Cir. 1987); Yakubowitcz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989).

241. Volokh & McDonnell, *supra* note 238, at 2432.

242. For a discussion of the value and origins of using a test suite, see *supra* note 19.

243. *See, e.g.*, Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam).

under the proposed test. Take as an example a situation where Kelly, a spurned ex-girlfriend, calls up Randall and tells him that he better watch out because she bought a new rifle and wants to test it out on him. This speech is not protected under current law and is not protected under my proposed test.

The *intent prong* is met because the explicit nature of Kelly's words makes clear that she purposely threatened Randall. Randall was certain to receive the threat because Kelly spoke directly to him. Even though there was no prior history of threats or violence there would be little doubt that Kelly meant, at the very least, to frighten Randall.

The *actor prong* is met because Kelly stated that she would personally act. The *reasonable listener prong* is also met because there is no doubt a reasonable listener would view Kelly's statement, given the context, as a serious threat. The threat had a specific target, and nothing indicated that it was said in jest.

Thus, Kelly's threat would not be protected by the First Amendment under the proposed test. This result fits with the broad agreement of the courts that these types of clear, direct, and personal threats are unprotected. Such direct threats have little or no value and produce all of the harms that threats cause. This hypothetical is a prototypical example of why there is a true threats exception to the First Amendment.

2. *Direct Threats Made in Public Forum*—Kelner

In *United States v. Kelner*, the defendant, a member of the Jewish Defense League, threatened to assassinate Yasser Arafat while Arafat was in New York for a meeting at the United Nations.[244] The Second Circuit found the defendant guilty of making a true threat.[245] Under my proposed test the outcome would be the same.

The *intent prong* is met. Not only did Kelner admit that he wanted to intimidate Arafat, but based on the explicitness of Kelner's words alone a jury or judge is likely to find that he either purposely or knowingly sought to intimidate Arafat. In addition, the context, namely Kelner's wearing of combat fatigues and holding of a gun, strongly suggests that he was

244. United States v. Kelner, 534 F.2d 1020, 1020-21 (2d Cir. 1976); *see also* discussion *supra* at Parts IV.B, V.B.

245. *See Kelner*, 534 F.2d at 1028.

making a threat. The fact that Kelner secretly never intended to carry through with the threat is irrelevant.

In addition, even if Arafat did not see the television broadcast, the telecast was reasonably calculated to reach him because of the large audience and public dissemination. At the very least, the threat would reach the United States government, which would be forced to take precautions to protect the foreign dignitary while he was in New York.

An argument that the defendant was merely using rhetorical hyperbole will likely fail. First, in contrast to *Watts*, Kelner intended his speech to reach his target, Arafat, rather than to energize his supporters with strong rhetoric. In addition, unlike in *Watts*, no one laughed in response to his comments, nor was there any other indication that the statements were made in jest. Furthermore, even if there was a degree of hyperbole in Kelner's remarks, he certainly knew there was a substantial risk that his statements would be viewed as intimidating or frightening by Arafat.

The *actor prong* is met since Kelner threatened that his co-conspirators would take action, stating that his people were out "now" to carry out the deed.[246] The fact that the defendant was holding a gun while speaking intimated his own willingness to act.

Finally, the *reasonable listener prong* is met because a reasonable person would likely interpret Kelner's statement as being a serious threat. A specific target was named as well as a specific time and place for the assassination. Thus, under the proposed test Kelner's speech would not be protected.

This outcome seems right because Kelner's speech will cause disruption, fear of an assassination, and possibly coercion. In addition, Kelner had ample alternative ways to convey his message that the Jews would protect themselves against Arafat and the Palestinians without making a direct threat.

To test my theory further, consider the following variation on *Kelner*: In this version the defendant is speaking at a rally and says "supporters of Arafat oughta have their necks broken." This might be protected under the more protective *Kelner* standard which requires proof that the threat would be

246. *See id.* at 1021.

viewed as likely to be carried out imminently, but might be considered a threat under the reasonable listener standard of the other circuits. This hypothetical situation is similar to that of *Claiborne Hardware* where such a speech was found protected by the Supreme Court.[247] It would also be protected under my proposed test.[248]

The *intent prong* would probably be met since the speaker appears to intend to intimidate Arafat supporters. However, there are two possible reasons why it might not be met. First, depending on the locale and coverage of the rally it is possible that there was little or no likelihood that Arafat or his associates would receive the threat, which would cut against its meeting this prong. Second, it is possible that given the context of the speech, the words could be viewed as hyperbole used as a rhetorical device. In this hypothetical, the speaker is rallying support from the crowd much as the defendant in *Watts* did as well as Evers in *Claiborne Hardware.*

Whether or not the *intent prong* is met, the *actor prong* is not met since there is no suggestion that the speaker or his associates would act. If we were given more information, such as that the speaker and his associates were stockpiling weapons or organizing an army, or if there had been violence committed by the speaker or his associates, then the outcome would be different. As long as the speaker did not recklessly suggest that he or his associates would act, the speech will not meet the *actor prong.*

Under my modified *reasonable listener prong,* the reasonable listener test would not be met since the speech, given at a public rally, was not directed at a specific target, but rather at a

247. I specifically chose to tone down the rhetoric by using the phrase "oughta have their necks broken" rather than "we're gonna break your damn neck," which Evers in *Claiborne Hardware* was accused of saying. I think this is a fairer comparison because of the dispute over what was said and the larger context of Evers' speech. *See* discussion *supra* Part III.

248. Compare with *Lucero v. Trosch* where the defendant, Father Trosch, a Roman Catholic Priest, threatened to kill a fellow guest on the Geraldo show who was an abortion provider. However, when questioned by Geraldo he admitted that he would not kill him, he merely thought he should be dead. Thus, the court found his words protected even if Dr. Lucero felt threatened by him because he clearly stated that he had no intention of acting and his threats were simply hyperbolic advocacy. *See* Lucero v. Trosch, 928 F. Supp. 1124 (S.D. Ala. 1996). A *Brandenburg* analysis might apply here, although such an argument is unlikely to succeed because there was no suggestion of imminence or likelihood of action given the context.

group, much as in *Claiborne Hardware*. Even though individual members of a group may feel threatened, the lack of specificity makes it less likely that the threat is serious.

Since this speech fails the *actor prong* and the *reasonable listener prong* it would not be considered a true threat. Thus, the only way that the speech could be found unprotected if my proposed test were in place is under the *Brandenburg* analysis for incitement of illegal activity. This outcomes fits with the holding of *Claiborne Hardware* and with the First Amendment's protection of political advocacy and allowance of strong rhetoric even where violence is advocated.

3. Conditional Threats

Conditional threats are a variation of the direct threat where the threat is contingent on some event or action. Conditional threats are often used to coerce the victim to do something against his will. Going back to the example of Kelly, the spurned girlfriend, imagine her calling up Randall and saying "If you don't get back together with me, I'll use you for target practice." All courts would find this threat unprotected unless, given the context, it was said clearly in jest.

The *intent prong* is clearly met because there is no doubt that Kelly wished to intimidate and coerce Randall. Similarly, the *actor prong* is satisfied because Kelly said she would be the actor. The *reasonable listener prong* also would be met because a reasonable person would have no trouble identifying Kelly's words as a threat. Punishing Kelly's speech here makes sense because, despite the conditional language, her statement will frighten Randall, possibly coerce him to act against his free will, and may force both Randall and the police to take disruptive precautionary measures.

By contrast, under my proposed test, the conditional speech in *Watts* would still be protected. The *intent prong* would most likely not be met. The defendant's intention was not to intimidate or frighten the President but rather to make a political statement to his audience. This intention was fairly clear from the context. Watts made the alleged threat for purposes of rhetorical hyperbole rather than to intimidate, frighten, or coerce the President beyond what is allowable political advocacy.

Even though it is likely that the President or the Secret Service would be apprised of Watts' speech because it was given in a public forum near the White House, this is not enough on its own to satisfy the intent prong. One could argue that the defendant was at least reckless as to whether his speech would be viewed as a threat, but there is no evidence in the record that he suspected the President would be threatened. Given his goals, he seems at most negligent.

The *actor prong* is met because the defendant was going to be the one to act. It is possible that the *reasonable listener prong* could be met, but it is not likely because the statement was not taken seriously by the listeners, and was conditioned on an event the speaker vowed would never occur.[249]

Because the defendant did not purposely, knowingly, or recklessly wish to intimidate or coerce the President, and a reasonable person would not view the statement as threatening, the speech in *Watts* would be protected. This is the right outcome not only because it is consistent with the holding in *Watts*, but also because it promotes open debate and vigorous advocacy.

4. Threats Made Through Third Parties

In *State v. Chung*,[250] the defendant told several of his fellow teachers that he planned to kill the school principal.[251] The Hawaii Supreme Court held that his statements were punishable threats even though the defendant did not convey his threat directly to the principal.[252] The outcome would be the same under the proposed test.

The *intent prong* is clearly met because the defendant explicitly told two other teachers that he wanted to and planned to kill the principal. In addition, the teachers were likely to warn the principal of this threat. Even though the speech was to a third party, it was directed to a specific target and there was no suggestion that the speaker was using

249. This is a different question than whether or not the defendant would actually be drafted and then forced to fight. The fact that the speaker believed that the event on which he conditioned his threat would never occur suggests that he was not serious about the threat.

250. 862 P.2d 1063 (Haw. 1993).

251. *Id.* at 1067-68.

252. *Id.* at 1070-73.

hyperbole to make a rhetorical point, such as drumming up support for a teachers' strike.

The *actor prong* is also met because the defendant said that he would be the one to do the killing. Finally, the *reasonable listener prong* is met because a reasonable person hearing the statement would have concluded that the defendant's statement was a serious threat. There was a specific target named and there was no suggestion that the speaker was joking. Holding the defendant here responsible for his threat even though it was told to a third party makes sense because his speech has little or no value and causes all of the harms sought to be prevented by the true threats exception to the First Amendment.

5. Warning Threats

Warning threats are one crucial area where threatening speech should be protected.[253] However, one does not want to allow truly threatening speakers to escape punishment by couching their threats as a warning. The following scenarios will help illustrate the difference by clarifying how warning threats can be distinguished under the proposed test.

First, consider *United States v. Dinwiddie*.[254] The defendant, Mrs. Dinwiddie, allegedly threatened an abortion provider, Dr. Robert Crist, and other staff at a Planned Parenthood clinic.[255] One of the defendant's statements could be interpreted as a warning rather than as an actual threat. Specifically, Mrs. Dinwiddie yelled the following through a bullhorn: "Robert, remember Dr. Gunn [a physician killed a year earlier] . . . . This could happen to you . . . . He is not in the world anymore . . . . Whoever sheds man's blood, by man shall be shed."[256] The defendant then went even further and made a clear threat by saying "You haven't seen violence yet until you see what we do to you."[257] The Eighth Circuit found that, given the context, both Mrs. Dinwiddie's statements constituted punishable true threats.[258]

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253. *See* discussion *supra* Part V.C.
254. 76 F.3d 913 (8th Cir. 1996).
255. *See id.* at 917-18.
256. *Id.*
257. *Id.* at 925.
258. *See id.* at 926.

The outcome would be the same under the proposed test. The *intent prong* is met because the defendant purposely or at the very least knowingly wished to intimidate and coerce her victim to stop providing abortions. In addition, Dr. Crist unquestionably received the threats because the defendant spoke to him directly. Mrs. Dinwiddie's history of advocating violence against abortion providers and personally attacking Planned Parenthood employees lends support to the proposition that she purposely intimidated and frightened Dr. Crist with threat of violence.[259]

The one possible argument in the defendant's favor is that her statements were rhetorical hyperbole. However, unlike in *Watts* and *Claiborne Hardware*, her speech was not given to a large audience of supporters, but rather was conveyed directly to the victim. There was no evidence that she was trying to whip up the support of her listeners. One could argue that her efforts to convince just one individual, Dr. Crist, constituted some degree of advocacy, and therefore she is entitled to use hyperbole even in this more private context. However, the factor of rhetorical hyperbole should be applied in a more restrictive fashion in order to protect the rights of threatened individuals. Where there is not a large audience, it is harder to argue that the speech is harmless advocacy rather than a threat against the specific listener who is targeted. Furthermore, the speaker is free to address an individual for the purpose of advocacy so long as the speaker does not threaten the listener with violence or substantial property damage.

The *actor prong* is also met here because the defendant mentioned that "we" were going to take action. Even if Mrs. Dinwiddie had only made her first statement regarding Dr. Gunn's death, it is likely that the actor prong still would be met because there are considerations aside from the explicit words Dinwiddie used that suggest that she was, at the very least, reckless with regard to conveying the idea that she or her associates would act. After all, Dinwiddie was a known advocate of violence, had repeatedly threatened clinic workers, and had signed a petition supporting the murder of the very

259. *See id.* at 925-26. The defendant also had signed a petition in support of Michael Griffin, an anti-abortion activist who killed Dr. David Gunn. *See id.* at 918 n.2.

man she told Dr. Crist to remember.

In addition, Mrs. Dinwiddie directly targeted and threatened Dr. Crist. This is not the sort of general threat against a group that suggests the speaker and her associates will not act. Any test for true threats cannot require a defendant to explicitly say that she is personally going to injure the victim because such a test would allow crafty speakers to escape punishment by carefully choosing their words. As the above analysis shows, the context of the speech and the background of the speaker will differentiate between thinly veiled actual threats and legitimate warning threats.

The defendant's statements also satisfy the *reasonable listener prong*. A specific target was identified and a reference was made to past violence. There is no evidence that the statement was made in jest and the defendant made repeated threats to her victim. Unlike in *Watts*, the act was not contingent on any unlikely event; unlike in *Claiborne Hardware*, the message was conveyed directly to a specific target rather than to a group primarily composed of supporters.

It makes sense to punish Dinwiddie's speech because her statement causes all of the harms that threats can produce, and her right to advocate her political views does not outweigh the individual's right to be free from fear and intimidation. Furthermore, she still can present her views without directly threatening an individual doctor.

Now consider the following variation on *Dinwiddie*: a Catholic priest speaks at an anti-abortion rally outside a Planned Parenthood clinic. There are known supporters of violence in the audience, but the priest has always stated that he opposes violence. The priest warns the doctors that their lives are in danger from angry anti-abortionists if they continue to perform abortions.

The priest's speech fails the *actor prong* of the test. This sort of speech is a warning threat and should be allowed even if the priest hopes to discourage Dr. Crist and others from performing abortions. It is possible that the priest does intend to frighten Dr. Crist with the foreshadowing of violence, but given his nonviolent stand it is unlikely that he is suggesting that either he or his associates would carry out such a threat. Therefore, the priest cannot be punished under the proposed test.

The actor prong is the key difference between this hypothetical and *Dinwiddie*. In *Dinwiddie*, there was evidence that the defendant, a known advocate of violence, was threatening the victim that she would act. In contrast, the hypothetical priest threatened abortion doctors in general, not a specific individual doctor. This more diffuse threat suggests that the alleged threat is not a true threat.

It is important that the priest's speech not be restricted in this instance, because this is the kind of strong advocacy that the First Amendment serves to protect. The small danger that the priest or his associates might act must be balanced with the First Amendment value of allowing vigorous debate even on controversial issues. As both *Claiborne Hardware* and *Brandenburg* demonstrate, the Supreme Court has protected speech even where violence is advocated and even where there is a backdrop of violence. To the extent that the priest's words might incite others to act, his speech should be analyzed under the *Brandenburg* test for incitement.

There is a risk that would-be threateners will carefully construct their speech to avoid implying that they will act in order to avoid punishment under the proposed test. For example, an individual might have every intention of threatening an abortion provider but say "I personally wouldn't do anything nor would my associates, but others might." This problem will be avoided by looking to the speaker's intent and the factors that determine intent. If the speaker purposely, knowingly, or recklessly gives the impression that the speaker or the speaker's associates will carry out the threat, then the actor prong can still be met.

The determination of whether or not the speaker is, at a minimum, reckless under the actor prong is related to the factors considered to show the speaker's intent.[260] For example, if the speaker had committed acts of violence in the past, then it would be less believable for her to claim that she would not be the actor of the threat. Similarly, if she had made prior threats or told others of her intentions to commit a violent act against the victim, her intention could be proven.

Consider another variation on *Dinwiddie:* What if the priest in the prior example, rather than warning the doctors about out of

260. See factors listed under the *intent prong, supra* Part VI.A.

control anti-abortion activists, threatens with the wrath of God? This in fact happened not only in *Dinwiddie*, but also in *Simpson v. Burrows*,[261] in which the court in dicta suggested that threats of God's vengeance might be enough on their own to subject the speaker to punishment.[262]

Even though a reasonable listener might be frightened, intimidated, and even coerced by threats of God's vengeance, these are clearly threats or warnings that should be protected. People who believe atheists, homosexuals, and adulterers are sinners who are going to be struck down by the hand of God should be able to voice their beliefs. The line is crossed, however, when the speaker suggests that he or his associates will help God by taking action down on Earth.[263]

6. Implied Threats

Some of the most difficult cases to analyze are those where the alleged threat is not explicit. The recent controversies over the Nuremberg Files and the Jake Baker e-mails fall into this category of implied threats. The current tendency is to punish speech that I believe should be protected under the First Amendment. Because there are no clear and consistent guidelines for determining a true threat, courts have the flexibility to decide cases based on individual interpretations and instincts. The courts' reliance on subjective factors often results in decisions that restrict speech that ought to be protected by the First Amendment. A few examples demonstrate that the proposed test will better protect and, in some instances, punish speech.

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261. 90 F. Supp. 2d 1108 (D. Or. 2000).

262. *See id.* at 1130.

263. The topic of hate speech is hotly debated in the legal community. Without complicating the discussion of threats, it is worth noting that there is a certain degree of overlap. Hateful speech damning homosexuals or Jews to perdition is not likeable nor something one would seek to encourage, but a society that allows free expression of ideas must tolerate even repulsive speech. Furthermore, the suppression of hateful speech about groups that are favored may prevent critical speech at a later date about groups that we think should be criticized. For example, telling a member of the KKK that God will damn him for his bigotry and anti-Christian values should be allowed. *See generally* John Stuart Mill, *Freedom of Thought and Discussion*, *in* CLEAR AND PRESENT DANGER: THE FREE SPEECH CONTROVERSY 24-26 (Nicholas Capaldi ed., 1969) (discussing the importance of allowing all opinions no matter how controversial or untrue to flow freely). For a discussion of whether hate speech is protected by the First Amendment see HAIMAN, SPEECH AND LAW, *supra* note 9, at 27-34.

a. The Nuremberg Files

Recall that the Nuremberg Files were published on a website which listed names of abortion supporters and crossed out the names of abortion doctors after they were murdered. The fact that the jury in Oregon found this speech threatening and awarded a large judgment makes clear that a reasonable person would likely view the website as a serious threat. Many scholars agree with this outcome and believe that the Nuremberg Files should be considered a punishable threat.[264] The proposed test would reach a different conclusion.

The *intent prong* would likely be met because the crossing out of the doctors' names suggests that the defendants knowingly, or at least recklessly, intimidated or frightened the doctors listed on the site with a threat of violence.[265] In addition, many of the defendants were known advocates of violence against abortion providers, which lends even more evidence of their intent. Because the names were listed on a public website the targets were likely to receive the threat.

The *actor prong*, however, would not be met because there was no evidence that the defendants or their associates threatened that they would take any action beyond cataloging the names of abortion providers and identifying when they were injured or killed. Even though there was a backdrop of violence, and one of the defendants had a history of violence, the Supreme Court in *Claiborne Hardware* has made clear that the violent acts of one member of an organization cannot be imputed to either the organization or its other members.

The posting does not meet the minimum recklessness standard of the actor prong because nothing beyond the broader backdrop of anti-abortion violence suggests that the defendants were aware of a substantial risk that the site implied they would act.

The defendants may well have been negligent as to whether

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264. *See, e.g.*, Martin, *supra* note 5, at 781-83; Rothchild, *supra* note 5, at 223, 231 (treating them as menacing speech); Andrews, *supra* note 5; Hagan, *supra* note 5, at 444. *But see* Gey, *supra* note 6, at 543-44. In addition, many politicians, physicians, and citizens at large think that the Nuremberg Files should not be protected.

265. As discussed earlier, the web creators could be happy that abortion doctors were killed. In fact one of the web creators stated that when he crossed out a name on the website, it was a way of saying "I told you so." David Rovella, *Judges Target of Abortion Foe Web Site*, NAT'L L.J., Nov. 23, 1998, at A6.

others would believe they were threatening that they would act, but that is not a sufficient mental state for the actor prong. The fact that the website may have facilitated or incited violence against abortion doctors is not relevant under the proposed test but could be analyzed under *Brandenberg*.[266]

The *reasonable listener prong* is met because a reasonable person reading the website, given the context of abortion clinic violence and the crossing out of the names, might well view it as a serious threat. Nothing about the site suggested that it was a joke. Thus, the Nuremberg Files would be protected speech, under the proposed test, only because it fails the actor prong.

The validity of this outcome is shown, in part, when one considers the mirror websites put up by several First Amendment advocates once the original site was taken down.[267] The mirror sites exactly replicated the Nuremberg Files.[268] No court has evaluated whether these mirror sites constitute true threats, but the publishers or servers of these sites have all since dismantled them.[269] Under the proposed test, the mirror sites would be protected.

First, the *intent prong* would probably not be met. There is no question that the intent of the mirror websites was to allow scholars and the public to examine the files, as well as to make a point about free speech.[270] The individuals who posted the mirror sites clearly had no intention of threatening the doctors; many of them were in fact supportive of abortion rights. However, if nothing about the website suggested who the webmasters were or their motives, one might conclude that the mirror website creators were reckless as to the threatening

266. It is unlikely that the imminence requirement of *Brandenburg* would be met by the level of advocacy in the Nuremberg Files; however, it is possible that prosecutors could charge the website creator with criminal facilitation. *See* Rice v. Paladin Enterprises, 128 F.3d 233 (4th Cir. 1997). The doctors might also be able to file civil charges for invasion of privacy for the printing of private addresses and unlisted phone numbers.

267. *See* Gey, *supra* note 6, at 541 n.1.

268. *See id.*

269. Hagan, *supra* note 5, at 413 n.17. The site Gey refers to is no longer in operation. *See* Gey, *supra* note 6, at 541 n.1. It is not entirely clear why the mirror sites were taken down, but it is certainly possible, even likely, that fear of large monetary judgments against those who posted mirror sites or servers who allowed them to be posted was a main incentive in taking down the websites.

270. The mirror site creators' intent would be even clearer if they had put disclaimers at the beginning saying: "I am posting this duplicate of the Nuremberg Files solely in the interest of Free Speech."

impact of the site.

The *actor prong* also would not be met because the publishers of the mirror sites were not interested in taking any action and nothing in the sites suggested they or their associates would act. The *reasonable listener prong* would likely be met, because a reasonable listener, absent a disclaimer in the website, would find the site to pose as equally serious a threat as the original site. Thus, because the mirror sites fail the actor prong—and probably the intent prong as well—such sites would be protected speech under the proposed test.

These mirror sites should be protected in the interest of scholarship and public access to information.[271] Similarly, the original Nuremberg Files should be protected speech. It is difficult to justify allowing mirror sites with identical postings while banning the original website simply because of the website publishers' differing positions on abortion, unless further evidence of planned action by the original website creators exists. The proposed test would eliminate the potential for such value-based judgments. Instead, the crucial issue would be the actor prong and whether the website creators were at a minimum reckless as to whether they suggested that they or their associates would carry out the alleged threat.

Even though protecting the Nuremberg Files is a controversial outcome, it is the right result because it protects heated political advocacy where there is not sufficient proof that the speakers threatened that they would take any action. The proposed test results in a fairer, more viewpoint-neutral evaluation of speech and protects social commentary, opinion, and advocacy. Banning speech like the Nuremberg Files will severely limit anti-abortion speakers' ability to express harsh condemnation of abortion because such strong speech against the backdrop of violence will often seem threatening to the reasonable listener.

b. Fulmer—*the Silver Bullet Case*

Another situation likely to be incorrectly decided under the

271. Adolph Hitler's *Mein Kampf*, for example, is banned in several countries but is protected under the First Amendment. Hitler's book may generally pose a danger to Jews based on its content; however, there is little dispute that the availability of this book is useful for scholars and the public alike.

current test arose in *United States v. Fulmer*,[272] which I described at some length above in Part V.[273] The defendant found new evidence in a case he had asked the FBI to investigate. He called an FBI agent and told him "the silver bullets are coming."[274] The FBI agent felt threatened and the defendant was convicted at the initial trial.[275]

The jury decision in *Fulmer* shows that using only a reasonable speaker test, a reasonable person might find the defendant's words to be a threat even though there was clear evidence that the defendant did not intend to make a threat. This evidence was not information that the FBI agent would have had and thus it is possible that a reasonable person in his shoes also would be frightened.

However, it is unjust to punish the defendant in this instance for poorly chosen words. He used the phrase the "silver bullets are coming" as a way of suggesting impending justice—this was a phrase his acquaintances heard him use often and understood to be non-threatening speech. The proposed test reaches the correct conclusion here where the current test fails.

The *intent prong* is not met because there is clear evidence that the defendant did not purposely, knowingly, or even recklessly frighten, intimidate, or coerce the FBI agent. At worst, he was negligent. The *actor prong* might not be met because the phrase "the silver bullets are coming" uses a passive construction and is vague, therefore making it unclear as to who a potential actor might be. However, the defendant's initiation of the phone call might be interpreted as an indication that he would carry out the alleged threat. As discussed above, the *reasonable listener prong* is probably met.

Fulmer highlights the importance of adding an intent prong to the test for true threats because, without such a requirement, inarticulate and merely negligent speakers would be unfairly punished.

c. Jake Baker

The highly-publicized Jake Baker case involved a series of e-

272. 108 F.3d 1486 (1st Cir. 1997).
273. *See* discussion *supra* Part V.A.2.
274. *See Fulmer*, 108 F.3d at 1490.
275. *See id.* at 1489.

mails sent between Jake Baker and an e-mail pen pal.[276] The e-mails, which were privately exchanged and not accessible via the web, contained explicit discussions of the correspondents' mutual interests in harming and sexually abusing women.[277] Baker also posted a story on a public Usenet newsgroup. The story described in explicit detail the rape, mutilation, and murder of a woman who had the same name as one of Baker's classmates at the University of Michigan.[278] Even though the court of appeals and district court both believed the e-mails were protected speech under the First Amendment, there was a vociferous dissent on the Court of Appeals for the Sixth Circuit and several requests for an en banc hearing.[279]

First let us consider the e-mails: Baker and his pen pal discussed their interest in harming women, but they never conveyed such threats to their targets and there was no evidence that they took any act towards doing so. With no other protection than the reasonable listener test, the defendant in Baker could have been convicted because the e-mails might have been interpreted as serious threats—certainly they were neither conditional nor mere jests.

Under my proposed test Baker's e-mails would be protected. The *intent prong* is not met because it is difficult to imagine how Baker purposely, knowingly, or recklessly intimidated, frightened or coerced anyone given the privacy of the communication. This emphasizes one of the key factors in the application of this prong—the likelihood of receipt; even if the prosecutors could identify a target of Baker's threat, it is highly unlikely that the victim would be apprised of the threats.

The *actor prong* is met because in each e-mail Baker discusses the actions that he will take. The *reasonable listener prong* is not met because the lack of a specific target suggests that a reasonable recipient would not be threatened by the communication. Baker mentioned an interest in attacking girls in his dorm, and local thirteen- and fourteen-year-old girls, but none by name.[280] This outcome is appropriate because the First

276. *See* United States v. Alkhabaz, 104 F.3d 1492, 1493 (6th Cir. 1997).
277. *See id.*
278. *See id.*
279. *See id.* at 1496 (Krupansky, J., dissenting).
280. *See Alkhabaz*, 104 F.3d at 1504 n.10 (Krupansky, J., dissenting); United States v. Baker, 890 F. Supp. 1375, 1388 (E.D. Mich. 1995), *aff'd sub nom.* United

Amendment protects private correspondence, thoughts, and fantasies even if the contents of such communications are disturbing or repulsive.

The posted story is another matter. If the government had pursued the conviction for the story, this speech might not have been so easily protected. The story was titled with Baker's classmate's last name.[281] The story repeatedly used her first and last names, identified her as a classmate of Baker's and described, in the first person, the narrator and an accomplice sexually molesting her, raping her, burning her, and then finally setting her on fire.[282]

Absent Baker's classmate's name this would be protected speech—nothing more than a gruesome fantasy. Baker's use of his classmate's name moves the speech into the category of unprotected speech under the proposed test. First, the *intent prong* is met. Even though Baker may not have purposefully intended to intimidate his classmate, he would certainly have known that if she read the story she would be intimidated by it, given its gruesome and explicit nature. It is also likely, because Baker posted the story on a public website and used his classmate's name as the title, that the victim would receive the threat.

The *actor prong* is met as well because the story describes a first-person account of the brutal torture and Baker is the woman's classmate and knows her whereabouts. Because of the realistic tenor of the story, and the use of the first person, Baker was at least reckless as to the implication that he would be the one to carry out the threatened attack.

The *reasonable listener prong* is also met because a reader of the story would certainly be threatened by it if she were in the classmate's shoes. Nothing suggests that the story was a joke, and Baker's choice to use his classmate's name in a public forum takes the speech out of the world of fantasy and gives it a specific target, who would likely be and, in fact, who was deeply affected by the story.[283] This result seems right because the speech is of limited value and the harms are great for the victim. In addition, Baker is free to post such a story without

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States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997).

281. *See Alkhabaz*, 104 F.3d at 1497.

282. *See id.*

283. *See id.* at 1498.

using his classmate's name.[284]

d. Cross Burning Cases

i. On Target's Property

When a cross is burned on a person's property, it is a strong signal that a direct threat has been made against that person. Courts in several circuits have found that the burning of crosses on a person's private property is an unprotected threat.[285] Similarly, under the proposed test, burning a cross on the private property of the intended victim would not be protected.

First, the *intent prong* is met—by placing the cross and then setting fire to it, the defendant is making a clear statement that he purposely wishes to intimidate, frighten, or coerce the inhabitants of the property.[286] The fact that the cross is burned on the victim's property makes it seem like the speaker promises to follow through with further violent action or destruction of property. Furthermore, it is highly likely that the inhabitants of the property would notice a burning cross on their front lawn.

The *actor prong* is met here because the fact that a person has no qualms about breaking the law by trespassing and burning a cross suggests that the cross-burner may engage in further violent action against the victim.[287] This case is different from the Nuremberg Files and *Claiborne Hardware* because the speaker personally conveyed the threat to the intended target and took physical action against the target, which suggests the speaker's willingness to take further action.

The *reasonable listener prong* is also satisfied. This is especially

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284. Of course if Baker did not use his classmate's name, but then suggested to that classmate that the story was about her, the story might be even more clearly a threat than it is in its original form.

285. *See., e.g.*, United States v. Hayward, 6 F.3d 1241 (7th Cir. 1993); United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994).

286. The burning of a cross in the United States historically symbolizes the Ku Klux Klan's systematic intimidation and lynching of blacks in the name of white supremacy. *See generally* JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 385 (8th ed. 2000).

287. *See* HAIMAN, SPEECH ACTS, *supra* note 12, at 6 (suggesting that the burning of a cross on the victim's lawn is not only speech but is also an illegal act, involving physical trespass and perhaps destruction of property).

true given the historical meaning of cross burning and would be even clearer if the targets were African American. By burning the cross on an individual's property, the speaker violates the victim's right to be free from threats. This countervailing right outweighs the speaker's right of expression. This outcome makes sense because there are alternative ways the speaker could communicate his message of racial antipathy, including burning a cross in a different location.

ii. On Public Property or Consenting Person's Private Property

Cross burning on public property is another story. This starts to move more into the category of public and political speech that the First Amendment generally protects. Racist individuals should be able to express their racist beliefs by burning crosses on their own property and even in some circumstances on public property.[288] The proposed test would reach the same result as the Eighth Circuit in *United States v. Lee*,[289] which held that when a cross is burned on property not belonging to the victim, further evidence is required before a defendant can be convicted of making a threat, including evidence that the defendant intended to threaten his victims.[290] To the extent that cross burning incites violence against blacks or other groups, it should be analyzed under *Brandenburg*, not under a theory of threats.

Cross burning can imply a threat against blacks in general, but burning a cross on public property does not suggest that violence or substantial property damage will be committed against anyone in particular. Racists are allowed to burn crosses and protestors to burn flags[291] as long as they do not explicitly threaten an individual or a discrete group of individuals. In keeping with these principles, the proposed test

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288. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (holding that flag burning is protected by the First Amendment). *But see* Robin D. Barnes, *The Reality of First Amendment Jurisprudence: Giving Aid and Comfort to Racial Terrorists*, *in* FREEING THE FIRST AMENDMENT: CRITICAL PERSPECTIVES ON FREEDOM OF EXPRESSION 266-67 (David S. Allen & Robert Jensen eds., 1995) (treating public cross burning as racial terrorism).

289. 6 F.3d 1297 (8th Cir. 1993).

290. *See id.* at 1304.

291. *See Johnson*, 491 U.S. 397.

would allow cross burning at rallies.

Specifically, the *intent prong* might not be met depending on the evidence of whether any particular effort was made to intimidate, frighten or coerce the victims. As discussed above, it is not as clear that violence or property damage is promised by the burning cross because the cross is not on a particular target's lawn. The main audience is likely in this instance not to be local blacks, but rather supporters of the cause. It is difficult to show intent where there is no clear victim.

In addition, it might be difficult to assess whether the targets of the alleged threat actually received it, depending on the location of the burning. If the cross burning was in the town square of a small town and anti-black rhetoric was involved, one might say the threat was directed towards all the African Americans in town. In a small town, all the blacks would likely hear about the cross burning. In a large city, it is possible that the African-American community might not hear about the cross burning or it might be in such a remote place that no one besides members of the group burning the cross would find out about it. Of course, if the cross burning received news coverage that would be a different story.

The *actor prong* would probably be met since the speakers are actively burning a cross. This action suggests that the speaker and his associates will have no qualms about taking further action. The *reasonable listener prong* is probably not met because there was no specific target beyond perhaps blacks in the community, and the nature of the threat is unclear. Because the reasonable listener prong cuts against finding a threat, a jury may conclude that no threat was made.

To confirm that this is the right result, consider an event which occurred in 1988 at Gallaudet University, the nation's only liberal arts college for deaf and hearing impaired students. The students wanted the university to hire a deaf president.[292] When the Board of Trustees chose yet another hearing president, the students protested and burned an effigy of the new president on the campus grounds.[293] The intent of the burning effigy may well have been intimidation, but it was also

292. *See generally* JACK R. GANNON, THE WEEK THE WORLD HEARD GALLAUDET (1989).

293. *See id.* at 79.

clearly political advocacy since the whole protest was in the context of a civil rights movement for the deaf. The students' goal was not to take violent action against the president, but rather to make a political statement which enabled them to release their anger and frustration.[294]

This kind of speech should be protected by the First Amendment. Allowing the burning of effigies and crosses allows people to advocate their views strongly and dramatically without resorting to violence against individuals. Where no specific individual or individuals are threatened such speech must be allowed.

A more difficult question arises if a cross is burned across from the NAACP headquarters. The *intent prong* is more likely to be met here since the speakers chose the location in an effort to intimidate NAACP members and visitors. However, the *reasonable listener* prong might not be met since there is no indication that the cross burning threatens any future acts of violence or destruction of property. Even though the target is more specific than in the burning of a cross on a generic patch of public property, there is no threat made to harm individual members or visitors to the NAACP. It seems that this cross burning would need to be accompanied by some additional actions or statements before it would lose First Amendment protection. Otherwise, it seems if anything less directed and specific a threat than the burned effigy of the specific individual at Gallaudet.

e. Ryder Trucks Case

In *United States v. Hart*,[295] the defendant parked two Ryder trucks in the driveways at an abortion clinic and was convicted for making a threat in violation of the Freedom of Access to Clinic Entrances Act (FACE).[296] The defendant was a known anti-abortion activist.[297] Even though the defendant's purpose could have been merely to interfere with the clinic's daily functioning, it was clear to the court that he had threatened the

294. *See generally id.*
295. 212 F.3d 1067 (8th Cir. 2000).
296. *See id.* at 1069; 18 U.S.C. § 248(a)(1) (1994).
297. *See Hart*, 212 F.3d at 1069.

clinic.[298]

Given the circumstances in the actual case, the speaker would also be convicted under the proposed test. The *intent prong* is met since the defendant admitted that he wanted to threaten the abortion clinic.[299] It is clear that the speaker purposely or at least knowingly intimidated and frightened the clinic by choosing Ryder trucks, which he knew were the ones used in the Oklahoma City bombing.[300] In addition, there was no doubt that the clinic staff was aware of the defendant's actions given the location of the trucks.

The *actor prong* is also met since the defendant parked the trucks himself. The implicit threat was that the trucks had bombs in them. Because the defendant parked them, he was at the very least reckless as to the fact that others would view him as the one to carry out the threatened action of detonating the explosives believed to be contained within the trucks.

The *reasonable listener prong* is certainly met since a reasonable person in the clinic would be intimidated and fearful especially against the backdrop of the Oklahoma City bombing, which the clinic workers remembered and associated with the trucks. It makes sense to find that the defendant made a true threat because his intentional action caused all of the harms associated with a true threat, and he had other effective ways of expressing his anti-abortion views.

f. Snipers Wanted

In August 2000, the "Late Late Show" with Craig Kilborn flashed the words "snipers wanted" under a picture of Republican presidential nominee George W. Bush.[301] Given the context of the presidential campaign and the comic nature of the show, this speech is clearly protected by the First Amendment. However, under only a reasonable listener test, the sense of humor of the jury would determine whether or not

298. *See id.* at 1072. If the defendant had obstructed the clinic's functioning, this would not be considered a threat. However, he would be punishable for trespass and interference with business.

299. *See id.* at 1070.

300. *See id.* at 1072.

301. *See* Brian Lowry, *Huge "Survivor" Ratings A Reality, Television*, L.A. TIMES, Aug. 25, 2000, at F22.

Kilborn's speech is punished.[302]

The proposed test would afford clearer protection for this speech. The *intent prong* would not be met. It seems likely that Kilborn could prove that his intent was merely to convey a joke. Bush might even have viewed the call for snipers as a joke. At worst, Kilborn was probably negligent as to the risk that his speech would be viewed as a threat.

The best protection for Kilborn, however, is the *actor prong*. Kilborn and his associates did not express any intent to act themselves. Nor would anyone take seriously Kilborn's alleged effort to hire snipers to carry out the assassination. The *reasonable listener prong* would most likely not be met given the context of the show and Kilborn's history of telling jokes on the show. Given this background, most listeners would have thought the segment was a joke. The only way to assure protection for this sort of parody is to have more than just a reasonable listener test. Kilborn's call for snipers should be protected in order to allow public commentary and open channels for parody and humor.[303]

7. *Spontaneous Threats*

Most of us can recall times when we have muttered, under our breath, things like "I'll get you" or "I could kill you" or "If only I had a gun" to people who are infuriating us. These off the cuff expressions are statements that clearly should not be punished as true threats.[304] Not only are these natural outbursts, but they also provide a safety valve which allows people to express their frustration without resorting to violence.[305]

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302. Although his case was never prosecuted, it is worth considering the possible outcome.

303. This outcome seems reasonable even now that George W. Bush is President. Kilborn's speech should still be protected under the proposed test. However, courts and juries are more likely to err in favor of punishing threats against the President if only the reasonable speaker/listener test is in effect.

304. *See* GREENAWALT, *supra* note 11, at 91 ("Since many threats are made in a flush of emotion that will dissipate and since sometimes threats operate as a psychological alternative to immediate physical assault, the failure to make criminal all threats of serious harm is understandable . . .").

305. *See* MELLVILLE B. NIMMER, Nimmer on Freedom of Speech § 1.04 (1984) ("It is thought that men will be less inclined to resort to violence to achieve given ends if they are free to express themselves through speech advocating such ends."). *See also* KING, LETTER FROM A BIRMINGHAM JAIL, *supra* note 33.

One can imagine a variation on *Lovell v. Poway*,[306] a case where a student sued after her school suspended her for allegedly threatening her guidance counselor.[307] In our hypothetical, the student is criminally charged for her outburst.[308] The evidence in the case showed that the student, Lovell, had been shuttled back and forth between administrative offices for hours while unsuccessfully trying to change her course schedule.[309] Lovell was clearly at the end of her patience by the time she met with the guidance counselor.[310] When the counselor told her that she might not be able to make the requested changes Lovell said "I'm so angry, I could just shoot someone."[311] Lovell apparently immediately apologized for her outburst.[312]

Under only a reasonable listener test, Lovell could have been found guilty of making a criminal threat. The court noted that "[I]n light of violence prevalent in schools today, school officials are justified in taking very seriously student threats against faculty or other students."[313]

This seems like the wrong outcome because Lovell was expressing exasperation, not a violent threat. This is just the sort of letting off steam that is considered in the safety-valve justification for allowing some forms of incendiary speech. By expressing anger, an individual's rage is defused before it can build over time and result in future violence. This is true even if the enraged individual has no present interest in committing a violent act. Under the proposed test, Lovell could not be seen as having made a true threat. She did not purposely, knowingly, or recklessly frighten, intimidate, or coerce the

306. 90 F.3d 367 (9th Cir. 1996).

307. *See id.* at 368.

308. It is important to change the situation to one of a criminal indictment since there is a significant difference between speech that schools can discipline and speech that can be criminally punished.

309. *Id.* at 369.

310. *See id.*

311. *Id.* In the actual case, the guidance counselor thought Lovell said: "If you don't give me the schedule change I'm going to shoot you." The district court judge believed Lovell's version of the events so that is the version I use above. *See id.* at 369 n.1.

312. *Id.* at 369.

313. *See id.* at 372. Even though this case involved disciplining a student rather than a criminal indictment, the strong language suggests a potential danger that under only a reasonable listener test the student might well be found guilty of making a criminal threat given the backdrop of school violence.

counselor. She was exasperated and had a verbal outburst which both parties agree she immediately apologized for. Again the importance of having an *intent prong* is evident.

Another example of a spontaneous outburst was in *United States v. Crews*,[314] where a patient in a mental ward threatened to kill President Reagan after watching a television movie about a nuclear disaster. The Tenth Circuit found no First Amendment problem with the conviction but reversed and remanded on other grounds.[315] This outcome seems wrong given both the impetus for the speech and the context of the speech.

The defendant would not have been convicted under my proposed test. First of all, the statement appears to be an outburst much like Lovell's and therefore does not meet the *intent prong* of the test. There was little reason for the speaker to believe that his comment, made essentially to the TV screen, would be viewed as a threat. In addition, it was unlikely that anyone would report his statements to the authorities.[316]

The *actor prong* and *reasonable listener prong* might be met because the speaker suggested he would act and because a jury might find that given the mentally unstable character of the speaker and the content of the threat it should be taken seriously. However, since the intent prong is not met, the defendant's speech would be protected.

This is the right outcome because it allows for free expression where there are few harms. There was little doubt that the defendant was not about to carry out any action against the President. Even though the Secret Service was called in, only one officer investigated, and he left after a short interview with Crews. In addition, the President was not likely to even be apprised of such a minimal risk and he certainly would not have been disrupted or coerced in any way by the threat. Even though it is important to protect the Chief Executive of our country vigilantly, it is also important to allow for vocal criticism of the President as well as angry outbursts, as long as a serious threat has not been made.

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314. 781 F.2d 826 (10th Cir. 1986).
315. *See id.* at 829-32.
316. *See* discussion *supra* Part V.D.

8. Threats Against the President

With the exception of *Crews* above, cases in which the President's life is threatened would come out the same under the proposed test. For example, in *United States v. Roy*,[317] a private in the Marines who was awaiting transport from Camp Pendleton to Vietnam heard that the President was visiting the Marine base the next day.[318] He and his fellow officers joked about shooting the President.[319] The defendant decided to call the operator from the pay phone in the barracks.[320] He told the operator to tell the President not to come to the base because if he did he was "going to get him."[321] At trial, despite the defendant's claim that he was joking, he was convicted of threatening the President.[322] The Ninth Circuit affirmed his conviction.[323]

The outcome would be the same under the current test. The *intent prong* is met. Even though the defendant might not have purposely threatened the President, he certainly did so knowingly. It was likely that the operator would convey his threat to the authorities, especially since the President was visiting the next day.

The *actor prong* is also met because the defendant stated that he would be the one to kill the President. The *reasonable listener prong* is also met given the circumstances of the speech: the President was to arrive the next day, the speaker would most likely have been seen as a disgruntled draftee being shipped off to Vietnam, and the operator took his threat seriously. This outcome makes sense because of the directness of the threat, the great jeopardy to our nation when the President's life is in danger, and the potential disruption the threat could cause during the President's visit.

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317. 416 F.2d 874 (9th Cir. 1969).
318. *See id.* at 875.
319. *See id.*
320. *See id.*
321. *Id.*
322. *See id.* at 876.
323. *See id.* at 878-79.

9. Threats in the Context of Political Protests or Boycotts

It has long been the tradition in this country to allow dissent and protests. Boycotts, protests, and strikes are prime examples of situations where the First Amendment stands guard over the rights of speakers. The Supreme Court has repeatedly emphasized that protests and labor strikes are protected speech.[324] To the extent that the definition of what constitutes punishable threats is vague there is a danger of suppressing and chilling those who wish to protest because they will censor themselves to avoid punishment.[325] Limits on speech during boycotts and protests will hamper the ability of civil rights leaders, social leaders, and politicians to communicate and rally support for their causes. It is therefore of the utmost importance to apply the proposed test to boycotts, protests and strikes.

a. Strikes and Abortion Protests

Perhaps abortion protests and labor strikes seem like two unlikely bedfellows, but in a discussion about threats they go hand in hand. In both protests and strikes there are excited participants who want to communicate their opinions and who strive to coerce either their employer or an abortion provider to change his behavior. In both cases there may be a backdrop or

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324. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 909-10 (1982); *see also* McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1992) (holding that the making of a threat to protest the appearance of a Holocaust revisionist even if violence might break out was protected speech under the First Amendment). *See generally* Webb, *supra* note 30. It is worth noting that a threat to protest would not even reach my proposed test because it is a nonviolent threat and does not threaten substantial property damage. As such the alleged threat would immediately be outside the scope of a true threat and could only be restricted under such other First Amendment doctrines as incitement analysis or a content-neutral restriction based on time, place, and manner.

325. For a discussion of the chilling effect of RICO on protestors see Brian J. Murray, *Protesters, Extortion, and Coercion: Preventing RICO from Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691, 694 (1999). Murray warns that:

> the only people who can afford fully to exercise their right to protest are the wealthy, who can afford litigation, and the poor, who are judgment-proof anyway. Others, fearful of the costs of this sort of litigation—even if they ultimately "win"—will be intimidated into limiting the exercise of their rights to some level far below that which they are entitled under the First Amendment for fear of crossing the murky line from protest to trespass.

Id.

threat of violence.

In the context of abortion protests, rhetoric is heated and there is a history of violence from anti-abortion fanatics. However, abortion protesters have every right to speak out even in terms that seem incendiary. This was discussed earlier in some depth regarding the Nuremberg Files and *United States v. Dinwiddie*.[326]

In order to assure the wide open debate that the First Amendment and *Brandenburg* protect, some rhetoric advocating violence must be tolerated. However, speech crosses the line when a direct threat of violence is made against a specific target. This was the case in *Dinwiddie* and in *United States v. McMillian*[327] where an anti-abortion activist threatened to shoot clinic staff and pantomimed shooting them by turning his hand into the shape of a pistol.[328]

Similarly, workers have every right to threaten to strike, to strike, and even to advocate violence, so long as it is not a true threat, is not intended to incite imminent violence, and is not likely to cause imminent violence. This boundary was crossed in *People v. Prisinzano*[329] during a labor strike at the Fulton Fish Market.[330] The defendant approached some replacement workers and told them that once "the cops leave, the blood is going to run off of your bald fucking head," and "I'm going to get you."[331] The court found that the defendant could be tried since his speech met the criteria for true threats.[332]

The defendant's speech would also be punishable under the proposed test. The *intent prong* is met since the intent of the defendant was unquestionably to intimidate, frighten, and coerce the replacement workers into leaving and to stop them from crossing the picket line. There was no question that the targets received the threat because they were spoken to directly. The *actor prong* is also met since the defendant threatened that he personally would act.

The *reasonable listener prong* is met because the threat was

326. *See* discussion *supra* Part VI.B.5.
327. 53 F. Supp. 2d 895 (S.D. Miss. 1999).
328. *See id.* at 897.
329. 648 N.Y.S.2d 267 (N.Y. Crim. Ct. 1996).
330. *Id.* at 527-28.
331. *Id.*
332. *Id.* at 277.

directed at a specific target. Even though the backdrop of the speech was a picket line, the defendant was not making a public speech and therefore there is no suggestion that he was exaggerating for rhetorical effect. Although one can certainly exaggerate in private speech, there is more need to protect hyperbolic public speeches as they contribute more substantially to the public debate on controversial issues. In contrast, individually conveyed rhetoric is more likely to be viewed as a threat than speech conveyed to a group.

For several reasons, *Prisinzano* comes out differently than *NAACP v. Claiborne Hardware*, where Charles Evers' speech during a boycott was protected. First, the majority of Evers' speech was directly related to non-threatening words about the importance of the boycott and nonviolence, whereas in *Prisinzano* the defendant's only words to the alleged victims were direct threats of violence. In addition, the actor prong is met, unlike in *Claiborne Hardware*.

Furthermore, the speech in *Prisinzano* was directed to specific individuals, rather than to a group of boycott violators who may or may not have been present for Evers' speech. The less specific and immediate the target of the speech, the less it makes sense to consider it to be threatening violence. This difference is crucial because it shifts the test from my proposed test for true threats to the already established test for incitement under *Brandenburg*.

Even though protests and strikes are generally protected by the First Amendment, when protestors and strikers cross the line and make direct threats of violence, the mere political background of their speech does not make their threats protected. This outcome makes sense in *Prisinzano* because the defendant's speech caused all the harms that justify the true threats exception, and he had ample room to speak without making threats. The defendant could even have advocated violence, provided he stayed within the requirements of *Brandenburg*, but he could not threaten specific individuals by suggesting that he would physically attack them.

b. Claiborne Hardware

Claiborne Hardware is one of the most difficult cases to analyze. The decision itself is fairly opaque about its basis for determining that Evers' speeches did not constitute true

threats.[333] Particularly troublesome is Evers' speech where he may have said "we're gonna break your damn neck." To the extent that Evers was this direct in his threat and a specific list was referred to with the names of boycott violators, the proposed test might punish Evers' speech even though the Supreme Court found it to be protected. However, if a less extreme interpretation of Evers' statement is applied in which there are no specific targets of the alleged threat, the proposed test would come out the same way as the Supreme Court's ruling, which held that his speech did not constitute a true threat. The outcome under the proposed test would be in accordance primarily because of the actor prong.

Whether the *actor prong* is met depends very much on what Evers said. There is a dispute about the actual language he used and whether or not he was really conveying a true threat or merely voicing his disapproval of boycott violators. Assuming Evers never said "we" will break your necks, then the actor prong, which requires the threat to call for either the speaker or his associates to act, would not be met. In addition, even if he used stronger language, there is ample evidence that Evers was a strong believer in nonviolence and that the bulk of his speech emphasized nonviolence. Furthermore, there was no evidence linking Evers to any criminal activity. It was therefore unlikely that Evers suggested that he would himself act or that he would instruct others to commit violent acts. Thus, without more evidence the actor prong would not be met.

The *intent prong* might also not be met because Evers' statements seemed more directed at the audience of supporters and rallying the group than at threatening or intimidating anyone. Therefore, his speech was more rhetorical hyperbole than any sort of threat. However, Evers likely knew that if his speech was heard by potential boycott violators, they would be intimidated or coerced. Evers certainly wanted to coerce people to obey the boycott, but it is not clear that he threatened any acts of violence—without such a threat, the intent prong cannot be met.

It is not clear whether the *reasonable listener prong* would be met. Several things suggest that it might not be. First, Evers spoke to a large crowd primarily composed of supporters who

333. *See* discussion *supra* Part III.

responded favorably to him. Much of the audience reacted with support rather than fear. Also, the threat was made to boycott violators in general, not to any specific people. However, because of the existence of the list of boycott violators, the reasonable listener prong could be satisfied.

Even if the intent prong and reasonable listener prong were met, Evers' speech would be protected because the speech fails the actor prong. The protection of Evers' speech, as interpreted here, makes sense because it preserves open and vehement debate and advocacy, which is not only crucial to the expression of ideas, but is a cornerstone of civil rights movements. However, if a similar situation arose in which an advocate of violence was known to have said "we're gonna break your neck" to a clearly identifiable group of individuals, the outcome should be different and such speech should be restricted. This type of speech would cross over from being a legitimate tool of advocacy to an unprotected true threat.

VII. CONCLUSION

The absence of a clear and uniform test for determining when a true threat has been made presents a serious danger of punishing speech which should be protected under the First Amendment. The time for reform is now, not only because of the recent high-profile Internet cases, but also because of new federal and state laws that are rapidly being developed that arise out of the law of threats. These include the increasing number of stalking statutes, anti-mask statutes, statutes prohibiting panhandling, and hate crimes laws.[334] Each of these statutes has been developed as an extension of existing statutes on threats. Each statute focuses on specific behavior that individuals might find intimidating, coercive, or frightening.

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334. *See, e.g.*, 18 U.S.C. § 2261A (2000); CAL. PENAL CODE §§ 422.6, 422.7, 646.9 (Deering Supp. 2001); COLO. REV. STAT. § 18-9-111(4)(b)(II) (2000); CONN. GEN. STAT. § 53a-181 (2001); 720 ILL. COMP. STAT. 5/12-7.3(a)(1) (West 2000); MICH. COMP. LAWS § 750.411i (2001); N.J. STAT. ANN. § 2c:12-10 (West Supp. 2001); OR. REV. STAT. §§ 163.730, 163.732 (1999); CITY OF ERIE § 733.05(c) (struck down by the courts in *KKK v. Erie*, 99 F. Supp. 2d 583 (W.D. Pa. 2000)); REV. CODE OF INDIANAPOLIS AND MARION COUNTY § 407-102 CITY ORD. No. 78 (1999). *See also* HAIMAN, SPEECH ACTS, *supra* note 12, at 18-20 (commenting on the Second Circuit's upholding of a ban on panhandling in New York subway stations and emphasizing that panhandling is a form of speech deserving of scrutiny under the First Amendment).

In applying each of these statutes, the majority of the courts use some sort of reasonable listener test to determine the speaker's First Amendment protections. More and more speech and actions will be restricted as threats without the protection of a clear and consistent test for determining the parameters of the First Amendment exception for true threats.

It is time for the Supreme Court to grant certiorari in a threats case to settle once and for all this murky area of law. Meanwhile, circuit courts should call for en banc hearings to settle inconsistent and unclear precedents within each circuit. State Supreme Courts also have an opportunity to step into the fray and clarify a more speech protective test under their individual state constitutions.

The courts should then, at a minimum, adopt Justice Marshall's recommendation in *United States v. Rogers* of including a subjective intent prong in the test for threats. Furthermore, as my proposed test suggests, the addition of an actor prong, requiring the speaker or his associates to be the individuals supposed to carry out the threat, will protect warning threats and strongly worded political advocacy. Without such safeguards in place, speakers in both the political and private arena run the risk of being punished for speech that is misconstrued as a threat or which constitutes allowable advocacy. This is especially true when analyzing speech where there is no explicit threat. A more well-developed test will better distinguish between speech that implies a true threat and speech that, no matter how inflammatory it may be, is not a threat at all. Until the test for true threats is reformed, I recommend that one watch one's words and one's websites carefully, or else one might find oneself on the wrong end of a threat—not as a victim, but as an unexpected defendant.