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MENACING SPEECH AND THE FIRST AMENDMENT: A FUNCTIONAL APPROACH TO INCITEMENT THAT THREATENS

John Rothchild*

Constitutional rules of protection cannot be based on purely formal distinctions among modes of utterance that are inattentive to the way the communications actually function . . . 1

I. Introduction

The two-level approach2 to evaluating restrictions on speech for consistency with the First Amendment depends crucially on whether the speech is characterized as belonging to a category of constitutionally disfavored speech. Since courts rarely uphold content-based restrictions on speech that receives undiluted First Amendment protection, but usually do approve such restrictions on constitutionally disfavored speech, the determination whether a particular statement fits into one of the disfavored categories is generally outcome determinative.

But some speech is resistant to categorization using this approach. One difficulty arises when a statement is expressed in the form associated with one category of speech, but functions like speech belonging to another category. This article addresses one variety of such cross-category speech, namely advocacy of illegal action that functions as a threat. Its principal argument is that certain types of advocacy speech should be analyzed according to the criteria that are normally applicable to threats, with the result that some speech that is currently considered protected would be found unprotected. Because this new rule is more likely to have practical conse-

* Victor Kramer Fellow, University of Chicago Law School. I received helpful comments on an earlier version of this article from Dan Burk, Joan Hartman, Doug Lichtman, Geoffrey Stone, and David Strauss.


quences when applied to speech communicated via the Internet than when applied to speech communicated through the older media, the proposal may be viewed as an example of a disparate-impact approach to fashioning new rules to govern online speech.

II. First Amendment Status of Harmful Speech

Consider the following hypothetical situation. Larry, a dedicated animal rights activist, believes that killing animals is wrong. Larry sets up a Web site, on which he displays the slogans "Carnivorism is murder," "Shut down the death camps," and "Animals are people too." The Web site also states: "Stand up for the rights of defenseless animals! Shoot all CEOs of meat-packing companies." Larry's Web site expresses the view that those killings would be justifiable homicide, not murder, since they would prevent the deaths of countless animals. The Web site also includes a list of several dozen meat-packing CEOs, including their pictures, their home and work addresses, a description of their cars, and information about members of their family. Several of the CEOs listed on Larry's Web site have been killed or wounded by animal rights vigilantes. May the government compel Larry to take down the Web site, or penalize him for the speech it contains, without infringing Larry's First Amendment rights?

In general, the First Amendment prohibits the government from imposing content-based restrictions on speech, absent a compelling government interest that cannot be promoted through any less restrictive alternative; 3 this is referred to as the "strict scrutiny" test. Certain categories of speech, however, due to their "low value" 4 and propensity to bring about serious harms, are treated differently. Some types of speech, such as obscenity, 5 child pornography, 6 fighting words, 7 false advertising, 8 speech proposing an illegal transaction, 9 and perjury, 10 are deemed outside the

3. See Sable Communications v. FCC, 492 U.S. 115, 126 (1989) ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.").


10. See United States v. Masters, 484 F.2d 1251, 1254 (10th Cir. 1973).
protections of the First Amendment. The government may restrict or ban those types of speech without raising constitutional issues.  

Restrictions on other categories of speech, such as defamation and commercial speech, are not excluded from First Amendment review, but strict scrutiny is not applied. Thus, a restriction on commercial speech is valid if there is a reasonable "fit" between the restriction and the furtherance of a substantial government interest, and whether a speaker may be held liable for a defamatory statement depends on such factors as the speaker's state of mind and the plaintiff's status.

As to speech falling within all of these categories, the Supreme Court engages in "definitional balancing" rather than the "ad hoc balancing" that strict scrutiny demands.  Definitional, or categorical, balancing involves designating a particular category of speech, based on either the subject matter of the speech or the setting in which it occurs, for special treatment: restrictions on speech falling into such a category are evaluated through a standard other than strict scrutiny. This categorical approach usually results in reduced protection for speech. Thus, in deciding to apply definitional balancing to child pornography, the Court noted:

[I]t is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if

11. The First Amendment may, however, forbid restrictions based on the viewpoint that speech promotes or the subject matter that it addresses, even as to speech falling within these low-value categories. See R.A.V. v. City of St. Paul, 505 U.S. 377, 384 (1992).

12. See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Defamatory speech is itself divided into sub-categories for First Amendment purposes. Defamation directed at public figures may be restricted only on a showing that the speaker acted with "actual malice," while defamation of a person who is not a public figure may be penalized as long as the speaker is at least negligent. See also Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).


15. See Sullivan, 376 U.S. at 287.


any, at stake, that no process of case-by-case adjudication is required.\footnote{19}

Two additional categories of speech that are subject to definitional balancing are most relevant in the present context: advocacy of illegal action, and threats of violence.

A. Advocacy of Illegal Action

The current First Amendment analysis of advocacy of illegal action derives from cases challenging convictions under the Espionage Act of 1917,\footnote{20} which outlawed a broad range of activities deemed to interfere with the war effort. In \textit{Schenck v. United States},\footnote{21} the Court first set forth the "clear and present danger" test, which allows the government to restrict speech if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."\footnote{22} Subsequent cases under the Espionage Act, as well as prosecutions brought under the Smith Act,\footnote{23} a law making it illegal to advocate overthrow of the government, modified the "clear and present danger" test in several stages.\footnote{24}

In \textit{Brandenburg v. Ohio},\footnote{25} the Court reformulated the "clear and present danger" test into its present form. In \textit{Brandenburg}, a Ku Klux Klan leader challenged his conviction under the Ohio Criminal Syndicalism Act for making the statement, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."\footnote{26} Reversing the conviction, the Court held that "the 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."\footnote{27} \textit{Brandenburg} thus holds that the First Amendment allows the government to prohibit advocacy of illegal conduct if (1) it is "directed to" inciting others to engage in illegal conduct "imminently," and (2) it is likely to bring about

22. \textit{Id.} at 52.
23. 54 Stat. 671.
26. \textit{Id.} at 446.
27. \textit{Id.} at 447.}
such conduct "imminently." The "directed to" language imports an intent requirement: the speaker must intend to bring about the unlawful conduct.\textsuperscript{28} The "imminence" requirement receives a temporal interpretation. That is, to satisfy the "imminence" requirement, harm must be likely to result immediately after the incitement.\textsuperscript{29}

Several considerations underlie Brandenburg's imminence requirement. First, this limitation on the government's power to suppress speech is in keeping with the "marketplace of ideas" principle that counterspeech is preferable to censorship.\textsuperscript{30} If speech is not likely to result in unlawful conduct right away—in other words, if there is time for counterspeech—then there is no basis for restricting the speaker's freedom to voice his views. Second, the imminence criterion responds to a suspicion that the government may seek to suppress speech for improper reasons.\textsuperscript{31} It is "an attempt to ensure that the danger is in fact not speculative and that the government's interest in preventing the violence is not pretextual."\textsuperscript{32}

\begin{footnotesize}
\begin{enumerate}
\item See Bernard Schwartz, Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?, 1994 SUP. CT. REV. 209, 240. It has been argued that in some circumstances a probabilistic interpretation—under which the imminence criterion would be satisfied if the unlawful action is likely to occur, even if it will not occur right away—would be more sensible. See Redish, supra note 28, at 1180-81 ("[W]hat of the individual who urges another, 'when your husband returns from Europe on the 11th of next month, you should kill him.'?"); Crump, supra note 17, at 59-61.
\item See Dennis v. United States, 341 U.S. 494, 503 (1951) ("[S]peech can rebut speech, propaganda will answer propaganda . . . ."); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."); Holly Coates Keehn, Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses, 28 SETON HALL L. REV. 1230, 1251-52 (1998). When the speech is communicated publicly, advocacy of future illegal conduct may give authorities an opportunity to prevent the action from occurring. See Kent Greenawalt, Speech and Crime, 1980 AM. BAR FNDTN. RES. J. 647, 758-59. For a criticism of the consequentialist justification of the "more speech" principle, and an autonomy-based justification, see David A. Strauss, Persuasion, Autonomy, and Freedom of Expression, 91 COLUM. L. REV. 334 (1991).
\end{enumerate}
\end{footnotesize}
B. Threats of Violence

Another category of speech that the First Amendment does not protect consists of threats of violence. Various federal and state statutes make the issuance of a threat a basis for civil liability or criminal prosecution. The most general federal statute dealing with threats makes it a crime, punishable by fine or imprisonment, to transmit in commerce "any communication containing . . . any threat to injure the person of another."33 Other federal statutes are more specific—prohibiting, for example, threats of force or violence against the president or vice president;34 judges and other federal officials;35 IRS employees;36 providers of abortion services;37 and jurors.38 In addition, most states have laws that declare the making of threats to be a criminal offense.39

The modern First Amendment analysis of threats derives from Watts v. United States.40 The defendant in that case was convicted under a federal statute that prohibits threatening the president.41 The defendant's conviction was predicated upon the following statement:

"They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." "They are not going to make me kill my black brothers."42

The defendant made the statement at a rally on the Washington Monument grounds, early in the United States' military involvement in Vietnam, in response to a statement by somebody else at the rally that young people should get more education before expressing their views about the war.

Reversing the decision of a split panel of the Court of Appeals,43 the Supreme Court held that the defendant's speech could not serve as the basis for his conviction. The opinion provides remarkably little guidance. It says only that the constitutional free speech principle requires us to inter-

39. See Keehn, supra note 30, at 1249.
42. Watts, 394 U.S. at 706 (quoting an army investigator's testimony of defendant's statements).
pret the term "threat" in the anti-threat statute as being limited to threats that are "true," and that the speech for which the defendant was convicted is political hyperbole that does not meet this threshold. The Court in Watts offers no further criteria by which to determine whether a threat is "true," and thus unprotected, nor has it since.44 Further development of the First Amendment law pertaining to threats has therefore been left to the lower courts.

There is no canonical statement of the criteria for determining whether a statement is a "true threat" for First Amendment purposes; various courts of appeals have formulated the test in various ways. But the formulations, with one exception,45 are mostly similar, and contain the following elements:

**Intentional speech.** First, the speaker must have made the statement intentionally, but specific intent is not required. That is, the speaker must have intended to make the statement, but it is not necessary that she actually intended to carry out the threatened action,46 or even that she had the capability to do so.47

**Expression of intent to harm.** Second, the statement must express an intention to inflict harm upon another.48 In one typical formulation, the test is "whether a reasonable person would foresee that the statement

44. In R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992), the Court enumerated, in passing, "the reasons why threats of violence are outside the First Amendment," namely: "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." The Court offered no further elaboration of the test for unprotected threats.

45. The Second Circuit applies a more stringent test: "So 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." United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976).

46. See United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991) ("[I]t is the making of the threat that is prohibited without regard to the maker's subjective intention to carry out the threat."); United States v. Hoffman, 806 F.2d 703, 707 (7th Cir. 1986) ("[T]he government is not required to establish that the defendant actually intended to carry out the threat.").

47. See United States v. Hoffman, 806 F.2d 703, 708 (7th Cir. 1986) ("[C]orroborating evidence that the defendant had the ability to carry out the threat is not a requirement to establish a 'true threat' . . . ."); United States v. Orozco-Santillan, 903 F.2d 1262, 1265-66 n.3 (9th Cir. 1990) (intent requirement does not include "that [speaker] was able to carry out his threat").

48. Under the statutes cited above, only threats to inflict bodily harm are actionable. But the First Amendment leaves unprotected a broader range of threats, such as a threat to reveal information that harms the victim—blackmail. See Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 244 (4th Cir. 1997) (referencing blackmail along with other forms of "speech brigaded with action").
would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.\textsuperscript{49} Whose intention must be expressed: must it be the speaker's own intention, or may it be some third party's intention? The caselaw takes it for granted that it must be the speaker's own intention.\textsuperscript{50} Indeed, as the test is formulated by the courts of appeals, there seems no alternative—the speaker must be expressing her own intention, as it is linguistically, logically, and psychologically impossible to express somebody else's intention. It is possible for a group of people to express their collective intention—"We've talked it over, and have decided that we're going to do $x$"—but that is no more than an aggregation of individual expressions of intent. It is also possible to make a guess at what a third party intends—"I think that Frank intends to do $x$"—or a prediction as to what a third party will do—"I think that Frank is going to do $x$"—but neither of these is an expression of the third party's intent.

**Serious expression.** Third, the statement must be such that the maker would reasonably foresee that those to whom it is communicated would interpret it as a serious expression of an intention to inflict harm.\textsuperscript{51} The purpose of this element is to distinguish threatening statements that cause substantial harm—namely, those that a reasonable listener would take seriously, and that are likely to reasonably instill fear in the target of the threat—from those that should be understood as harmless hyperbole. Some courts phrase this element of the test slightly differently, shifting the inquiry to whether a reasonable recipient of the speech would interpret it as a threat, rather than whether a reasonable person (such as the speaker)

\textsuperscript{49} United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) (emphasis added). See also United States v. Malik, 16 F.3d 45, 51 (2d Cir. 1994) ("A threat is a statement expressing an intention to inflict bodily harm to someone . . . .") (quoting jury instructions); Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969) (holding that a threat requires "a serious expression of an intention to inflict bodily harm upon or to take the life of [another]").

\textsuperscript{50} See United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (noting that criteria for determining whether speech is a true threat include "whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence") (emphasis added); cf. United States v. Kosma, 951 F.2d 549, 554 (3d Cir. 1991) (distinguishing Rankin v. McPherson, 483 U.S. 378 (1987), on the ground that "Kosma's letters implied that Kosma himself would be the person who would kill the President, while McPherson's statement merely expressed a desire that another person kill the President.").

\textsuperscript{51} See, e.g., United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (holding that the test for a "true threat" is "whether [the speaker] should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made"); Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969) ("[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.").
would foresee that the recipient would interpret the speech as a threat. Despite the difference in focus, each of these formulations states an objective standard (how a reasonable person would interpret the speech) rather than a subjective one (how a particular person actually interpreted it), and it is hard to see any practical differences between them.

Contextual consideration. Finally, the statement is to be interpreted in light of the context in which it is made. A statement that is perfectly innocent in one context may connote a threat in another. Contextual factors include "the identities of the speakers and listeners, the current and historical relationship between the parties, the place in which the communication is made, and the method or mode of communication," as well as the social, political, and cultural contexts. Also relevant is the subjective factor of whether those who hear the speech actually interpret it as a serious threat. Therefore, the subjective reactions of listeners may be a factor in establishing whether the speech was objectively a serious threat.

The First Amendment analysis of threats responds to the nature of the harms that true threats typically cause, and the mechanism by which such harms are inflicted. Threatening speech is outside the protection of the

52. See, e.g., United States v. Welch, 745 F.2d 614, 618 (10th Cir. 1984) ("The question is whether those who hear or read the threat reasonably consider that an actual threat has been made.") (quoting United States v. Dysart, 705 F.2d 1247, 1256 (10th Cir. 1983)); United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973) (noting that whether an "ordinary, reasonable recipient who is familiar with the context of the [statement] would interpret it as a threat of injury is a relevant issue").


54. See Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (considering the political context in holding that an offensive statement regarding political opposition to the president was not a true threat); United States v. Beltrichard, 994 F.2d 1318, 1321 (8th Cir. 1993); United States v. Khorrami, 895 F.2d 1186, 1193 (7th Cir. 1990).


57. See United States v. J.H.H., 22 F.3d 821, 827 (8th Cir. 1994) ("Evidence showing the reaction of the victim of a threat is admissible as proof that a threat was made."); United States v. Daughenbaugh, 49 F.3d 171, 174 (5th Cir. 1995) ("The reaction of the recipients is probative—the three judges who testified took extra security measures.").

58. This article considers only unconditional threats of violence, in which the threaten
er her intention to inflict unjustified bodily injury on another. A conditional threat takes the form: "Unless you do p, I will do q," where p is something that the threaten wants and q is something that the threatened person does not want and from which the threatened person has a right to be safe. The unprotected status of a conditional threat may be justified on the ground that it coercively interferes with the threatened person's autonomy, and there-
First Amendment in view of the harms it inflicts, as weighed against the interests it advances.

Two types of harm are associated with threatening speech. The first is the inducement of a state of fear or emotional disturbance in the threatened person.

The fear that threats of violence create in their auditors can be great . . . . It is also frequently difficult—particularly with anonymous threats—to determine the likelihood that the speaker will attempt to carry out the threat. The resulting uncertainty, coupled with knowledge that one cannot protect oneself at all times, can lead to extreme stress. 59

The second type of harm involves the diversion of resources and disruption that accompany defensive efforts aimed at preventing the carrying out of the threat. 60 "[S]erious threats, especially those directed at highly prominent public persons, may call forth extensive social resources to prevent their fulfillment, and may inhibit the activities of those subject to the threats." 61

These harms arise directly from the mere perception of what seems to be a serious threat. That is why a threat may be unprotected even if it is not communicated to the target. 62 Even if the target is unaware of the

59. Nockleby, supra note 56, at 663.
60. See R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992). The Court goes on to enumerate a third reason why threats of violence are outside the First Amendment: "protecting individuals from . . . the possibility that the threatened violence will occur," Id. But it is not obvious how the expression of a threat makes its commission more likely. There seems little reason to expect that the expression of a threat makes it more likely that the one who expresses it will carry it out; or, conversely, that if one is forbidden to issue a threat, but must harbor his animus in silence, he will be less likely to act on it.
61. Greenawalt, Criminal Coercion, supra note 1, at 1105.
62. See United States v. Martin, 163 F.3d 1212, 1216 (10th Cir. 1998) (threat against police detective communicated to defendant's compatriot); United States v. Shoulberg, 895 F.2d 882, 884 (2d Cir. 1990) (threat against co-defendant communicated to other co-defendant); United States v. Crews, 781 F.2d 826, 829 (10th Cir. 1986) (threat against the president made to a psychiatric nurse).
threat, the making of the threat may give rise to efforts by law enforcement officials and others to defend against the threat. This effect is most pronounced where the target is a public official. It also explains why there is no requirement that the threatener intend to carry out the threat. "The threat alone is disruptive of the recipient's sense of personal safety and well-being and is the true gravamen of the offense." 

C. Analysis of the Hypothetical

Let us now return to the hypothetical posed above. This situation seems to involve advocacy of illegal action. Larry is trying to incite his audience, through language displayed on his Web site, to kill the CEOs of meat-packing companies, and killing (except in unusual circumstances not present here) is certainly illegal. Is this unprotected speech, under the Brandenburg analysis? Probably not. Recall that for advocacy of illegal action to lose its First Amendment protection, it must be aimed at motivating others to engage in "imminent" illegal conduct, and it must be likely to result in such conduct. The speech in our hypothetical probably does not satisfy this latter requirement, for the simple reason that a visitor to Larry's Web site is unlikely to be in the immediate presence of the targets of Larry's invective at the time he accesses the site. He is likely to be sitting in front of his computer at his home or office, at some remove from the CEOs. There will be some substantial interval between the time a person views Larry's message, and the time when he is able to act on an inclination to kill the CEOs. During that interval, he will have time to reflect on what he is doing, and perhaps to seek the views of others as to the appropriateness of yielding to Larry's exhortations. It is the theory of the First Amendment that the existence of this possibility for reflection renders Larry's speech sufficiently less dangerous that the government may not restrict his speech.

If Larry's speech is not unprotected advocacy of illegal action, perhaps it is an unprotected threat. To qualify as a threat under the test that

63. One purpose of 18 U.S.C. § 871, which prohibits threats against the president, is to prevent "the detrimental effect upon Presidential activity and movement that may result simply from a threat upon the President's life." Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969).
64. United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991). See Rogers v. United States, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring) ("[T]hreats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out.").
65. Conversely, those who live or work in immediate proximity to the CEOs—consisting of their employees, friends, and family—are unlikely to find Larry's message persuasive.
the courts of appeals have fashioned, the speech must express the speaker’s intention to inflict bodily harm on another. But Larry’s speech is not of this sort: he does not state, expressly or by implication, that he intends to take action against the CEOs. To the contrary, Larry’s Web site makes him look a bit like a hypocrite. He urges others to engage in homicide, rather than doing the deed himself. If he had any intention of killing the CEOs himself, he would most likely not be broadcasting his intentions but would instead be stealthily hatching a plan to plant a bomb at a meatpackers’ convention. Therefore, Larry’s speech is not a threat, let alone an unprotected one.

Though Larry’s speech does not meet the Brandenburg test for unprotected advocacy of illegal action or the lower courts’ formulation of the test for a true threat, I will argue that speech of this sort should nevertheless be held unprotected through application of the First Amendment principles that lie behind the unprotected status of threats. To make this argument, I will shift from the hypothetical to the real-world situation on which it is based.

III. Advocacy of Violence Against Abortion Providers

In Planned Parenthood v. American Coalition of Life Activists, the plaintiffs, doctors who perform abortions and two clinics that offer abortions and other reproductive health care services, sued a group of anti-abortion activists who had engaged in a campaign of vehement harassment of abortion providers. The speech in question consisted of two posters and a collection of dossiers on abortion providers that was later posted on a Web site called the Nuremberg Files. The posters, which defendants presented at a press conference, proclaim that abortion providers are “GUILTY of Crimes Against Humanity,” and liken abortion to the “war crime[s]” that were prosecuted during the Nuremberg Trials in 1945-46. One of the posters lists, under the heading “THE DEADLY DOZEN,” the names, addresses, and telephone numbers of twelve people, including three of the plaintiffs. The other poster describes one of the plaintiffs as a

67. See supra text accompanying notes 41-57.
68. 23 F. Supp. 2d 1182 (D. Or. 1998). The award of damages in this case resulted from a jury verdict, rendered on February 2, 1999, that is not reflected in any published judicial decision. Before sending this case to the jury, the district court ruled on the First Amendment issues. See id. and 945 F. Supp. 1355 (D. Or. 1996).
69. See Planned Parenthood, 23 F. Supp. 2d at 1186. Plaintiffs based their allegations on a fourth item as well: a bumper sticker reading “EXECUTE Murderers/Abortionists.” The court granted defendants summary judgment as to the claims based on the bumper sticker, finding that the evidence would not support a finding that the bumper sticker amounted to an unprotected “true threat.” Id. at 1194.
70. Id. at 1186.
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"notorious Kansas City abortionist [who] travels to St. Louis weekly to kill babies at Reproductive Health Services ***. He also sometimes kills women."71 The poster features a photograph of the plaintiff and his home and work addresses.72

The Nuremberg Files initially consisted of a box of hard-copy files containing personal identifying information about doctors who perform abortions. Defendants displayed these files at an anti-abortion event, and later created a Web site with the same name.73 The site stated that defendant ACLA "is cooperating in collecting dossiers on abortionists in anticipation that one day we may be able to hold them on trial for crimes against humanity," referencing the Nuremberg Trials as a historical antecedent. It continued: "We anticipate the day when these people will be charged in PERFECTLY LEGAL COURTS once the tide of the nation's opinion turns against child-killing (as it surely will)." The site contained the names of about 200 people who were labeled "abortionists," as well as names of more than 200 others, including clinic workers, judges, politicians, and law enforcement officers, who were characterized as "their weapons bearers," "their shysters," "their mouthpieces," and "their bloodhounds."74

Most chillingly, the Web site indicated the current status of each of the "abortionists" it named. As explained by a legend on the site, names of those who were "working" appeared in black letters, those who had been "wounded" by anti-abortion fanatics were shown in grey, and those who had been killed for providing abortion services—designated as "fatality"—had their names crossed out.75 The status indicators were updated regularly; when Dr. Barnett Slepian was murdered, the Web site was updated within several hours of his death.76 Some of the defendants indicated their approval of the murder of abortion providers in other ways as well. In the midst of a series of violent attacks against abortion providers, one defendant publicly stated: "More violence is inevitable, and it is righteous. *** It wouldn't bother me if every abortionist in the country today fell dead from a bullet."77 Defendants also "held a 'White Rose Banquet,' at which they

71. Id. at 1187 (alterations in original).
72. See id.
73. See id.
74. Id. at 1188. The Nuremberg Files Web site was taken down shortly after the jury verdict. A mirrored version of the site was available at this writing. See The Nuremberg Files (last modified March 19, 1999) <http://www.netfreedom.net>.
77. Planned Parenthood, 945 F. Supp. at 1362 (alteration in original).
honored individuals who were incarcerated for committing anti-abortion violence."\textsuperscript{78}

The defendants moved for summary judgment, arguing, among other things, that their speech was protected by the First Amendment. The court denied the motion with respect to the posters and Web site,\textsuperscript{79} holding that the statements were "true threats" under the Ninth Circuit's version of the Watts test and therefore unprotected. The court acknowledged that "the statements at issue do not contain any expressly or apparently threatening language."\textsuperscript{80} Nevertheless, it found that the statements met the "true threat" criterion when viewed "'in light of their entire factual context.'"\textsuperscript{81} The relevant contextual factors were (1) the climate of escalating violence against abortion providers, including several murders, that had been ongoing for several years, and (2) the reaction of those to whom the statements were conveyed.\textsuperscript{82} Once the court rejected the defendants' First Amendment challenge, the case went to the jury, which awarded $107 million in compensatory and punitive damages.\textsuperscript{83}

I believe that the district court erred in finding that the speech at issue constituted "true threats" under existing caselaw. Like Larry's animal-rights Web site in our hypothetical, the statements were not "threats" at all, because none of the statements conveyed any intention, either seriously or hyperbolically expressed, on the part of the makers of the statements to inflict bodily harm upon the plaintiffs. Under the circumstances, it was certainly reasonable for the plaintiffs to fear that they might become victims of violence. But this fear did not arise from any threats made by the defendants—it instead arose from the justifiable concern that defendants' expressions of approval of murder would incite others to violent actions against plaintiffs.

A statement need not, of course, be expressed in the canonically threatening form—"I am going to harm you"—to constitute a threat. Thus, a statement that has irrational elements may still be a threat, since "potential assassins may well be irrational."\textsuperscript{84} In addition, a statement that is

\textsuperscript{78} Planned Parenthood, 23 F. Supp. 2d at 1187.
\textsuperscript{79} The court granted summary judgment for defendants as to the bumper sticker. See id. at 1194.
\textsuperscript{80} Id. at 1193-94.
\textsuperscript{81} Id. at 1194 (quoting Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996)).
\textsuperscript{82} See id. at 1186, 1189. In this case, the FBI offered around-the-clock federal marshal protection for abortion providers named in the posters, the individual plaintiffs began wearing bullet-proof vests, and the plaintiff clinics increased their security measures.
\textsuperscript{84} United States v. Mitchell, 812 F.2d 1250, 1256 (9th Cir. 1987).
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ambiguous on its own may become clearly threatening when combined with other statements. For example, the statements "you have only one chance" and "Please Maurie, make it easy on yourself by cooperating fully," standing alone, are ambiguous at best, but when joined with the statement "We want $10,000.00 cash in 10's and 20's ...," the meaning becomes clear. Such coy phraseology falls short of stating explicitly that the threatener will take some action, but leaves no doubt that the threat, if any, will be carried out by the threatener. In Planned Parenthood, however, the makers of the statements do not suggest, or even imply, that they will themselves carry out acts of violence.

To see why the defendants' statements in Planned Parenthood do not qualify as "true threats" under current law, it is instructive to compare the case with another case involving similar facts but with a crucial difference. In United States v. Khorrami, the defendant was convicted for making threatening telephone calls and sending threatening communications by mail to the New York headquarters of the Jewish National Fund (JNF). In telephone calls made over the course of six months, the defendant "stated 'death to' Jews, various individuals, and the Jewish National Fund," and "spewed forth other vicious, degrading and random insults including statements that 'Jews are scum,' as well as profane statements such as 'Fuck all Jews.'" The first mailing, which was sent in a JNF business-reply envelope, consisted of "a poster-like paper that stated at its top 'Wanted for crimes against humanity and Palestinians for fifty years.'" The poster contained pictures of Israeli leaders and officials of the JNF, inscribed with the statements "Execute now!," "His blood need," and "Must be killed." The second mailing contained a JNF calendar, which was defaced with swastikas and statements similar to the "death to" language of the telephone calls.

The defendant appealed his conviction, arguing, among other things, that the "Wanted" poster "was merely 'political hyperbole' and could not have been interpreted by a reasonable jury as containing 'true threats.'" The court rejected this argument. Instead, it held that given the context in which the poster was sent, including (1) the threatening telephone calls, (2) the threats contained on the defaced calendar, and (3) defendant's use of JNF materials to convey the mailings, indicating he had had prior contact

85. United States v. Prochaska, 222 F.2d 1, 2 (7th Cir. 1955).
86. 895 F.2d 1186 (7th Cir. 1990).
87. Id. at 1188.
88. Id. at 1189.
89. Id.
90. Id. at 1193.
with the JNF, a reasonable jury could find that the "Wanted" poster constituted a "true threat." 91

The "Wanted" poster that served as a basis of Khorrami's conviction bears a striking resemblance to the posters at issue in Planned Parenthood. The posters in both cases used the "Wanted" format to suggest that the targets of the posters were lawbreakers; both named specific individuals; and neither expressly stated that the maker of the communication intended to inflict harm on the recipients. But the differences between the two sets of facts are crucial. First, Khorrami had directed threats at the recipients through other means (the telephone calls and defaced calendar). Since these threats were expressions of his own intent, the court could reasonably interpret the poster likewise as an expression of the defendant's own intent to harm the recipients. Second, the fact that Khorrami mailed the poster directly to the targets, rather than making the same statements in a public, political context 92 led the recipients to interpret the poster as an expression of Khorrami's own intent, rather than as an effort to convey ideas through "political hyperbole." 93

By contrast, nothing about the context presented in Planned Parenthood would lead the recipients of the speech at issue to interpret it as an expression of the intention of the makers of the communication to inflict bodily harm. The context that the court relied upon—the climate of escalating violence directed against providers of abortion services 94—shows that plaintiffs reasonably felt threatened, but that context has nothing to do with whether defendants expressed a threat. The court conflated two connotations of the word "threat": it allowed the jury to infer, from the clearly established facts that (1) the plaintiffs felt "threatened" as a result of defendants' speech, and (2) defendants intended for plaintiffs to feel "threatened," that the speech consisted of threats. But this is a non sequitur—the fact that one feels "threatened," in the ordinary sense, does not imply that one has been subjected to a threat. One may feel threatened by circumstances that do not involve speech of any sort. Likewise, one may instill fear in others through speech that does not contain threats.

91. Id.
92. See United States v. Daughenbaugh, 49 F.3d 171, 174 (5th Cir. 1995) (distinguishing Watts on grounds that "it involved a public rally, not a private letter"); United States v. Welch, 745 F.2d 614, 618 (10th Cir. 1984) (finding the fact that defendant's statements "were not made at a political rally or political meeting or during a political discussion" supports finding of "true threat").
93. See Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (holding that mere political hyperbole is not a "true threat").
94. See Planned Parenthood, 23 F. Supp. 2d at 1188.
Thus, under current law, the defendants' statements in Planned Parenthood were not unprotected threats. In addition, it seems likely, as in the hypothetical involving Larry and the meat-packers, that these statements, while constituting advocacy of illegal action, are not unprotected advocacy under the Brandenburg criterion, because the posters and Web site are unlikely to bring about unlawful conduct imminently. There is no reason to think that a person who sees the poster or Web site is likely, then and there, to commit an act of violence against an abortion provider, if for no other reason than that there is unlikely to be such a person in immediate proximity. Application of existing First Amendment law thus leads to the conclusion that the government may not prevent people from posting on the Internet speech that likens abortion providers to Nazi mass murderers, expresses approval of the murder of abortion providers, and offers personally identifying information that would be helpful to one who decides to engage in violence against abortion providers.

This is a troubling result. The effect of defendants' speech was to make plaintiffs reasonably fear that they would be the target of violent attacks, and to disrupt their activities by forcing them to put security measures in place. In other words, defendants' speech resulted in the harms usually associated with threats, even though it took the form of advocacy of illegal action. Speech of this sort—I will call it "menacing speech"—falls between the cracks of present First Amendment doctrine: it is not an unprotected threat, because there is no threat involved, and it is not unprotected advocacy of illegal action, because illegal action is not imminent. Thus, if menacing speech is to be considered unprotected, it will be necessary either to create a new category of speech that is analyzed through categorical balancing, or to enlarge an existing category to include menacing speech.

95. The advocacy here was not explicit, but "camouflaged." See Crump, supra note 17. It consisted of (1) equating abortion providers with Nazi mass murderers, (2) expressing approval of violence directed against abortion providers, through maintaining a scorecard of who had been injured or killed, and (3) supplying names and other personal information about abortion providers, which would facilitate targeting them for violence.

96. If the imminence requirement is interpreted as importing predictability or probability, rather than temporal proximity, see Redish, supra note 28, at 1180-81; Crump, supra note 17, at 59-61, the speech might be found unprotected. Additionally, it might be different if the context were different—for example, if the same statements were made before an angry armed mob stationed outside an abortion clinic. Cf. John Stuart Mill, On Liberty 67-68 (Prentice-Hall 1956) (1859) ("An opinion that corn dealers are starvers of the poor... ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer... ")

97. See supra text accompanying notes 59-61.
My thesis, then, is that First Amendment principles require that speech that results in the harms usually associated with threats, and that brings about those harms through the mechanism usually associated with threats,98 should be subject to restrictions under the same standards that apply to threats, even though the speech takes the form of advocacy of violence. This result is consistent with both Brandenburg and Watts. The following section justifies and elaborates this thesis.

IV. Justification for Treating Menacing Speech Like Threatening Speech

Removing First Amendment protection from menacing speech is consistent with the principles underlying the unprotected status of threats and other low-value speech.

A. Criteria for Finding Speech Subject to Categorical Balancing

Although the Supreme Court has not clearly articulated the basis for its determination that certain categories of speech should be relegated to unprotected status,99 the central elements of the methodology may be deduced from the caselaw. The Court’s approach is to weigh the harms brought about by a particular category of speech against its value, taking into account the mechanism by which the harms are produced. The Court also considers the risk that restricting such speech will result in chilling protected speech.

1. Balancing harms against value

The balancing of harms against value is implicit in the Supreme Court’s oft-quoted recitation from Chaplinsky v. New Hampshire:100

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a

98. The several mechanisms by which speech may bring about harm are discussed infra in the text accompanying notes 121-27.

99. See Sunstein, Democracy, supra note 4, at 11, 125; Stone, Content Regulation, supra note 31, at 194.

100. 315 U.S. 568 (1942).
This passage indicates that the disfavored status of low-value speech derives from a finding that the elevated risk of harm that the speech presents outweighs its minimal value. The Supreme Court has applied this methodology, with varying degrees of fidelity, in several contexts, including obscenity, child pornography, and defamation. Commentators

101. Id. at 571-72 (emphasis added) (citations omitted). This statement is not accurate as a description of the current treatment of certain categories of speech: speech that is lewd (but not obscene), profane, or libelous is not categorically excluded from constitutional protection. See Shaman, supra note 16, at 303. However, the balancing approach that it sets out retains currency.

102. See Shaman, supra note 16, at 302-03; Crump, supra note 17, at 48.

103. The Court's assignment of commercial speech to a middle rung in the constitutional hierarchy of protected speech curiously departs from this approach. In holding that commercial speech is entitled to First Amendment protection, the Court emphasized the high value of such speech: a "consumer's interest in the free flow of commercial information... may be as keen, if not keener by far, than his interest in the day's most urgent political debate." Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976). Although the Court later wavered on that point, see Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (limited protection of commercial speech is "commensurate with its subordinate position in the scale of First Amendment values"), it more recently reaffirmed the high value of commercial speech, see City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 418-19 (1993) (rejecting "the proposition that commercial speech has only a low value"). The Court has referred to "[t]he interest in preventing commercial harms" as a justification for "more intensive regulation of commercial speech than non-commercial speech," id. at 426 n.21, but it has relied more heavily on another justification: that commercial speech is especially hardy, and not likely to be chilled by regulation that may be overbroad. See Bates v. State Bar, 433 U.S. 350, 380-81 (1977).

104. In Miller v. California, 413 U.S. 15 (1973), the Court defined the category of obscenity that is unprotected by the First Amendment as that which (1) causes harm by making a "patently offensive" appeal to the prurient interest, and (2) "lacks serious... value." Id. at 24 (emphasis added). In Roth v. United States, 354 U.S. 476 (1957), the Court relied on its characterization of obscenity as valueless—"utterly without redeeming social importance"—but declined to engage in an inquiry into the harms it causes. Id. at 484, 485-87.

105. In New York v. Ferber, 458 U.S. 747 (1982), the Court held that the government may prohibit the distribution of visual depictions of children engaging in sexual conduct that do not meet the Miller definition of obscenity. In so doing, it relied upon (1) a finding "that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," and (2) its assumption that "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis." Id. at 758, 762.

106. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court held that the First Amendment requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80. The holding privileges speech concerning the official conduct of public officials on the basis of the elevated value of such speech. The Court quotes with approval from an opinion by the Supreme Court of
have likewise invoked the same methodology in support of proposals to allow the government greater leeway in regulating pornography and racist hate speech. In fact, the Court weighs harms against value not only in its categorical approach, but also in the ad hoc balancing that is entailed by strict scrutiny.

To say that some speech is of low value is not to say that it has no value at all. In particular, it is surely incorrect to say that threats of violence and advocacy of illegal action are utterly without value, for such speech may serve several First Amendment values. It may: (1) communicate ideas, (2) provide an emotional outlet, (3) express individual autonomy, and (4) enable listeners to offer counterspeech. Each value is addressed in turn.

**Communication of ideas.** Threatening utterances and advocacy of illegal action powerfully convey the speaker's discontent. "[T]here is marketplace [of ideas] value in knowing that some members of the body politic are so concerned about particular government practices that violence is considered as an alternative." In *Watts*, for example, the defendant's threatening utterance—"If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."—was rather clearly intended as an expression of his strong disapproval of the United States' involvement in

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Kansas, which stated, with reference to discussions of the qualifications of candidates for public office: "The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved . . . ." *Id.* at 281 (quoting Coleman v. MacLennan, 98 P. 281 (Kan. 1908)). The Court addressed the harm side of the equation in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-48 (1974), in which it declined to extend the actual malice requirement to defamation of persons who are not public officials or public figures. Its rationale, in part, was that defamation of private persons is more harmful than defamation of public persons: "Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Id.* at 344.


109. See Sunstein, *Pornography, supra* note 107, at 615 n.147 ("In every case . . . the court is implicitly or explicitly weighing a perceived state interest against the perceived value of the speech involved.").

110. Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. Rev. 915, 949 (1978) (discussing speech that incites unlawful action). *See* Kalven, *supra* note 2, at 11 ("If a man is seriously enough at odds with society to advocate violent revolution, his speech has utility not because advocating revolution is useful but because such serious criticism should be heard.").

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Vietnam. A blander statement, like "I oppose U.S. policy with respect to Vietnam," would not carry the same meaning as the defendant's declaration. Watts' statement, unlike the colorless version, vividly conveys his view that by sending him off to kill Vietnamese, the president was alienating his own constituency.113

Emotional outlet. Harmful speech may serve as a means of venting one's emotions. Making a threat, expressing hate, or calling for illegal action may be cathartic to the threatener, diverting the threatener's impetus to carry out the threat. "[S]ometimes threats operate as a psychological alternative to immediate physical assault."114 Violent speech may bring about palpable harms, but it is surely preferable to violent action.

Individual autonomy. Making threats and advocating illegal action may be an expression of individual autonomy. "[T]here is independent value in allowing people to explore all possibilities and to think through the comparative advantages and disadvantages of various options."115 Such exploration may be thought to "stimulate[ ] intellectual development."116

Opportunity for counterspeech. Expression of harmful speech provides an opportunity for counterspeech. An example from the online medium is presented by the Jake Baker case.117 There the defendant was indicted under a federal threats statute based on a story he posted to a Usenet newsgroup, which "graphically described the torture, rape, and

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112. Watts' statement might best be understood as a pure-speech analogue of flag-burning. See Sunstein, Democracy, supra note 4, at 182 ("Flag-burning conveys the relevant message more sharply and distinctively than anything else. If the speaker says instead, 'My country is doing wrong,' the message will be so muted as to be fundamentally transformed.").

113. This idea comes across more clearly in the version of Watts' statement offered by a newspaper reporter: "* * * that he did not think that Negroes ought to serve in Vietnam to shoot Vietnamese. He didn't think black men should look down the barrel of a rifle to kill Vietnamese. He said that rather than looking down the barrel of a rifle to kill Vietnamese people he would rather look down a rifle aimed at the President." Watts v. United States, 402 F.2d 676, 686 (D.C. Cir. 1968) (Wright, J., dissenting), rev'd, Watts v. United States, 394 U.S. 705 (1969).

114. Greenawalt, Speech, Crime, supra note 58, at 91; see also Shiffrin, supra note 110, at 949 ("There is cathartic value in having speakers who might otherwise become dangerous release their tensions through verbal violence rather than physical violence."); First Circuit Defines Threat, supra note 53, at 1114-15.


116. Id.

murder of a woman who was given the name of a classmate of Baker's.  

By publishing his odious fiction on Usenet, Baker invited others to post their reactions. Many of his readers did just that, expressing their outrage. This feedback may serve as a reality check to people, like Baker, whose fantasies suggest mental imbalance. Counterspeech can help those who hold fringe views to recognize their true position on the spectrum of opinion. A prohibition against expression of pathological ideas eliminates this avenue of feedback.

Threats and advocacy of illegal action therefore promote certain First Amendment values. Occasional judicial statements to the contrary should not be taken literally, but rather "as shorthand for a complex calculation that the harms of such speech outweigh their contribution to the sphere of expression." Accordingly, we cannot dismiss these utterances out of hand as unworthy of constitutional protection. As with other categories of low-value speech, we must engage in a balancing of value against harm.

2. Mechanism through which harm comes about

The mechanism through which the harm comes about is less often discussed, but nevertheless underlies several distinctions that the Court has made in its treatment of certain categories of speech. The relevant aspect of the harm-producing mechanism is the directness with which harm follows speech. We may distinguish three such mechanisms, corresponding to three degrees of directness: (1) the impact mechanism, (2) the believability mechanism, and (3) the persuasion mechanism.

The impact mechanism. In some cases, harm comes about upon a recipient's mere perception of the speech. This is characteristic of obscenity: the harms it causes result as soon as the recipient perceives it.

118. Baker, 890 F. Supp. at 1379. The superseding indictment, under which Baker was actually prosecuted, was not based on this story. Id.

119. See Mike Godwin, Cyber Rights: Defending Free Speech in the Digital Age 120 (1998) ("[M]any readers of alt.sex.stories were appalled by Baker's fiction, and said so publicly.").

120. Kagan, supra note 32, at 419.

121. For present purposes, we need not concern ourselves with two additional mechanisms by which speech may bring about harm. Speech may cause harm through its direct physical effects, such as by waking the sleeping or triggering an avalanche. Speech may also cause harm by conveying information, such as how to make a bomb, that can be used to accomplish some act that causes injury. See Thomas Scanlon, A Theory of Freedom of Expression, 1 Philosophy & Pub. Aff. 210-11 (1972). The former mechanism works more directly than those discussed in text, while the latter works less directly.

122. See Sunstein, Pornography, supra note 107, at 595-602. Sunstein addresses pornography, which as he defines it is not co-extensive with the Supreme Court's definition of obscenity. But his discussion of the harms resulting from pornography applies to many types of obscenity as well.
Perjury likewise belongs in this category because the administration of justice is disrupted the moment false testimony is given. We may also include "fighting words," which trigger an immediate emotional response, as well as ethnic slurs, profanity, blasphemy, and other "intrinsically offensive" speech.¹²⁴

The believableness mechanism. With other types of speech, another step is required: harm arises only after the recipient perceives the speech and processes it cognitively, arriving at a judgment as to whether it should be credited. For example, a threat to commit bodily harm is usually not harmful merely upon being perceived; it only becomes harmful once the recipient evaluates it in context and concludes that it is seriously intended.¹²⁶ Likewise, a defamatory statement causes no harm if the recipient judges that it is not meant to be taken seriously or is fatuous. False advertising might seem to be harmful only if it persuades a consumer to make a purchase, but in fact it causes harm merely by being believable, since any material misinformation in the marketplace interferes with the operation of consumer sovereignty.

The persuasion mechanism. The least direct type of harm results only if the speech proves persuasive. Advocacy of illegal action is usually of this sort. The audience may perceive this speech as serious and may judge

¹²³. It might even be said that obscenity consisting of visual depictions making use of live actors and models, like child pornography, results in harm even before it is viewed, through the coercion and brutalization of women who participate in producing pornography. See id. at 595-97; New York v. Ferber, 458 U.S. 747, 758 (1982).
¹²⁴. See Strauss, supra note 30, at 341-42 (discussing examples of "intrinsically offensive" speech).
¹²⁵. The qualification is in recognition of the possibility that a threat may provoke an immediate violent reaction from the audience even if it is not believed to be serious. Consider, for example, the statement "Step outside, if you're a man, so that I can beat you senseless." The Supreme Court seems to acknowledge the possibility that a threat may constitute "fighting words." In Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942), the Court quoted with approval from an opinion of the New Hampshire Supreme Court, which enumerated "profanity, obscenity and threats" as among the types of speech that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."
¹²⁶. See, e.g., United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) ("[W]hether a particular statement may properly be considered a threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.").
¹²⁷. False advertising may even harm consumers through its unbelievableness. See Robert Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 671 (1977) (arguing that rampant misinformation in the marketplace may lead consumers to rely, to their detriment, on price as proxy for quality).
that the speaker intends to be taken seriously; yet no harm arises unless the speech persuades a listener to carry out the illegal action.

This dimension of harmful speech—the mechanism through which it results in harm—explains why the imminence of harm is a factor in the \textit{Brandenburg} test for whether advocacy of illegal action is unprotected, but is not a factor in the \textit{Watts} test that applies to threats. Because advocacy of illegal action normally works through the persuasion mechanism, it is dangerous and therefore proscribable only if it is likely to be persuasive. Threats, on the other hand, normally do their mischief through the believability mechanism and are therefore unprotected as long as they are likely to be taken seriously. The harm arising from threats may be viewed as \textit{inherently} imminent, since there is no need to wait for persuasion.

3. Risk of chilling protected speech

Treating a category of speech as unprotected may have the undesired side effect of chilling protected speech. This chilling can happen if the category is not sufficiently well defined, so that speakers are unsure whether speech in which they propose to engage is within the unprotected category. The concern with overbreadth is addressed in case-by-case evaluations of restrictions on speech.\footnote{See Richard H. Fallon, Jr., \textit{Making Sense of Overbreadth}, 100 YALE L.J. 853, 863-67 (1991).} The Supreme Court has also found it applicable when establishing categorical treatment of a particular class of speech. Thus, in holding that restrictions on commercial speech may be sustained on a lesser showing than the generally applicable "compelling government interest" test, the Court explained that commercial speech is less likely to be chilled than other kinds of speech, because the motive to engage in it, being pecuniary in nature, is especially strong, and because commercial speakers are in a better position than others to be confident in the truth of speech concerning their own wares.\footnote{See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976); Bates v. State Bar, 433 U.S. 350, 380-81 (1977). The validity of this justification is contestable. See, e.g., Alex Kozinski & Stuart Banner, \textit{Who's Afraid of Commercial Speech?}, 76 VA. L. REV. 627, 634-38 (1990).}

\textbf{B. Application of the Criteria for Disfavored Categorical Treatment to Menacing Speech}

Application of these four criteria leads to the conclusion that menacing speech should be designated as low-value speech and evaluated categorically, rather than being subject to the strict scrutiny test.
1. Harm resulting from the speech

Considered from the standpoint of the harm it causes, menacing speech is (by definition) the equivalent of a true threat: speech qualifies as "menacing," as defined in this article, only if it brings about the harms normally associated with threats. As discussed above, these harms are the fear that the target experiences and the disruption caused by efforts to prevent the carrying out of the threat.\textsuperscript{130} Advocacy of violence, in the context that is present in \textit{Planned Parenthood}, may certainly cause a reasonable target to be placed in fear and to have her routine disrupted.\textsuperscript{131}

2. Value of the speech

As discussed above, advocacy of illegal action may promote recognized free speech values. It may convey ideas, serve as an emotional outlet, promote autonomy, and facilitate counterspeech.\textsuperscript{132} But there is no reason to think that such speech has, on a categorical basis, any more value by virtue of the fact that it is menacing. In other words, if advocacy of violence that is likely to be persuasive is so little valued that it is subject to disfavored categorical treatment, the same should be true of advocacy that is menacing.

3. Mechanism by which harm results

Menacing speech differs from ordinary advocacy of illegal action in that it brings about its harms through the mechanism of believableness, rather than the mechanism of persuasion. That is, it causes harm through the mechanism usually associated with threats. There is no opportunity for counterspeech: the harm is done as soon as the target perceives the threat and judges it to be serious. It thus seems justified to evaluate menacing speech according to the standard that applies to threats (objective seriousness of the threat), rather than that which usually applies to advocacy (likelihood that illegal action will result imminently).

4. Danger of chilling protected speech

It will admittedly often be difficult to determine whether a particular utterance qualifies as menacing—that is, whether advocacy of violence is likely to bring about the harms usually associated with threats. But this difficulty is equally present when applying the existing criteria for deter-

\textsuperscript{130} See supra text accompanying notes 59-61.
\textsuperscript{131} As one of the defendants testified at trial in the \textit{Planned Parenthood} case: "If I was an abortionist, I would be afraid." Nat Hentoff, \textit{When "Pro-Lifers" Threaten Lives}, \textit{WASH. POST}, Feb. 27, 1999, at A21.
\textsuperscript{132} See supra text accompanying notes 110-20.
mining whether a threat is a "true threat," and whether advocacy of illegal action is likely to result in such action imminently. The inquiry required to determine whether a threat is serious or merely rhetorical is a highly contextual one, which the courts often have difficulty applying. 133 Evaluating menacing speech calls for applying the same test to statements with a different formal structure. In addition to evaluating the reasonable, contextually dependent signification of statements like, "I am going to kill you meat-packing CEOs," a court would apply the same criteria to statements like, "I urge all right-minded people to kill meat-packing CEOs."

C. Relation of the Proposed Rule to Current Doctrine

The proposed rule could be implemented through any of several different modifications of current doctrine. The most likely approaches are: (1) designating menacing speech for disfavored categorical treatment, (2) relaxing Brandenburg's "imminence" requirement, or (3) modifying the "true threat" standard that the lower courts have derived from Watts.

1. Creating a new category of menacing speech

Menacing speech could be made unprotected by placing it within a new category of disfavored low-value speech that is not subject to strict scrutiny. As with obscenity, true threats, fighting words, and advocacy of illegal action that meets the "imminence" test, the government could justify a restriction on menacing speech simply by showing it falls within the category so defined.

Although it may seem surprising, this shift may be accomplished without disturbing Brandenburg. That case is sometimes viewed as standing for the proposition that the government may proscribe speech that advocates illegal action if and only if that speech meets the imminence criterion, or conversely, that advocacy of illegal action is protected by the First Amendment unless it meets the imminence criterion. 134 The Supreme Court seems to say this explicitly: the holding of Brandenburg is that "the 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." 135

133. See Nockleby, supra note 56, at 658 (noting, for example, that courts "have struggled to define the limits of racially-motivated intimidation or threats of violence").

134. See, e.g., Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. CHI. L. REV. 46, 47 n.4 (1987) ("Express incitement... may be suppressed only if it is 'directed to inciting or producing imminent lawless action and is likely to incite or produce such action.'").

But this interpretation of Brandenburg is untenable. Recapping the discussion above, the general or default rule is that content-based restrictions on speech are evaluated through application of the strict scrutiny test, which almost invariably results in a finding that the restriction is unconstitutional.\textsuperscript{136} Certain categories of low-value speech may be regulated under a more lenient standard. These categories include, for example: (1) speech with sexual content that meets the Court's definition of "obscenity" articulated in Miller v. California,\textsuperscript{137} (2) advocacy of illegal action that satisfies the Brandenburg imminence criterion, and (3) threats that meet the Watts "true threat" standard. Figure 1 illustrates the First Amendment status of these three categories of speech. The area inside the large circle represents speech in general. The area inside the circle labeled A represents obscenity as defined in Miller, circle B represents advocacy that meets the Brandenburg test, and circle C represents true threats meeting the Watts test. Restrictions on speech in all three of these categories are upheld as long as they do not inappropriately discriminate among viewpoints.\textsuperscript{138}

But what of (1) sexually oriented speech that is not obscene, (2) advocacy of illegal conduct that is not likely to bring about such conduct imminently, and (3) threats that a reasonable listener would not view as seriously intended? In Figure 1, the area inside circle A' represents sexually oriented speech, which includes but is broader than the category of obscenity. Likewise, circle B' represents advocacy of illegal conduct that includes, but is not limited to, advocacy that meets the Brandenburg test, and circle C' represents threats that may or may not meet the Watts test. Thus, the ring between circles A and A' represents speech that is sexually oriented but does not meet the Miller test for obscenity, the ring between circles B and B' represents speech that advocates unlawful conduct but is not likely to bring about such conduct imminently, and the ring between circles C and C' represents threats that are not to be taken seriously. The speech within these three rings does not fit in any of the categories of low-value speech. Accordingly, content-based restrictions on these types of speech will be evaluated according to the default criterion of strict scrutiny, or some other applicable standard. So, for example, in FCC v. Pacifica Foundation,\textsuperscript{139} the Supreme Court upheld a restriction on speech that was indecent but not obscene.\textsuperscript{140} In so doing, it rejected the speaker's argument


\textsuperscript{137} 413 U.S. 15 (1973).

\textsuperscript{138} See R.A.V., 505 U.S. at 382-85.

\textsuperscript{139} 438 U.S. 726 (1978).

\textsuperscript{140} Represented by point P on Figure 1.
"that inasmuch as the [speech] is not obscene, the Constitution forbids any abridgment of the right to broadcast it on the radio."\textsuperscript{141} In other words, the Court rejected the claim that speech that shares some of the characteristics of obscenity may be proscribed \textit{only if} it meets the \textit{Miller} definition of obscenity. Meeting the \textit{Miller} criterion is a \textit{sufficient} basis for regulating sexual speech, but it is not a \textit{necessary} one.

In the same way, \textit{Brandenburg} sets forth a criterion—"imminence"—that is sufficient to justify suppression of speech that advocates illegal conduct, but this criterion is not the \textit{only} ground on which suppression of such speech may be justified. For example, speech that advocates illegal conduct, but that is not likely to bring about such conduct imminently, would, if it incorporates legally obscene utterances,\textsuperscript{142} be proscribable under \textit{Miller}, despite the Court's pronouncement in \textit{Brandenburg} that the government may not forbid advocacy of illegal conduct "except where" imminent

\textsuperscript{141} FCC \textit{v.} \textit{Pacifica}, 438 U.S. at 742.

\textsuperscript{142} Represented by point $Q$ on Figure 1.
illegal conduct is likely. To be consistent with the methodology of definitional balancing, the Court’s holding in Brandenburg must be read as setting forth a sufficient condition for finding advocacy of illegal action to be unprotected, but not a necessary one.

Thus, Brandenburg poses no impediment to a rule that applies categorical balancing to menacing speech—despite the fact that such speech takes the form of advocacy of illegal conduct. Just as Brandenburg would not prevent the government from prohibiting menacing speech on the ground that it is obscene, or that it meets the strict scrutiny test, neither would it be offended by treating menacing speech categorically as disfavored low-value speech. We might rationalize the seemingly contrary expression of Brandenburg’s holding by interpolating a limiting phrase, so that it would be understood as if it read: “the 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, [on the ground that such advocacy may result in such use of force or law violation,] except where” the imminence requirement is met.143

The newly defined category of unprotected menacing speech would occupy the circle labeled D in Figure 1. Located in the ring between circles A and A', circle D represents a functional subset of speech that formally advocates illegal action but does not satisfy the Brandenburg imminence test.

2. Relaxing the Brandenburg imminence requirement

An alternative approach to implementing the proposed unprotected status of menacing speech would require a modification of Brandenburg. The Supreme Court could relax Brandenburg’s imminence requirement, either eliminating the requirement of temporal proximity or replacing it with a degree-of-harm factor. The modified Brandenburg criterion could take several forms. One possible modified version: the government may prohibit advocacy of illegal action if such advocacy is (1) directed to inciting lawless action (at some unspecified point in the future) and is likely to incite such action (at some unspecified point in the future), and (2) the advocated action is the infliction of violence upon a specified individual or

143. The Court comes close to this formulation of the Brandenburg test in Hess v. Indiana, 414 U.S. 105, 109 (1973) (per curiam): “[S]ince there was no evidence or rational inference from the import of the language, that [defendant’s] words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had ‘a tendency to lead to violence.’” (quoting the decision below, 297 N.E.2d 413, 415 (Ind. 1973)).
small group of individuals. This modification of First Amendment doctrine is represented on Figure 2 as area E. Area E encloses the same speech that is within circle D on Figure 1, but does so by pushing out the boundary of circle B rather than by defining a wholly new category. E is a bulge, while D is an island.

This approach is subject to several varieties of criticism. First, it is problematic from the standpoint of administrability. Eliminating the temporal proximity criterion for advocacy of murder would require plaintiffs to prove that it is likely that someone in a mass audience will be persuaded by the message, despite unconstrained opportunities for counterspeech, to take

144. Cass Sunstein has tentatively proposed a similar modification of Brandenburg. He suggests that, in view of the ease with which modern communications technologies allow incendiary speech to be transmitted to an audience numbering in the millions, it may be appropriate to loosen Brandenburg's imminence requirement, at least "[w]hen messages advocating murderous violence are sent to large numbers of people." See Cass R. Sunstein, Constitutional Caution, 1996 U. CHI. LEGAL F. 361, 370-71.
murderous action at some point in the future. It is not at all clear what sort of evidence would suffice here; due to the possibility that any number of intervening events might break the chain of causation, this burden is very different from proving that speech is likely to have an immediate effect of incitement to illegal action. By contrast, the other two approaches to making menacing speech unprotected—creating a new disfavored category covering menacing speech, as discussed above, and reformulating the test for a true threat, as discussed below—focus on the reasonableness of the target's apprehension of fear rather than the likelihood that the advocacy will be persuasive. It seems far less difficult to evaluate evidence that the target of murderous advocacy will reasonably feel threatened when such speech is broadcast to millions of recipients than to evaluate evidence that at least one of those recipients is likely to engage in the advocated action.

The second problem with this approach is that the rationale for moving away from the “persuasion principle,” though initially limited to speech advocating murder or other serious crimes, would be difficult to confine to that circumstance. Many aspects of First Amendment law depend on the assumption—unrealistic though it may be—that counterspeech will vanquish harmful speech. If that assumption is rejected in the present context based on practical considerations, the same considerations might lead to its rejection elsewhere as well, leading to a serious erosion of the constitutional protection accorded unpopular speech.

3. Reformulating the “true threat” criterion

Alternatively, we might modify the lower courts' formulations of the test for a “true threat,” removing the formalistic requirement that the government may restrict only those threatening statements that express the speaker’s intent to inflict harm. It would be difficult to illustrate this modification using diagrams like Figures 1 and 2 because the circles in those diagrams represent speech that is defined formally rather than functionally. Conceptually, this modification calls for treating the speech within circle D (or area E) as though it were located in circle C, given the functional similarity between menacing speech and threats.

Nothing in Watts requires that the category of “true threats” be limited to expressions of the speaker's own intent. How “true” a threat is—that is, its propensity to frighten and disrupt the lives of reasonable targets—does not depend on the form of words that is used. The test that the lower courts have formulated, limiting the category to those utterances in which the
speaker expresses her intention to inflict harm, results from the coincidence that most threatening utterances in fact take that form. This is true, in particular, of the cases in which the courts of appeals fashioned the formulations of the "true threat" criterion that are employed by all the circuits.146

On the whole, enlarging the true-threats category seems to be the best means of implementing the proposal that menacing speech should be evaluated categorically for First Amendment purposes. It is least disruptive of current doctrine, requiring only a reformulation of the test that the lower courts have fashioned to implement the principles that the Supreme Court set forth in Watts. It would not have major repercussions in other areas of First Amendment doctrine, unlike a modification of the Brandenburg imminence requirement. Although this approach would have the same practical effect as designating menacing speech as a new category of low-value speech, it is conceptually tidier than creating a new category, and has the advantage of emphasizing the close functional connection between menacing speech and threats.

D. Application of the Proposed Rule

We may expect to encounter relatively few instances of menacing speech. Most speech that advocates unlawful conduct will not qualify as menacing speech. For one thing, to be menacing a statement must advocate violence. So, for example, urging a mob to sit down in the street, blocking the governor's motorcade, is not menacing. Furthermore, advocacy of violent illegal action must be sufficiently targeted to give rise to reasonable fear. Thus, urging a small audience to go to downtown Chicago and punch someone in the nose at random is not menacing. Speech must stray a considerable distance from the political discourse that is at the "core" of the First Amendment147 before it will qualify as menacing.148

146. See United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976); United States v. Maisonet, 484 F.2d 1356 (4th Cir. 1973); Roy v. United States, 416 F.2d 874 (9th Cir. 1969).

147. See SUNSTEIN, DEMOCRACY, supra note 4, at 9.

148. Examples of speech that the courts have found protected under the Brandenburg test, and that would remain protected under the proposal of this article, include: speech that "fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws," see Gay Lesbian Bisexual Alliance v. Pryor, 110 F.3d 1543, 1548 (11th Cir. 1997) (citing ALA. CODE § 16-1-28); a discussion of autoerotic asphyxia in a magazine article, see Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1018 (5th Cir. 1987); an advertisement by an anti-draft organization offering information on rights and options with respect to the draft, see San Diego Committee Against Registration and the Draft v. Governing Bd. of Grossmont Union High Sch. Dist., 790 F.2d 1471, 1472 (9th Cir. 1986); symbolic speech of Nazis marching in Skokie, Illinois, see Collin v. Smith, 578 F.2d 1197, 1198 (7th Cir. 1978); and song lyrics presenting suicide as a viable option, see Waller v. Osbourne, 763 F. Supp. 1144, 1146 (M.D. Ga. 1991). The proposal would also not disturb the First Amend-
As with threats, the test for menacing speech will be multi-factor and highly contextual. Factors supporting a determination that a statement is menacing will include:

**The specificity with which the intended victims are identified.**149 Urging violence against a particular named individual, or a group of named individuals, presents the clearest case. The most menacing version of this advocacy will include personally identifying information about the target such as her picture, home or work address, or a description of her car. If the advocacy targets a relatively small group that is defined by status or affiliation rather than by name, a conclusion that the speech is menacing may still be appropriate.150 Advocacy of violence against a very large group is unlikely to support a finding that the speech is menacing. Thus, advocacy of violence against specific, named abortion providers will provide a stronger case for restriction than advocacy of violence against abortion providers in general. A rather weak case would be presented by advocacy of violence against "supporters of abortion."

**The reactions of the listeners.**151 As with threats, the actual reactions of the recipients of the speech (whether the intended victims or third parties) can help to establish that speech is menacing. The fact that the intended victims react by taking defensive actions (at some cost to themselves), or that law enforcement officials react by offering to protect the intended victims, tends to support a finding that the speech is menacing.

**The degree of vituperation that the speech directs at the intended victims.** Listeners are more likely to inflict harm on the intended victims if they believe the victims are deserving of that treatment. Characterizing the
intended victims as Nazis, mass murderers, fascists, or racists, or using other terms that connote evil given the cultural context, helps to persuade listeners that violent action is appropriate.

The likelihood that the audience will be receptive to the message. If the audience is a defined group, its composition will be a factor affecting the likelihood that the advocacy will be persuasive. Calling for "Death to abortionists" at a pro-life rally is more likely to be found menacing than doing the same at a convention of the National Abortion and Reproductive Rights Action League.

The cultural and historical context. "Death to the Tutsis" might be menacing in contemporary Rwanda, but not in the United States. The opposite might be true of "Death to abortionists." Whether a statement is menacing may change over time within a single culture. "Death to abortionists" might not have been perceived as menacing in this country prior to the decision of Roe v. Wade.152

The breadth of dissemination of the speech. A statement advocating violence is more likely to be menacing if it is posted in a publicly available forum on the Internet (for example, on a Web site or in a newsgroup) than if it is made to a few individuals on a street corner. The larger and less well-defined the audience, the less confident the target is able to be that no listener will find the advocacy persuasive, and therefore the more reasonable the target's fear.

Each of these factors may make it more or less reasonable for the targets to conclude that the advocated action may occur, resulting in the fear and disruption usually associated with threats. No single factor will be dispositive. As with any multi-factor test, evaluating all the relevant factors and deriving a conclusion will in many cases be quite difficult.

V. Conclusion

This argument of this article has been that the test for whether a statement may be regulated as a threat should not depend on whether the statement reflects the formal structure of a threat, but rather on whether it results in the harms usually associated with threats. The proposed treatment of menacing speech is consistent with both Brandenburg and Watts, but would require a reformulation of the test that the lower courts have devised to implement the "true threat" criterion set forth in Watts.

Although the argument presented in the article does not depend on the medium by which speech is communicated, it may be seen as having greater relevance to speech communicated via the Internet than to speech

152. 410 U.S. 113 (1973).
transmitted through other media. We might distinguish two different routes by which online speech may become subject to rules different from those that apply to speech transmitted via the older communications media: the direct route and the disparate-impact route. The direct route consists of devising a new rule that responds to the novel aspects of the new medium. The disparate-impact route, by contrast, involves devising a new rule, or retaining an existing one, that ostensibly is to be applied even-handedly regardless of the communications medium involved. Because of differences among the various communications media, however, the practical consequences of the rule may vary significantly depending on the medium.

Because communication via the Internet may enable fringe opinions to reach a vastly larger audience, at vastly lower cost, than any other medium of communication, the proposed rule may be expected to have a disparate impact on Internet communications. The online medium currently reaches around 150 million people—an audience somewhat larger than the television viewership of a recent Super Bowl. But a one-minute Super Bowl pitch would cost $3.2 million, as compared to a cost of about $19.95 a month to put up a Web site. Of course, these numbers are not strictly comparable, since only a small fraction of the potential viewership will “tune in” to any given Web site. On the other hand, many Super Bowl viewers are known to visit the refrigerator or the bathroom during commercial breaks; the amount of content that can be placed on a Web site is incomparably more than what can be squeezed into a one-minute commercial; and speech on a Web site is persistent whereas broadcast speech is ephemeral.

Even if she had the cash, a fringe speaker might still be unable to get her message out to a mass audience through any medium other than the Internet. Mainstream media outlets exercise tight control over the content of commercial messages that they will distribute. For example, the network television broadcasters in the United States have developed elaborate sets of standards that they use in evaluating the suitability of a proposed advertisement, and they refuse to air advertisements that do not conform to those standards. It might be difficult to find a mainstream media outlet

155. See id.
that reaches a large audience that would agree to publish the content of the Nuremberg Files Web site. The Internet presents no such content filtering.\textsuperscript{157}

Until the advent of the Internet those who aimed at incitement of this sort were likely to be confined to means of communication that reach a limited audience,\textsuperscript{158} and their speech was in that respect less dangerous. The proposed rule is therefore more likely to come into play with respect to speech communicated via the Internet than with speech transmitted by the older communications media, and it may be viewed as an example of the disparate-impact route to applying different rules to a new communications medium.

But there is another way of looking at the speech involved in \textit{Planned Parenthood}. While speech that threatens without taking the form of a threat is most likely to be communicated via the Internet, it may also appear on the older communications media. It is possible, for example, for speech of the sort that appeared on the Nuremberg Files Web site to be communicated on a television talk show, reaching a wide audience.\textsuperscript{159}

However, speech of this type is less likely to have occurred in any widely disseminated medium while television broadcasting was tightly controlled by three networks with relatively high standards for what was allowed to be said on the air. The evolution of the television medium has occurred incrementally over the past few decades, through the addition of many cable channels and the lowering of the filtering function exercised by broadcasters. This evolution has caused a gradual democratization of the

\textsuperscript{157} The operator of a white-supremacist Web site called "Stormfront" is well aware of this feature: "We are able to reach millions of people that we never had access to in the past... The Internet is becoming an alternative new media for those who have an alternative point of view." Patti Hartigan, \textit{Internet Civil Rights Wars Renew Free Speech Issues}, \textit{Boston Globe}, Nov. 29, 1998, at A7. See Eugene Volokh, \textit{Cheap Speech and What It Will Do}, 104 \textit{Yale L.J.} 1805, 1837 (1995) (noting that the Internet reduces the power of speech intermediaries).

\textsuperscript{158} See, e.g., Abrams v. United States, 250 U.S. 616, 618 (1919) (distribution of leaflets voicing revolutionary sentiments by tossing them out the window of an office building and handing them out at clandestine meetings); Debs v. United States, 249 U.S. 211 (1919) (speech before a live audience).

\textsuperscript{159} See Lucero v. Troesch, 928 F. Supp. 1124, 1127 (S.D. Ala. 1996). The case was the aftermath of an episode of the "Geraldo Show," in which the guests were a doctor who performed abortions and an outspoken advocate of the view that the killing of abortion providers is justifiable homicide. The latter was allowed to express his views in rather inflammatory terms—including stating that the doctor "is a mass murderer and... should be dead," and that he "would approve of the killing." The doctor brought an action against him under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248. The court, analyzing the statements in context, concluded that they did not amount to "threats of force," but did caution that its decision was "heavily influenced by the specific circumstances surrounding [the anti-abortion advocate's] remarks." \textit{Id.} at 1131.
channels (in the broad sense) for communication of messages to broad audiences. The Internet may be viewed as the culmination of this democratization process—the price of entry is reduced to the cost of a computer, Internet access, and minimal technical competence. The current salience of online communications may therefore help us to recognize the incremental changes that have occurred in the older communications media, and a modification of First Amendment doctrine that seems necessitated by the novel characteristics of online communications may be recognized as an overdue modification of the doctrine applying to all media.