"THREATENING" SPEECH: THE THIN LINE BETWEEN IMPLICIT THREATS, SOLICITATION, AND ADVOCACY OF CRIME

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I. INTRODUCTION

Consider the following hypothetical Internet postings: (1) "I'm going to kill you, Judge X!" (2) "You deserve to die, Judge X! You'd better be careful—I know where to find you!" (3) "Judge X should be shot!" (4) "I urge the next patriot who has the chance to shoot and kill Judge X, without further delay!" (5) "Judge X deserves to die. Here are his home and office addresses." (6) "I will pay $10,000 to anyone who takes action leading to the assassination of Judge X."

Now ask yourself the following questions? Which, if any, of those statements, has value deserving of First Amendment protection? Which of those statements, if any, would Judge X *not* perceive as "threatening," if he were aware of it? I use the word "threatening" here in a colloquial, not a legal, sense—meaning that the speech, when heard or seen by its target, would result in serious apprehension of danger, at the hands of either the speaker *or* a third party who responds to the speech. I submit that *any* of those statements, in the absence of some indication of lack of seriousness on the part of the speaker, would be experienced as "threatening," in that everyday sense of the word. I contend, further, that none of the six statements has any significant value.

But the six statements would presumably *not* be treated the same for First Amendment purposes. Statement (1) would likely be viewed as an explicit "true threat," and thus totally without First Amendment protection.[1] Statement (2) might well be viewed as an *implied* "true threat," with the same legal status as an explicit threat.[2] Statement (3), however, could receive constitutional protection, under *Brandenburg v.*

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1 Elonis v. United States, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring in part and dissenting in part); Virginia v. Black, 538 U.S. 343, 359 (2003).

2 *See* note 25, *infra*.

Ohio,[3] as advocacy of non-imminent crime. Statement (4), on the other hand, supplies the element of advocacy of *imminent* crime, so that First Amendment protection will depend on a judicial determination that the crime is not likely to occur.[4] Statement (5) arguably begins with abstract advocacy of non-imminent crime (thereby making a claim to constitutional protection, per *Brandenburg*), but the supplying of "crime-facilitating" facts enhances the likelihood that the crime will occur.[5] Can statement (5) plausibly be described, then, as an implied "true threat," thereby deserving no First Amendment protection? Statement (6), finally (admittedly fanciful, as an online posting—*I think*), would presumably be treated as a solicitation of crime, apparently unprotected[6] despite the availability of an argument that it should be protected (per *Brandenburg*) as a species of advocacy of non-imminent crime.

Unfortunately, courts *have* treated speech that takes the form of my statement (5) as an unprotected threat, or even unprotected solicitation, despite the fact that such speech would more naturally be placed under the heading of advocacy of crime. *United States v. Turner*[7] is a striking recent example of a decision characterizing such speech as an implied threat. (The much-discussed "Nuremberg Files" case,[8] of over a decade ago, is another.) *United States v. White*[9] upheld the treatment of such speech as a form of criminal solicitation. The categorization matters, because, again, threats and solicitations receive no First Amendment protection, but advocacy of crime presumably does. The courts' opinions, in these cases, have produced confusion within the law of freedom of speech.

But *should* there be any difference in how, constitutionally, these statements are treated? I argue, in this article, that there should not be. That argument requires, *inter alia,* a reconsideration of the *Brandenburg* test, which—at least in theory—protects some speech that is just as "threatening" to its target as a "true threat." The argument for treating *all* "threatening" speech consistently will, in addition, have the beneficial effect of denying First Amendment protection to speech such as statement (5), *supra,* without having to distort the meaning of language by labeling such a statement as an implied "threat."

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[3] 395 U.S. 444 (1969).

[4] *See* text accompanying note 10, *infra*.

[5] *See generally* Eugene Volokh, *Crime-Facilitating Speech,* 57 STAN. L. REV. 1095 (2005), for an exhaustive consideration of the appropriate treatment of speech that "provides information that makes it easier for people to commit crimes, torts, or other harms." *Id.* at 1096.

[6] United States v. White, 698 F.3d 1005, 1008 (7th Cir. 2012); United States v. Stewart, 590 F.3d 93, 115 (2d Cir. 2009).

[7] 720 F.3d 411 (2d Cir. 2013). *See* text accompanying notes 26-41, *infra*.

[8] Planned Parenthood of the Columbia/Willamette, Inc. v Am. Coal. of Life Activities, 290 F.3d 1058 (9th Cir. 2002). *See* text accompanying notes 42-53, *infra*.

[9] 698 F.3d 1005 (7th Cir. 2012). *See* text accompanying notes 68-79, *infra*.

II. GOVERNING PRINCIPLES

A quick review of basic principles, at the outset, is required.

A. ADVOCACY OF CRIME

The cryptic *per curiam* decision in *Brandenburg,* handed down in 1969, purported to set forth a First Amendment test of sweeping magnitude, as follows:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[10]

Writing in 2002, I asserted that:

> The test was unnecessary to the resolution of the *Brandenburg* case itself, is laced with ambiguity despite its veneer of clarity, and has received little clarification in the few subsequent Supreme Court cases that might have shed additional light on its meaning. Lower courts, meanwhile, have, to a very considerable extent, applied and interpreted it very narrowly.[11]

Nothing of consequence has changed in the dozen years since I made those pronouncements.[12] Nonetheless, the *Brandenburg* test remains, in theory, the standard for assessing the constitutionality of regulations of advocacy of criminal acts.[13] Such advocacy is thus presumptively protected in the absence of imminence or likelihood of fruition.

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[10] 395 U.S. at 447.

[11] Marc Rohr, *Grand Illusion: The Brandenburg Test and Speech that Encourages or Facilitates Criminal Acts,* 38 WILLAMETTE L. REV. 1, 3 (2002).

[12] "[T]he lower courts' treatment of Brandenburg has not been reassuring. Many courts have been willing to limit its protections to abstract advocacy, and many others have misunderstood its requirements." Thomas Healy, *Brandenburg in a Time of Terror,* 84 NOTRE DAME L. REV. 655, 674 (2009). *See also* Steven Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech,* 80 NOTRE DAME L. REV. 1287, 1359 (2005): "[T]he courts display very little recognition that they are gradually shrinking the territory covered by the crown jewel of the First Amendment—Brandenburg and the other political speech cases that embody the legacy of the classic Holmes and Brandeis free speech opinions." *See also* L.A. Powe, Jr., *Brandenburg: Then and Now*, 44 TEX. TECH L. REV. 69 (2011): "It is hard to tell if *Brandenburg* remains good law or is just a period piece."

[13] *See, e.g.,* United States v. Fullmer, 584 F.3d 132, 154-55 (3d. Cir. 2009), in which the test was conscientiously applied.

B. THREATS

A "true" threat, on the other hand, receives absolutely no First Amendment protection.[14] The justifications for this conclusion have been indicated only implicitly by the Supreme Court, in this statement by Justice O'Connor in her majority opinion in *Virginia v. Black*: "[A] prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur."[15]

Remarkably, the governing constitutional definition of a true threat remains uncertain, despite the fact that Justice O'Connor, in *Black,* appeared to authoritatively address the issue, as follows: "[T]rue threats . . . encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat."[16] But this "subjective" definition of a true threat has, for the most part, failed to dislodge the "objective" definition that took root prior to the *Black* decision, typified by the following formulation set forth by the Court of Appeals for the Second Circuit: "This Circuit's test for whether conduct amounts to a true threat "is an objective one—namely, whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of injury."[17]

Of those federal appellate courts that have considered the question, only the Courts of Appeals for the Ninth and Tenth Circuits have interpreted Justice O'Connor's pronouncement in *Black* as one of general constitutional magnitude, thereby rendering the "objective" definition of threats obsolete.[18] The other circuits "continue to apply an objective test after *Black,* even though some courts focus on a 'reasonable sender' of the

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[14] Virginia v. Black, 538 U.S. 343, 359 (2003).

[15] *Id.* at 360. *See also* Justice Alito's partially dissenting opinion in *Elonis v. United States,* 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring in part and dissenting in part): "True threats inflict great harm and have little if any social value. A threat may cause serious emotional stress for the person threatened and those who care about that person . . . ."

[16] *Black*, 538 U.S. at 359.

[17] United States v. Turner, 720 F.3d 411, 420 (2d Cir. 2013).

[18] *See* United States v. Heineman, 767 F.3d 970, 982 (10th Cir. 2014); United States v. Bagdasarian, 652 F.3d 1113, 1116-18 (9th Cir. 2011). *But see* the Tenth Circuit's later characterization of its ruling in *Heineman* as purely an exercise of statutory interpretation, in *United States v. Wheeler*, 776 F.3d 736, 743 n.3 (10th Cir. 2015). Judge Floyd, concurring in part and dissenting in part in *United States v. White,* 670 F.3d 498, 518-24 (4th Cir. 2012) (Floyd, J., concurring in part and dissenting in part), essentially agreed. *See also* the thoughtful discussion of the issue in *United States v. Parr*, 545 F.3d 491, 499-500 (7th Cir. 2008) ("It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black* . . . . It is more likely, however, that an entirely objective definition is no longer tenable. . . . [A] standard that combines objective and subjective inquiries might satisfy the constitutional concern . . . . We need not resolve the issue here.").

communication or simply a 'reasonable person' familiar with all the circumstances."[19] Professor Mason has made a powerful argument against reading *Black* as having altered the governing constitutional definition of a true threat,[20] and Justice Thomas has indicated his agreement with that conclusion.[21] It may be questioned how often a fact-finder would rationally conclude that a speaker has, with no intent to cause fear or alarm, uttered words that a reasonable listener would interpret as a serious threat[22]—the only circumstance in which different results would flow from the choice of an objective or subjective test. Contrary to expectations, the issue was not resolved by the Supreme Court's eagerly-anticipated decision in the case of *Elonis v. United States,*[23] and it need not be resolved for the purposes of this article. But the following observation, made in a decision by the Third Circuit Court of Appeals, is worth noting: "Limiting the definition of true threats to only those statements where the speaker subjectively intended to threaten would fail to protect individuals from the 'fear of violence' and the 'disruption that fear engenders,' because it would protect speech that a reasonable speaker would understand to be threatening."[24]

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[19] *White*, 670 F.3d at 510. *See also* United States v. Martinez, 736 F.3d 981, 986-88 (11th Cir. 2013) (and the decisions cited therein); Caleb Mason, *Framing Context, Anonymous Internet Speech, and Intent: New Uncertainty About the Constitutional Test for True Threats,* 41 SW. U. L. REV. 43, 60-61 (2011)*;* Kenneth Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine,* 58 STAN. L. REV. 1337, 1348 (2006):

> The formulas vary. One formula asks whether a reasonable speaker would expect the target to take the statement as a threat of serious harm. An alternative formula asks whether a reasonable target would interpret the statement as such a threat. In theory, either of these formulations is an "objective" standard.

[20] Mason, *supra* note 19, at 52-60. The thrust of his argument is that the opinion's reference to subjective intent was entirely case-specific. "*Black* did not address the constitutionality of the objective test because the Virginia statute whose constitutionality the Court was considering did not employ an objective test. . . . Thus, the Court had no occasion to decide whether the reasonable-person test should be discarded." *Id.* at 59. *But see* Karst, *supra* note 19, at 1348.

[21] Elonis v. United States, 135 S. Ct. 2001, 2027 (2015) (Thomas, J., dissenting).

[22] *Martinez*, 736 F.3d at 992 ("Martinez refers to a rare, almost unicornical category of speech communicated by a speaker who 'acts with innocent intent, but negligently conveys a message that others [reasonably] find to be threatening.'").

[23] The Court held in *Elonis* that, in a prosecution under 18 U.S.C. § 875(c), it was error to instruct the jury that the government need prove only that a reasonable person would regard Elonis' statements as threats. 135 S. Ct. at 2012. For the majority, Chief Justice Roberts reached this conclusion as a matter of statutory interpretation, rendering unnecessary any consideration of First Amendment requirements. *Id.* Only the two dissenters, Justices Thomas and Alito, reached the First Amendment issue; each would adopt an objective definition of a true threat. *Id.* at 2014, 2028.

[24] *Elonis*, 730 F.3d at 330, *rev'd*, 135 S. Ct. 2008 (2015). Justice Alito agreed: "But whether or not the person making a threat intends to cause harm, the damage is the same." 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part). *See also* Mason, *supra* note 19, at 92 ("[D]o we want to punish negligently uttered threats? I think there are good reasons why we might want to do so.").

Regardless of how true threats are defined, it is clear that they need not be explicit.[25]

With this understanding of basic principles, let us turn to the troublesome recent appellate decisions.

III. TROUBLESOME DECISIONS

A. TURNER

The facts of *United States v. Turner,*[26] the Second Circuit case that inspired the series of hypotheticals with which this article began, are adequately summarized at the very beginning of Judge Livingston's majority opinion:

> On June 2, 2009, Harold Turner published a blog post declaring that three Seventh Circuit judges deserved to die for their recent decision that the Second Amendment did not apply to the states. . . . These judges deserve to be made such an example of as to send a message to the entire judiciary: Obey the Constitution or die. Turner's lengthy commentary declared that the blood of these three judges would "replenish the tree of liberty," that the judges "didn't get the hint" sent by a gunman who had murdered the family of another federal judge in Chicago, that they had not "faced REAL free men willing to walk up to them and kill them for their defiance and disobedience," that their ruling was "so sleazy and cunning as to deserve the ultimate response," and that the judges "deserve to be killed." The next morning Turner posted photographs, work addresses, and room numbers for each of the three judges, along with a map indicating the location of the courthouse in which they worked, and a photograph of the building modified to point out "Anti-truck bomb barriers."[27]

A jury convicted Turner of threatening the three judges, in violation of 18 U.S.C § 115(a)(1)(B).[28] The appellate court affirmed, finding the evidence sufficient to establish a true threat, and thus to support the conviction.[29] Judge Livingston restated the

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[25] *See, e.g.*, my discussion of several such cases, in Rohr, *supra* note 11, at 49-63. A good recent example is found in *United States v. White,* 670 F.3d 498, 504 (4th Cir. 2012) ("Just tell her that people that think the way she thinks, we hunt down and shoot.").

[26] 720 F.3d 411 (2d Cir. 2013).

[27] *Id.* at 413-14.

[28] *Id.* at 414.

[29] *Id.*

Second Circuit's adherence to an objective determination of whether a true threat had been uttered: "This Circuit's test for whether conduct amounts to a true threat 'is an objective one–namely, whether an ordinary, reasonable recipient who is familiar with the content of the [communication] would interpret it as a threat of injury.'"[30] Here, the majority found the test satisfied. "The full context of Turner's remarks," wrote Judge Livingston, "reveals a gravity readily distinguishable from mere hyperbole or common public discourse."[31] Focusing on Turner's allusions to the Chicago killings, Judge Livingston concluded that "[s]uch serious references to actual acts of violence carried out in apparent retribution for a judge's decision would clearly allow a reasonable juror to conclude that Turner's statements were a true threat."[32]

But *did* Turner, in any of his statements, indicate any intention to personally harm any of the three judges? Judge Livingston's opinion continued:

> Turner argues that a "close syntactical analysis" of his statements reveals that he used only the passive voice. He wrote variously that Judges Easterbrook, Bauer, and Posner "deserve to be killed" . . . . Because he never explicitly wrote, "I will kill them," Turner claims, his words cannot reasonably have been interpreted as a threat.[33]

But Judge Livingston rejected that argument:

> As we have said before, "rigid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render the statute powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat."
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> . . . .
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> We do not hold and do not mean to suggest that syntax is not a relevant factor for consideration in appropriate cases. But Turner's jury clearly acted reasonably in concluding that Turner's statements amounted to a true threat given, *inter alia,* his lengthy discussion of killing the three judges, his reference to the killing of Judge Lefkow's family, and his

[30] *Id.* at 420. The Court noted, in a footnote, that Turner had not argued that a subjective test should be used instead, but "[e]ven assuming, *arguendo,* that *Black* did alter the definition of 'true threats' to require subjective intent to intimidate, the outcome in this case would be the same." *Id.* n.4.

[31] *Turner*, 720 F.3d at 421.

[32] *Id.* at 421-22.

[33] *Id.* at 422.

> update the next day with detailed information regarding how to locate Judges Easterbrook, Bauer and Posner and to impede them in the performance of their duties by putting them in fear for their lives.[34]

Judge Livingston concluded his First Amendment analysis by rejecting Turner's argument "that his language, on its face, purported to be directed at third parties, rather than the judges themselves, and that it therefore cannot be prohibited unless it constitutes incitement within the meaning of *Brandenburg v. Ohio*."[35] Judge Livingston explained his dismissal of this argument by asserting that it "relies overmuch on the literal denotation and syntax of Turner's statements, refusing to acknowledge that threats—which may be prohibited, consistent with the First Amendment—need be neither explicit nor conveyed with the grammatical precision of an Oxford don."[36]

But Judge Poole, dissenting, gave Turner's arguments much more credence. The core of his opinion is sufficiently insightful to deserve quotation at length:

> [I]n determining whether speech is a purported threat, we must make sure that the speech is not instead advocacy protected by *Brandenburg*. *Brandenburg* (incitement) and *Watts* (true threats), and their respective progeny, offer different constitutional protections, and those afforded to advocacy would have less force if we analyzed all speech under the "true threat" test. Advocacy of the use of force, even if not incitement under *Brandenburg,* will often place the object of the advocacy "in fear of bodily harm or death," which would be "constitutionally proscribable" intimidation under *Black*. Much of what is said by even nonviolent advocates can "acquire[] the tinge of menace." . . . [W]e must distinguish between *threats* and other forms of speech that may intimidate, menace, or coerce but are protected . . . .
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> While "the line between the two forms of speech may be difficult to draw in some instances," case law establishes principles to distinguish between threats and other forms of speech. First, with respect to the true threats category, "a court must be sure that the recipient is fearful of the execution of the threat *by the speaker* (or the speaker's co-conspirators)." "Thus, generally, a person who informs someone that he or she is in danger from a third party has not made a threat, even if the statement produces fear. This may be true even where a protestor tells the objects of protest that they are in danger and further indicates political support for the violent

[34] *Id.* at 422-23 (quoting United States v. Malik, 15 F3d 45, 50 (2d Cir. 1994)).

[35] *Id.* at 424.

[36] *Id.* at 425.

> third parties." In other words, a threat "warns of violence or other harm that the speaker controls." In contrast, the incitement category involves "predictions or exhortations to others" to use violence. Drawing this distinction will necessarily lead us to the syntax of the communication at issue: "I will kill you" suggests danger from the speaker, while "you deserve to die" suggests a prediction or exhortation. However . . . "[a]n absence of explicitly threatening language does not preclude the finding of a threat." Speech may be ambiguous as to *who* will cause injury and still constitute a threat.[37]

Judge Poole went on to add, as an additional definitional principle, that "a purported threat must be directed toward the victim,"[38] but why should that be so? Should not the statement, "I'm going to kill Judge X," communicated to someone other than Judge X, potentially qualify as a true threat?

(Judge Poole would also have given significance to the distinction between an ostensible threat communicated to its target privately and one uttered in the context of public commentary, as was true here,[39] but I see no reason, ultimately, to make such a distinction.) Here, Judge Poole would have found that Turner's communications "were advocacy of the use of force and not a threat."[40]

B. PLANNED PARENTHOOD

The result in *Turner,* and the internal debate it engendered, were perfectly foreshadowed by the "Nuremberg Files" case of a decade earlier, *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*.[41] The salient facts of the case, admittedly boiled down to their bare essence here,[42] were basically as follows: The defendants (in this civil suit brought under the federal Freedom of Access to Clinic Entrances Act) (1) distributed "wanted"—as "guilty of crimes against humanity"—posters naming, *inter alia,* physicians who performed abortions, with accompanying photographs and addresses, and (2) maintained a ("Nuremberg Files") website that contained similar information.[43] Notably, three such physicians had been

[37] *Turner*, 720 F.3d at 431-32 (Poole, J dissenting) (referencing *Watts v. United States*, 394 U.S. 705 (1969), the first Supreme Court case dealing with threats).

[38] *Id.* at 432.

[39] *Id.* at 432-34. Professor Gey has plausibly suggested that a "reason to lower slightly the threshold for denying First Amendment protection to privately communicated threats is that such threats are far more likely to frighten the target of the threat." Gey, *supra* note 12, at 1350.

[40] *Turner*, 720 F.3d at 434.

[41] 290 F.3d 1058 (9th Cir. 2002) (en banc).

[42] For more detail, *see id.* at 1063-66; Rohr, *supra* note 11, at 56-58; Karst, *supra* note 19, at 1378-84.

[43] *Planned Parenthood*, 290 F.3d at 1064-66.

murdered after being named in such posters; their names, accordingly, were "struck through" on the website.[44] Some of the named physicians testified that they were "terrified" and "frightened" as a result.[45] The District Court ruled that these communications could, in context, be deemed true threats,[46] and a jury so found.[47] A panel of the Ninth Circuit reversed,[48] but that ruling was vacated *en banc.*[49] Judge Rymer's reasoning, for the *en banc* majority, was encapsulated in this passage:

> The posters are a true threat because . . . they connote something they do not literally say, yet both the actor and the recipient get the message. To the doctor who performs abortions, these posters meant "You're Wanted or You're Guilty; You'll be shot or killed." This was reinforced by the scorecard in the Nuremberg Files.[50]

Referencing the murders that had already occurred, Judge Rymer added:

> Even if the Gunn poster, which was the first "WANTED" poster, was a purely political message, when originally issued, and even if the Britton poster were too, by the time of the Crist poster, the poster format itself had acquired currency as a death threat for abortion providers. Gunn was killed after his poster was released; Britton was killed after his poster was released; and Patterson was killed after his poster was released.[51]

Judge Kozinski, joined in dissent by four other judges, made these key points, echoed later by Judge Poole in his dissent in *Turner:*

> The majority does not point to any statement by defendants that they intended to inflict bodily harm on plaintiffs.
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> . . . .

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[44] *Id.* at 1065.

[45] *Id.* at 1066.

[46] Planned Parenthood of the Columbia/Willamette, Inc. v. American Coal. of Life Activists, 23 F. Supp. 2d 1182, 1193-94 (D. Or. 1998).

[47] Planned Parenthood of the Columbia/Willamette, Inc. v. American Coal. of Life Activists, 244 F.3d 1007, 1013 (9th Cir. 2001).

[48] *Id.*

[49] *Planned Parenthood*, 290 F.3d at 1058.

[50] *Id.* at 1085.

[51] *Id.* at 1079.

> The majority tries to fill this gaping hole in the record by noting that defendants "knew the fear generated among those in the reproductive health services community who were singled out for identification on a 'wanted'-type poster." But a statement does not become a true threat because it instills fear in the listener . . . . In order for the statement to be a true threat, it must send the message that the speakers themselves—or individuals acting in concert with them—will engage in physical violence . . . .
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> Plaintiffs themselves explained that the fear they felt came, not from defendants, but from being singled out for attention by abortion protesters across the country.
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> From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties . . . . But it makes a difference for the purpose of the First Amendment.[52]

Judge Kozinski went on to suggest that, because "the posters can be viewed . . . as a call to arms for *other* abortion protesters to harm plaintiffs," the *Brandenburg* test applied—and did not allow a conviction here.[53]

Professor Karst, after examining the facts of the *Planned Parenthood* case in great detail,[54] concluded that the majority's finding that the communications at issue added up to a true threat was correct because the meanings thereof "were informed by a multitude of previous acts by the defendants and persons closely associated with them."[55] He added:

> Applause for the killing of "abortionists" is, of course, protected advocacy, just as the defendants' posters, considered literally, would be protected advocacy if they were published by some persons who had no knowledge of the previous posters, no history of threatening behavior, and no connection with practitioners of violence.
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> . . . .
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> The evidence here seems to me to be clear and convincing. The defendants' behavior demonstrates beyond any serious doubt that . . . the doctors named in the posters quite reasonably understood them as threats of

[52] *Id.* at 1090-92 (Kozinski, J., dissenting).

[53] *Id.*

[54] Karst, *supra* note 19, at 1377-84, 1395-1402.

[55] *Id.* at 1392.

> violence to be carried out by the people who issued the posters or by people in concert with them . . . .[56]

An unprotected true threat, Professor Karst helpfully affirmed, "must threaten harm to be inflicted by the speaker or his or her confederates."[57] On that view of the facts of the *Planned Parenthood* case, the result is considerably less troubling. (But Professor Karst made the case for this conclusion more effectively, in my opinion, than did Judge Rymer.)[58]

C. WHITE I

Compare the reaction of the Court of Appeals for the Fourth Circuit, in *United States v. White* (*White I*), to William White's posted online comments regarding Richard Warman, a Canadian civil rights lawyer, "repeatedly calling for his assassination and posting his home address."[59] More pertinent facts are these:

> There were two communications that followed in 2008 . . . which did form the basis for Count 6.
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> In the first . . . White posted on . . . a white supremacist website...an article describing the firebombing of a Canadian civil rights activist's house by a neo-Nazi group and wrote underneath the link, "Good. Now someone do it to Warman." In the second, . . . White posted an entry on his own website entitled "Kill Richard Warman, man behind human rights tribunal's abuses should be executed." The post began: Richard Warman . . . should be drug [sic] out into the street and shot, after appropriate trial by a revolutionary tribunal of Canada's white activists. It won't be hard to do, he can be found easily at his home, at [Warman's home address]. The post described Warman's use of Canada's hate speech laws against white supremacists and . . . closed with an "irreconcilable fact: Richard Warman is an enemy, not just of the white race, but of all humanity, and he must be killed. Find him at home and let him know you agree: [Warman's home address]."[60]

For these and other communications, White was convicted by a jury for violations of 18 U.S.C § 875(c), which makes criminal the interstate transmission of threats of

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[56] *Id.* at 1392, 1402.

[57] *Id.* at 1405.

[58] The *Planned Parenthood* decision is effectively critiqued in Gey, *supra* note 12, at 1337-45.

[59] 670 F.3d 498, 505 (4th Cir. 2012).

[60] *Id.* at 505-06.

harm.[61] But, with regard to the count based on White's statements about Richard Warman, the District Court granted White's motion for a judgment of acquittal, and the appellate court affirmed.[62] Here is Judge Niemeyer's explanation:

> These communications clearly called for someone to kill Richard Warman. But neither communication actually provided a threat from White that expressed an intent to kill Warman. . . . [F]or White to have called on others to kill Warman when the others were not even part of White's organization, amounted more to political hyperbole . . . than to a true threat. Moreover, the two communications . . . were posted to neo-Nazi websites and not sent directly to Warman.
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> . . . While the government is correct in noting that neither direct communication nor personal or group involvement in the threat is an essential component to finding a true threat, the lack of both, along with the fact that White's language was clearly directed to others in the form of advocacy, makes it impossible for us to conclude that a reasonable recipient would understand White's communications to be *serious expressions of intent to commit harm*.
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> . . . [E]ven taking into account the context created by these earlier communications, we cannot conclude that a reasonable recipient would believe that White's two communications advocating violence to Warman expressed an intent to harm Warman. The principal message expressed in White's communications was that *someone else* should kill Warman.
>
> While the two communications for which White was indicted . . . may have undoubtedly frightened Warman, those communications at most conveyed a *serious desire* that Warman be harmed by others but did not convey a *serious expression of intent* to do harm from the perspective of a reasonable recipient.[63]

This court got the legal analysis right—but, for reasons to be set forth shortly, arrived at an undesirable result. (Interestingly, the Court did not engage in a *Brandenburg* analysis of White's advocacy, almost certainly because he was prosecuted only under a "threat" statute.)

[61] *Id.* at 501.

[62] *Id.*

[63] *Id.* at 513-14.

D. BAGDASARIAN

To the same effect is *United States v. Bagdasarian*,[64] reversing a conviction under the federal statute making it a crime to "knowingly . . . threaten[] to kill . . . a major candidate for the office of President" of the United States[65]—in this case, Senator Barack Obama, in 2008. The following paragraph from Judge Reinhardt's majority opinion, reprinting the essence of the defendant's online postings, perfectly sums up the court's decision:

> [T]he prediction that Obama "will have a 50 cal in the head soon" is not a threat on its face because it does not convey the notion that Bagdasarian himself had plans to fulfill the prediction that Obama would be killed, either now or in the future. Neither does the "shoot the nig" statement reflect the defendant's intent to threaten that he himself will kill or injure Obama. Rather, "shoot the nig" expresses the imperative that some unknown third party should take violent action. The statement makes no reference to Bagdasarian himself and so, like the first statement, cannot reasonably be taken to express his intent to shoot Obama.[66]

Judge Wardlaw, dissenting in part, contended that, "[i]n the wake of [recent] experience, it is only logical to conclude that on-line postings of impending violence would be perceived by reasonable people as serious threats."[67]

E. WHITE II

"Threatening" speech (in the colloquial sense of the term) may also lead to a conviction on a charge of criminal solicitation, as is revealed by yet another prosecution involving William White (*White II*).[68] Here, from the Seventh Circuit's *per curiam* opinion upholding that conviction, are the facts:

> William White was charged with soliciting the commission of a violent federal crime against a juror in violation of 18 U.S.C. § 373. The alleged solicitations at issue were messages that White posted to a website that he created to advance white supremacy, which included White's 2005

[64] 652 F.3d 1113 (9th Cir. 2011).

[65] 18 U.S.C. § 879(a)(3) (2011).

[66] *Bagdasarian*, 652 F.3d at 1122. The court understood governing law as requiring the application of both an objective and a subjective determination of whether a true threat had been uttered, and, accordingly, also concluded that no reasonable person would have interpreted the defendant's statements as threats. *Id.* at 1116-19.

[67] *Id.* at 1127 (Wardlaw, J., concurring in part and dissenting in part).

[68] United States v. White, 698 F.3d 1005 (7th Cir. 2012) (per curiam).

> statement that "[e]veryone associated with the Matt Hale trial has deserved assassination for a long time," and his 2008 publication of information related to the foreperson, "Juror A," of the jury that convicted Hale. The 2008 post disclosed Juror A's home address and . . . phone numbers, though it did not contain an explicit request for Juror A to be harmed.[69]

The District Court had earlier granted White's motion to dismiss the indictment, on First Amendment grounds,[70] but that ruling was reversed, *per curiam*, by the same Seventh Circuit panel that ultimately affirmed White's conviction.[71] While that reversal was defensible, First Amendment concerns were arguably given short shrift in the panel's opinion, which rested largely on such unilluminating statements as "[s]peech integral to criminal conduct, such as fighting words, threats, and solicitations, remain categorically outside its protection," and "[t]his type of speech 'brigaded with action' becomes an overt act or conduct that can be regulated."[72]

Following conviction by a jury, Judge Adelman granted White's motion for a judgment of acquittal, finding (1) an absence of sufficient evidence to support a conviction for solicitation, and (2) that White's speech was protected by the First Amendment.[73] The latter conclusion clearly rested on Judge Adelman's belief that *Brandenburg* provided the controlling test. Her key pronouncements on that point were these:

> Knowledge or belief that one's speech, even speech advocating law breaking, might cause others to act does not remove the speech from the protection of the First Amendment, unless the speech is directed to inciting imminent lawless action and is likely to produce such action. *See Brandenburg* . . . . And this highly protective standard applies to the type of speech at issue here—internet communications disclosing personal information about others—even when that speech may tend to alarm or intimidate the persons so identified or expose them to unwanted attention from others.[74]

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[69] *Id.* at 1008; More factual details are stated at 1008-10.

[70] United States v. White, 638 F. Supp. 2d 935 (N.D. Ill. 2009), *rev'd and remanded per curiam*, 610 F.3d 956 (7th Cir. 2010).

[71] United States v. White, 610 F.3d 956 (7th Cir. 2010).

[72] *Id.* at 960.

[73] United States v. White, 779 F. Supp. 2d 775, 778 (N.D. Ill. 2011), *rev'd per curiam*, 698 F.3d 1005 (7th Cir. 2012).

[74] *Id.* at 803 (citations omitted).

Applying those standards, Judge Adelman found White's speech protected, because they were not directed to producing imminent lawless action. First Amendment protection was not lost, she wrote, by virtue of the fact that "the posts may have singled [Juror A] out for the attention of unrelated, potentially violent third parties."[75] She added, however, that she did "not 'intend to minimize the real fear of harm and intimidation'" that a juror might experience under these circumstances.[76]

The Court of Appeals reversed, never explaining why *Brandenburg* did not govern. Instead, the panel again offered the flat declaration that "criminal solicitations are simply not protected by the First Amendment," supporting that conclusion only with out-of-context quotations from two inapposite Supreme Court cases.[77] More enlightening reasoning was presented in this paragraph:

> Though the government did not present a specific "solicitee," it was unnecessary to do so given the very nature of the solicitation—an electronic broadcast which, a reasonable jury could conclude, was specifically designed to reach as many white supremacist readers as possible so that *someone* could kill or harm Juror A. 18 U.S.C § 373 requires proof of intent "that another person" commit the felony, and White's desire for *any* reader to respond to his call satisfies this requirement.[78]

The court also noted that readers of White's website "were not casual Web browsers, but extremists molded into a community by the internet—loyal and avid readers who . . . knew that Overthrow.com identified hateful enemies who should be assassinated."[79]

But how did White's statements not fall under the heading of *advocacy*, thereby calling for *some* consideration of the *Brandenburg* test—even if only to explain why that test should not apply to such speech?[80] And why did the court perceive no facial overbreadth problem,[81] per *Brandenburg*, with the pertinent federal statute, which makes it a crime, *inter alia*, to intentionally "endeavor[] to persuade" another person to commit a felony involving the use of force or the threat thereof?[82] Would that statutory

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[75] *Id.* at 804.

[76] *Id.*

[77] *White*, 698 F.3d at 1016 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942); United States v. Williams, 553 U.S. 285, 297 (2008)).

[78] *Id.*

[79] *Id.* at 1015.

[80] *See, e.g.*, the narrowing interpretation of *Brandenburg* set forth in *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 263-65 (4th Cir. 1997), discussed in detail in Rohr, *supra* note 11, at 41-46.

[81] *See generally* Broadrick v. Oklahoma, 413 U.S. 601 (1973).

[82] 18 U.S.C. § 373(a) (2010).

ban not encompass, to a substantial degree, supposedly protected advocacy of non-imminent crime?[83]

F. WHEELER

The dichotomy between threat and advocacy arose again, and was addressed by the court directly, in *United States v. Wheeler*,[84] in which the Court of Appeals for the Tenth Circuit found the following evidence sufficient to support Wheeler's conviction for transmitting a threat in commerce:

> Mr. Wheeler . . . posted a statement to his Facebook page urging his "religious followers" to "kill cops. . . . hunt them down and kill their entire bloodlines" and provided names. Four days later . . . Mr. Wheeler posted again . . . "to my religious followers and religious operatives. if my dui charges are not dropped, commit a massacre in the stepping stones preschool and day care, just walk in and kill everybody."[85]

Wheeler "urge[d] th[e] court to adopt a bright-line rule: exhortations to unspecified others to commit violence cannot amount to true threats,"[86] but Judge Kelly, for the court, rejected that argument, emphasizing the reasonable-listener standard for determining the existence of a threat, "[e]specially where, as here, a reasonable person might believe the individuals ordered to take action are subject to the will of the threatening party."[87] Wheeler protested that he didn't really have any "religious followers," but, Judge Kelly replied, "the appropriate inquiry is not whether Mr. Wheeler in fact had religious followers, or whether he believed he had religious followers, but whether a reasonable recipient of the threat could have so thought."[88] It might therefore be concluded that Wheeler foolishly brought his speech into the realm of true threats by creating the impression that he had followers ready to do his bidding; that would render the characterization of his exhortations as "threats" more palatable.

But, Judge Kelly offered this provocative passage as well:

> Mr. Wheeler contends that interpreting true threats to include such exhortations would "effectively abolish the constitutional distinction

[83] The *Brandenburg* decision itself was, of course, based on the conclusion that the Ohio statute that Brandenburg was convicted of violating was facially overbroad, in that it allowed the suppression of speech that did not satisfy the *Brandenburg* test. Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969).

[84] 776 F.3d 736 (10th Cir. 2015).

[85] *Id.* at 738.

[86] *Id.* at 744.

[87] *Id.*

[88] *Id.* at 746.

> between threats and incitement to violence." . . . Mr. Wheeler argues that treating his statements as true threats creates an end-run around the stringent *Brandenburg* requirements and permits incitement to be charged under the more lenient threat standard. But the line between threats and incitement, especially in cyberspace, is not as clear as Mr. Wheeler contends, and no court has suggested that the categories of unprotected speech are completely distinct from one another.[89]

But why is the line between these two forms of speech not a bright one? Judge Kelly's explanation is, I contend, doctrinally unpersuasive, yet significant:

> Speech such as Mr. Wheeler's may at first blush appear to be closer to incitement, but fits squarely within the rationale for excluding true threats from First Amendment protection. Prohibiting true threats "protect[s] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." Exhorting groups of followers to kill specific individuals can produce fear in a recipient no less than more traditional forms of threats. Allowing defendants to seek refuge in the First Amendment simply by phrasing threats as exhortations would, as the *Turner* court observed, leave the state "powerless against the ingenuity of threateners." We cannot endorse so wooden an interpretation of the term "threat."[90]

IV. EVALUATING THE CASE LAW

I submit that the present state of confusion in First Amendment law, blurring the distinction between protected advocacy and unprotected threats, is intolerable.[91] As Professor Karst agrees, "[a] threat is, by definition, a statement that expresses the speaker's intention to harm the target."[92] I therefore agree with those judges who

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[89] *Id.* at 744-45. In a footnote, Judge Kelly set forth some reasons for believing that "threats or incitement" are likely to engender more fear when uttered online. *See id.* at 745 n.4.

[90] *Wheeler*, 776 F.3d at 745 (citations omitted).

[91] Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L. Q. 339, 339 (2011) ("[M]uch of the protection offered by Brandenburg can easily be swallowed up by the true threat doctrine . . . . The current jurisprudence is hopelessly confused . . . ."). In the words of Professor Gey, "The line between absolute constitutional protection and none at all is very hazy." Gey, *supra* note 12, at 1325. The problem is compounded by the prevailing practice in the federal courts of allowing juries to make the ultimate determination of whether speech amounts to a true threat, without "independent [appellate] review." *See Wheeler*, 776 F.3d at 742.

[92] Karst, *supra* note 19, at 1355-56.

perceived no utterance of threats in the *Turner*,[93] *White*,[94] and *Bagdasarian*[95] cases, as well as Judge Adelman's treatment of White's "solicitation" as advocacy.[96]

But why should the kind of advocacy reflected in those cases—*e.g.*, that judges "deserve to be killed,"[97] "[k]ill Richard Warman,"[98] "shoot the nig,"[99] that a juror "deserved assassination,"[100] and "commit a massacre in the stepping stones preschool"[101]—receive First Amendment protection?

True threats are deemed to have no value worthy of protection. The same has been said with regard to solicitation, at least when it is "nonideological" in nature,[102] but the Supreme Court has not had occasion to address the point. The important question, then, is whether advocacy of crime, even when the advocated crime is neither imminent nor likely to occur, always deserves First Amendment protection.

In her dissenting opinion in the *Planned Parenthood* case, Judge Berzon addressed the distinction between advocacy and threats, saying this:

> One can . . . justify a somewhat different standard for judging the constitutionality of a restriction upon threats than for a restriction upon inducement of violence or other illegal action. There is a difference for speech-protective purposes between a statement that one oneself intends to do something and a statement encouraging or advocating that someone else do it. The latter will result in harmful action only if someone else is persuaded by the advocacy. If there is adequate time for that person to reflect, any harm will be due to another's considered act. The speech itself, in that circumstance, does not create the injury, although it may make it more likely.[103]

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[93] *See supra* text accompanying notes 27-41.

[94] *See supra* text accompanying notes 68-71.

[95] *See supra* text accompanying notes 64-67.

[96] *See supra* text accompanying notes 73-79.

[97] United States v. Turner, 720 F.3d 411, 414 (2d Cir. 2013).

[98] United States v. White, 670 F.3d 498, 505 (4th Cir. 2012).

[99] United States v. Bagdasarian, 652 F.3d 1113, 1122 (9th Cir. 2011).

[100] United States v. White, 698 F.3d 1005, 1008 (7th Cir. 2012) (per curiam).

[101] United States v. Wheeler, 776 F.3d 736, 738 (10th Cir. 2015).

[102] *See*, *e.g.*, District of Columbia v. Garcia, 335 A.2d 217, 224 (D.C. 1975). Professor Greenawalt has argued for *Brandenburg*-like protection for "public ideological encouragement" of crime. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 266-69 (1989).

[103] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1106 (9th Cir. 2002) (Berzon, J., dissenting).

But, as Judge Kelly recognized in *Wheeler*,[104] the fear and disruption typically experienced by the target of a threat (especially a death threat)—so well described by Professor Karst[105]—can be experienced as well by the object of advocacy that he should be harmed (especially advocacy that he be killed) by someone other than the speaker.[106] Thus, there is not enough difference, in terms of Judge X's reasonable reactions, between "I'm going to kill Judge X" and "someone should kill Judge X," to justify different treatment under the First Amendment.

Does advocacy of crime nonetheless deserve protection because it somehow has greater value? What value does it have?

Writing about the *Brandenburg* test more than a dozen years ago, I canvassed the responses of several commentators to those questions,[107] including what I called the "safety valve" rationale for protecting such advocacy,[108] the "visibility of danger" rationale,[109] and the personal autonomy rationale.[110] I quoted Professor Greenawalt's assertion that "[s]peech about what persons are morally justified in doing is an important branch of expression. Among important moral choices is decision when it is acceptable to disobey the law or to engage in revolutionary activity."[111] It seemed, therefore, that a sufficient basis exists for extending presumptive First Amendment protection to advocacy of crime, generally.[112] But does a narrower inquiry—whether

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[104] *See supra* text accompanying note 90.

[105] Karst, *supra* note 19, at 1341-45.

[106] "Juror A" and Richard Warman, who were targeted, respectively, in the *White I* and *White II* cases, testified that they experienced fear as a result of the defendants' statements. United States v. White, 698 F.3d 1005, 1011 (7th Cir. 2012) (per curiam); United States v. White, 670 F.3d 498, 506 (4th Cir. 2012). *See also supra* text accompanying note 45.

[107] Rohr, *supra* note 11, at 75-78.

[108] "If people were not allowed to . . . discuss their beliefs that the current laws of society should be disregarded, their dissatisfaction would increase and would be further exacerbated by suppression." MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 82 (1984). *See also* FRANKLYN S. HAIMAN, "SPEECH ACTS" AND THE FIRST AMENDMENT 7 (1993).

[109] "[B]y insulating such speech from governmental sanctions, Brandenburg makes it more likely that the speech will be uttered openly, making it easier to identify and monitor those who are contemplating unlawful behavior." Daniel T. Kobil, *Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 238 (2000).

[110] REDISH, *supra* note 108, at 84 (speaking of "the value inherent in allowing individuals to think and discuss freely."). *See generally* Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

[111] GREENAWALT, *supra* note 102, at 234.

[112] *See also* Healy, *supra* note 12, at 682-89.

advocacy of the murder of a specific person has sufficient value to warrant First Amendment protection—yield the same answer?[113]

V. GETTING THE RIGHT RESULTS: A PROPOSAL

Even on the supposition that advocacy of crime was presumptively entitled to First Amendment protection, I "tentatively" suggested, in my earlier article, this modification of the *Brandenburg* test:

> [I]t might be concluded that *Brandenburg* should be interpreted to mean that advocacy of criminal activity cannot be punished, when it pertains to a matter of public concern, unless the speaker intentionally and explicitly urges the commission of a specific crime, either (a) imminently, under circumstances such that it is likely that a listener will imminently attempt to commit the crime, or (b) *directed against a specific, identifiable victim*.[114]

My suggestion was based on my contention that the danger created by advocacy of harm to a specific individual outweighs the value of the advocacy. It was already clear, moreover, that courts often displayed a reluctance to apply *Brandenburg* literally to every instance of advocacy of crime,[115] so explicitly making *Brandenburg* less speech-protective would, to some extent, be to simply acknowledge that reality. Moreover, it is one thing to say, "Let those communists advocate revolution," and quite another to say, "Let those activists advocate the murder of physicians."

Professor Healy has thoughtfully made the case that the *Brandenburg* test can be seen as being in harmony with the later-developed approach[116] of applying strict scrutiny to content-based regulation of speech:

> The governmental interest threatened by criminal advocacy is compliance with the law: if criminal advocacy is successful, it will lead to crime. Does government have a compelling interest in preventing crime? With the exception of all but the most minor crimes, the answer is certainly yes. . . . Therefore, when criminal advocacy is *likely* to lead to crime, the government has a compelling interest in prohibiting it. But when criminal

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[113] Discussions of the value of advocacy of crime have frequently—and unsurprisingly, given the cases of the postwar years in the last century—focused on advocacy of subversive activity directed at government. *See generally* Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 106-09 (1991), and the commentators cited therein.

[114] Rohr, *supra* note 11, at 83 (emphasis added).

[115] *See id.* at 25-29, 32-39.

[116] *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011). This mode of analysis essentially emerged in *Police Dept. of Chi. v. Mosley*, 408 U.S. 92 (1972).

> advocacy is *un*likely to lead to crime, it cannot be prohibited because such advocacy, by definition, does not implicate the government's compelling interest in preventing crime.[117]

I agree with all but the last sentence of that passage. In accordance with my earlier suggestion, I would go further than Professor Healy, and argue that government has sufficient justification for preventing advocacy of physical harm to specific, named individuals, even in the absence of imminence or likelihood of occurrence. The compelling interest in such instances, as with true threats, is the prevention of the fear and/or disruption that such advocacy is likely to produce—at least in those cases in which the target becomes aware of the threat. But, even in the absence of such awareness, advocacy of murder adds nothing of value to any accompanying expression of social or political grievances. The more straightforward approach, therefore, is simply to declare such statements as totally lacking in value worthy of First Amendment protection. Modifying the *Brandenburg* test to reflect this reality would eliminate the perceived need to characterize statements like those in *White I* (notably including "[k]ill Richard Warman") as threats, and would render moot the judicial debates presently generated by such fact patterns.

But what about cases, like *Turner* and *White II* (and, it might be argued, *Planned Parenthood*), in which the speaker goes no further, semantically, than stating that a specific person or persons "deserve to be" killed? (In each of those cases, of course, the speaker added factual information that would enable an assailant to locate the target of the speech, thereby increasing the danger to him—and his fear.) Can such a statement (with or without the accompanying "location" information) plausibly be viewed as a species of advocacy of crime? While the question is a close one, I think the answer is "yes"—and I think that such a statement falls much more comfortably within the category of "advocacy" than within the category of "threats."

But should every such statement be punishable? What about this hypothetical: "George W. Bush deserves to be assassinated, based on what he did in Iraq?" I would condition the treatment of such a statement on a determination of the speaker's intent; if it were found that the speaker was not merely opining about what the object of his speech "deserves," but that the speaker truly intended to inspire a third party to take action, then I would treat his statement as unprotected advocacy of crime. A speaker who adds "and here's where you can find [the target]" is providing persuasive evidence of that intent. (Of course, any such words that appear to so advocate, like any words that appear to threaten, can be shown to be an exercise of non-serious "hyperbole," as in *Watts v. United States*.)[118]

Beyond the discrete proposal just put forth, I feel obliged to go even further, and ask this question: should murderous advocacy that does not name (and cannot reasonably be understood as identifying) specific individuals be stripped of First Amendment protection as well? The *Planned Parenthood* case provides the perfect

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[117] Healy, *supra* note 12, at 704-05.

[118] 394 U.S. 705, 708 (1969).

example: the bumper sticker exhorting readers to "Execute Murderers/Abortionists."[119] *Wheeler* ("kill cops")[120] provides another example. Musing about this possibility, some years ago, I wrote this:

> The strength of the government's interest in suppressing advocacy of crime may . . . vary according to the nature of the speaker's words in a given case. Mere "abstract" advocacy of the desirability of lawlessness (*e.g.*, "America would be a better place if all abortionists were shot"), which virtually every court would likely recognize as protected, would appear to pose less of a threat to the public order than general advocacy of the commission of a specific crime, without identifying a specific victim (*e.g.*, "I urge each of you here tonight to shoot an abortionist"), which in turn would appear to pose a smaller threat than advocacy of a specific crime directed against a specific victim (*e.g.*, "Shoot Dr. X!").[121]

While I am less certain of this than I am with regard to my proposal regarding specific named targets, I would be inclined to expand my proposed modification of *Brandenburg* to encompass advocacy of harm directed against groups of unnamed but identifiable persons. Even a statement of that kind—*e.g.*, "Execute abortionists!"—may strike fear in the heart of any abortion-performing physician who becomes aware of it, and arguably lacks value worthy of protection.[122]

VI. CONCLUSION

In this era of increasingly frequent incidents of ideologically-inspired acts of terrorism, heightened political polarization and animosity, and seemingly non-stop outbreaks of senseless shootings—all within a world of ubiquitous online communications and easy access to firearms—we no longer have the luxury of tolerating

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[119] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998).

[120] *See supra* text accompanying note 85.

[121] Rohr, *supra* note 11, at 80.

[122] Professor Gey disagreed, arguing that:

> The limitation of the "true threats" concept to speech that is personalized is necessary to avoid denying constitutional protection to speakers engaged in controversial political speech about controversial topics. In disputes over the most contentious issues . . . speakers will often resort to the language of threats and intimidation to communicate the depth of the speaker's feelings about the topic of discussion."

Gey, *supra* note 12, at 1348. He further suggested that "listeners do not respond with the same kind of fear to threats that do not single them out as targets of specific concern." *Id.* at 1349. I deem both those assertions highly questionable.

speech that calls for murder and assassination. Professor Gey asserted, accurately, that an "essential component of the Brandenburg paradigm is the assumption that society must adopt a high level of tolerance for risk stemming from speech."[123] But how high need that level of tolerance be? Threats *and* advocacy of murder (along with solicitation to murder) are dangerous, despicable, and "threatening." As more than one judge has recognized, both forms of speech create fear and emotional distress in the minds of their targets. But the proper judicial response to this confluence of legitimate concerns is not to *sometimes* pin the label of "threat" on exhortations more sensibly understood as advocacy. Instead, First Amendment doctrine should be expressly modified to make clear that targeted advocacy of homicide, like a true threat, receives no protection.

[123] *Id.* at 1371. *See also* Frederick Schauer, *Is it Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301, 305 (2009):

> [T]he First Amendment tradition demands that the risk of speech-caused negative consequences be borne by the entire citizenry, rather than being imposed on the speaker. It is dangerous to free speech values, it is said and so the doctrine says, to prefer being safe to being sorry; thus the doctrine commands that here, unlike elsewhere, it is better to be sorry than safe.