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# Is the True Threats Doctrine Threatening the First Amendment? Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalitiion of Life Activists Signals the Need To Remedy an Inadequate Doctrine

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# IS THE TRUE THREATS DOCTRINE THREATENING THE FIRST AMENDMENT? *PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC. V. AMERICAN COALITION OF LIFE ACTIVISTS* SIGNALS THE NEED TO REMEDY AN INADEQUATE DOCTRINE

*Lori Weiss**

## INTRODUCTION

It used to be that one had to commit a crime such as robbing a bank to be featured in a wanted poster. To the shock of a number of physicians and clinics offering reproductive services, it today seems that providing abortion services will suffice. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*[1]—more notoriously known as the "Nuremberg Files" case[2]—has been a focus of First Amendment commentary[3] since a federal jury in Oregon awarded several abortion-providing physicians and two clinics offering reproductive services $109 million in February

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1. 290 F.3d 1058 (9th Cir. 2002) (en banc) (Reinhardt, J., Kozinski, J., Berzon, J., dissenting), *reh'g en banc denied*, No. 99-35320, 2002 U.S. App. LEXIS 13829 (July 10, 2002), *cert. denied*, 123 S. Ct. 2637 (2003). The defendants, consisting of two organizations, American Coalition of Life Activists ("ACLA"), Advocates for Life Ministries ("ALM") and fourteen of their founders and leaders, will be referred to collectively as "ACLA" unless otherwise specified.

2. *See* Sam Howe Verhovek, *Anti-Abortion Site on Web Has Ignited Free Speech Debate*, N.Y. Times, Jan. 13, 1999, at A1 (explaining that the site has been named for the German city where Nazi officers were tried after World War II for crimes against humanity).

3. *See, e.g.*, Seth D. Berlin, *Are the Nuremberg Files and "Wanted" Posters Protected Advocacy or Unprotected Threat?*, Comm. Law., Summer 2002, at 1; Clay Calvert & Robert D. Richards, *The "True Threat" to Cyberspace: Shredding the First Amendment for Faceless Fears*, 7 CommLaw Conspectus 291 (1999); Bruce Fein, *Free Speech or Verbal Terrorism?*, Wash. Times, May 28, 2002, at A13, *available at* 2002 WL 2911349; Eugene Volokh, *Free Speech is Nothing to Fear*, Wall St. J., Apr. 3, 2001, at A34.

1999.[4] As part of its impassioned campaign to put an end to abortion, the American Coalition of Life Activists ("ACLA")[5] published the "Deadly Dozen" and "Wanted" posters, reminiscent of the old Wild West posters issued to capture outlaws, featuring physicians "Guilty of Crimes Against Humanity" for providing reproductive services.[6] The posters contained the names, addresses, and phone numbers, along with a $5,000 reward for "information leading to the arrest, conviction and revocation of license to practice medicine,"[7] of the featured individuals. In addition to the posters, the anti-abortionist group published the "Nuremberg Files" website,[8] urging readers to "Visualize Abortionists on Trial."[9] Images of fetuses and dripping blood surrounded the website's legend, which listed working physicians in black font, the wounded in gray, and names with strikethroughs to mark the fatalities.

The physicians asserted that these materials constituted a "true threat" as defined by the Freedom of Access to Clinic Entrances Act of 1994 ("FACE").[10] The complicated aspect of the case was that neither the posters nor the Nuremberg Files explicitly threatened the physicians. Rather, the perceived threat stemmed from the murders of physicians who were featured in previously released posters containing language and attributes closely analogous to those employed in the materials in question.[11] As noted by the Ninth Circuit, by the time the materials were published, "the poster format itself had acquired currency as a death threat for abortion providers."[12] The physicians, haunted by the fate of those featured in ACLA posters before them, sought to remove the materials from circulation.

The dependency of alleged threats on the context in which they were expressed produced a great deal of discord among judges and commentators alike. At the heart of the debate lie two major questions: (1) Whether the materials at issue constitute a true threat or incitement of unlawful action; and (2) Whether speech can be denied First Amendment protection based on context alone.[13] Any

4. Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA, 41 F. Supp. 2d 1130 (D. Or. 1999).

5. The ACLA is a Portland-based anti-abortion organization. *See infra* notes 280-84 and accompanying text.

6. *See infra* Part II.B.

7. Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA, 945 F. Supp. 1355, 1362 (D. Or. 1996).

8. *See infra* Part II.B.3. The website emulated the files compiled on Nazi officers following World War II.

9. *See infra* Part II.B.3.

10. 18 U.S.C. § 248 (1996). See *infra* Part II.B. for further discussion.

11. *See infra* Part II.B.4.

12. Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA, 290 F.3d 1058, 1079 (9th Cir. 2002).

13. *See* Berlin, *supra* note 3, at 1 (listing a number of "thorny" issues presented by

doubt as to the complexity of the issues presented by *Planned Parenthood* is quickly dispelled upon looking at the progression of the case through the Ninth Circuit. At each stage, the issue of how the ACLA's materials should be properly analyzed ultimately decided the case's outcome.[14] In the end, a sharply divided en banc panel of the Ninth Circuit declared that the ACLA's materials constituted a true threat under FACE and reinstated the jury verdict.[15]

Critics of the Ninth Circuit's decision to enjoin the posters and website and award damages assert that the materials clearly fall within the established bounds of protected speech and claim that the injunction unnecessarily chills First Amendment rights. For example, Professors Richards and Calvert maintain that "the powerful nature of the First Amendment lies in safeguarding minority viewpoints, which at times can be distasteful to mainstream society but should co-exist to ensure a vigorous national discourse."[16] If we are to remain true to the principles underlying the First Amendment and the goals it promotes, the argument goes, the political commentary and dissent expressed by these pro-life groups must be protected, regardless of whether the masses adhere to the position they are lobbying or not.[17]

Surprisingly, a number of civil libertarians known for their fervent advocacy in the name of First Amendment rights have supported the jury verdict.[18] While acknowledging that the actual language embodied in the Wanted posters and Nuremberg Files website is clearly protected by the First Amendment, the proponents of the verdict express their objections to the message conveyed on the posters and website.

The issue of whether or not the ACLA's materials were worthy of First Amendment protection was further complicated by the fact that

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*Planned Parenthood*).

14. *See infra* Part II.C.

15. *Planned Parenthood*, 290 F.3d at 1058.

16. Calvert & Richards, *supra* note 3, at 291.

17. As stated by Professor Redish: "It is a hallmark of our free society that we tolerate all viewpoints, even those of 'fringe' elements, who advocate illegal conduct, so long as they present no real threat to society. Only a danger of true harm justifies curtailing the flow of free and open discourse." Martin H. Redish, Freedom of Expression: A Critical Analysis 187-88 (1984).

18. *See, e.g.*, Steven G. Gey, *The* Nuremberg Files *and the First Amendment Value of Threats*, 78 Tex. L. Rev. 541, 542-43 (2000) (discussing the accepting reaction of civil libertarians to the jury verdict, despite their usual position advocating protection); Daniel T. Kobil, *Advocacy on the Line:* Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. Tol. L. Rev. 227, 230 (2000) (observing that the overwhelming majority of his students believe that the Nuremberg Files website should be subject to government sanctions, representing a marked divergence from the liberal reactions usually voiced by students); Dennis Byrne, *Cleaning Up Cultural Waste*, Chi.-Sun Times, June 16, 1999, at 41, *available at* 1999 WL 6543959; Ira Glasser, Letter to the Editor, *Murder Threats Are Not 'Free Speech,'* Wall St. J., Feb. 17, 1999, at A23 (Executive Director of the American Civil Liberties Union), *available at* 1999 WL-WSJ 5441035.

the implicit threats were interwoven into the ACLA's political expression. The Supreme Court has repeatedly confirmed that speech involving political debate or public issues occupies "the highest rung of the hierarchy of First Amendment values,"[19] and is therefore awarded special protection.[20] Despite this well-established principle, heated debate erupted over whether the ACLA's materials constitute true threats or incitement to unlawful action due to the divergent levels of First Amendment protection provided by each doctrine. While the Court established its defining precedents proscribing both categories of speech within two months of one another, the speech analyzed under the doctrines has received divergent treatment and different levels of protection in the years that followed.[21] Many First Amendment scholars have hailed the Court's modern incitement doctrine for its rigorous protection of First Amendment concerns.[22] The true threats doctrine, on the other hand, has endured great criticism for failing to provide the level of First Amendment protection intended by the Court.[23] Much of this criticism stems from the development of true threats jurisprudence in the lower courts.[24] With limited guidance provided by the Court, the lower courts have played a significant role in shaping the adjudication of true threats. The objective standard applied by lower courts analyzing alleged threats has been vehemently chastised as failing to provide the appropriate level of First Amendment protection.[25]

The issues involved in *Planned Parenthood* bring the divergent First Amendment protection afforded by the incitement and threats doctrines to the forefront. In particular, the ACLA's materials illuminate the inherent difficulties in analyzing implicit threats under the existing test. Those difficulties are further compounded when expressions of political debate or matters of public concern accompany the alleged threats. The debate and controversy surrounding *Planned Parenthood* signals a need to revise true threats jurisprudence to cure its deficiencies.

This Note proposes that the inadequacies associated with the true threats doctrine could be remedied by adopting a different standard for evaluating implicit threats embedded in expressions of political debate or matters of public concern. This new standard imports the public-private dichotomy developed in the constitutionalization of defamation and calls for a balance between First Amendment and competing fundamental rights. Applying the public-private

19. NAACP v. Claiborne Hardware, Co., 458 U.S. 886, 913 (1982).
20. *See, e.g.*, *infra* notes 41-43, 63, 101, 112, 179 and accompanying text.
21. *See infra* Part II.A.
22. *See infra* notes 240-42 and accompanying text.
23. *See infra* notes 243-45 and accompanying text.
24. *See infra* notes 198-201 and accompanying text.
25. *See infra* Parts II.A.2.a., II.A.2.b., II.A.3.

distinction would assist courts in distinguishing true threats from protected speech, particularly when the alleged threats are expressed implicitly and are accompanied by political debate or matters of public concern. This standard embodies the premise that political debate does not generally target private individuals. A speaker expressing an alleged threat targeting a private individual should be required to show that the defense of political debate or matters of public concern is more than a mere pretext before the statement is awarded the highest level of First Amendment protection. Speech not involving political debate or matters of public concern does not receive the same level of special protection given to political speech. Accordingly, if a court deems a claim of political debate or matter of public concern as pretextual, the competing fundamental rights of the targeted individual should be considered.

Part I provides an overview of the principles underlying the First Amendment freedom of speech and the reasons for safeguarding this fundamental right. It then examines the Supreme Court's efforts to strike an appropriate balance between First Amendment and competing fundamental rights in the areas of defamation, privacy and public employment. Part II discusses incitement of unlawful advocacy and true threats jurisprudence, including the evolution of both doctrines and the divergent level of First Amendment protection each currently affords. Next, it presents the facts of *Planned Parenthood* and traces the controversial case's progression through the Ninth Circuit. Part III proposes adopting a new standard for the evaluation of true threats, which imports the public-private dichotomy developed in the constitutionalization of defamation and calls for a balance between First Amendment and competing fundamental rights similar to the balance invoked by the Supreme Court in several areas of the law. It then applies this standard to *Planned Parenthood.*

## I. FIRST AMENDMENT AND COMPETING FUNDAMENTAL RIGHTS

Freedom of speech, as guaranteed by the First Amendment, is a cornerstone of our democracy and has been a championed right of our citizens since the Bill of Rights was enacted.[26] Several principles have been identified as the underlying reasons for advancing, cherishing and safeguarding free speech: realization of autonomy and self-fulfillment;[27] fostering the discovery of knowledge and truth in the

26. Kent Greenawalt has stated that a fundamental premise of all "Western" governments is a minimal principle of liberty: "[T]he government should not prohibit people from acting as they wish unless it has a positive reason to do so." Kent Greenawalt, Speech, Crime, & the Uses of Language 9 (1989). This principle translates into affording special protection to speech "by establishing a special value for speech" and placing prohibitions "at odds with how human beings should be regarded or with the proper role of government." *Id.* at 10-11.

27. Thomas I. Emerson, The System of Freedom of Expression 6-7 (1970).

marketplace of ideas;[28] promoting self-government and representative democracy;[29] and creating "a more adaptable and hence a more stable community."[30] The power that free speech wields is exemplified by the decisive role it has played in many of our nation's major movements, including Civil Rights, Women's Rights, environmental, anti-war and labor.[31]

The purposes and principles underlying the First Amendment have secured its position as a cherished fundamental right. Freedom of expression is firmly rooted in our sense of democracy and self-autonomy.[32] The vast protection afforded to a broad range of language and expression exemplifies the level to which our society values freedom of speech. The commitment of the courts to safeguarding free speech to the greatest extent is evident in the aversion to applying a "balancing" test in the adjudication of First Amendment rights.[33] This objection stems from the subjective and unpredictable nature inherent in balancing ill-defined categories on an ad hoc basis.[34]

While refraining from employing balancing tests promotes expansive First Amendment protection, problems arise when First Amendment rights are in direct competition with other fundamental rights.[35] For example, when a speaker's expression involves another individual, the speaker's First Amendment right may conflict with the individual's right to reputation. When fundamental values are at odds

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28. *Id.*

29. *Id.*

30. *Id.* at 7. *See also* Greenawalt, *supra* note 26, at 16-34; Redish, *supra* note 17, at 9-86; S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 Wm. & Mary L. Rev. 1159, 1173-74 (2000) (comparing the First Amendment to a "social safety valve," allowing the disgruntled to vent without resorting to violence); Michael Vitiello, *The Nuremberg Files: Testing the Outer Limits of the First Amendment*, 61 Ohio St. L.J. 1175, 1221 (2000).

31. *See* Berlin, *supra* note 3, at 26; Volokh, *supra* note 3.

32. *See supra* notes 26-30.

33. *See* Redish, *supra* note 17, at 226 (observing that the aversion to a balancing tests was a distinctive feature of both the Warren Court's liberal branch and those traditionally protectionist of free speech interests); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 952-58 (1987) (considering possible explanations for the Supreme Court's move towards balancing in its constitutional methodology).

34. *See* Thomas I. Emerson, Toward A General Theory of the First Amendment 54-56 (1966) (highlighting the difficulties and drawbacks of the ad hoc balancing test); Redish, *supra* note 17, at 54, 226.

35. *See* Lee C. Bollinger, Images of a Free Press 24-25 (1991) (noting that the most obvious criticism of the extensive protection afforded to the press is that it imposes too great a sacrifice of social interests); Emerson, *supra* note 34, at 66-88 (discussing conflict with personal interests, such as reputation, fair trial, and privacy and social interests, including consensus and efficiency, preservation of internal order and national security).

with one another, courts must strike a proper balance that respects both rights in accordance with the Constitution.[36]

This part examines several areas of the law in which the Supreme Court has recognized the existence of competing rights. Part I.A. discusses the Court's consideration of the right to reputation throughout the constitutionalization of defamation. Part I.B. looks at the Court's efforts to balance First Amendment concerns competing with an individual's right to privacy. Part I.C. reviews the Court's efforts to create a proper balance of First Amendment concerns within the scope of public employment. An overview of the Court's evaluation of competing rights within these areas imparts a sense of how the factors and considerations at issue are balanced.

### A. *The Constitutionalization of Defamation:* New York Times Co. v. Sullivan *and Its Progeny*

The constitutionalization of defamation law was set in motion in 1964 with *New York Times Co. v. Sullivan*.[37] L.B. Sullivan, one of three elected Commissioners of the City of Montgomery, Alabama, alleged that he had been libeled by a full-page advertisement about the Civil Rights movement that ran in the *New York Times*.[38] In its landmark decision, the Supreme Court held the Alabama State law constitutionally deficient for failing to provide the safeguards for freedom of speech and of the press, as required by the First and Fourteenth Amendments.[39] The Court further held that in order for a public official to recover damages in a claim of defamatory falsehood

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36. *See* Redish, *supra* note 17, at 55 ("Although the first amendment cannot practically be interpreted to provide absolute protection, the constitutional language and our political and social traditions dictate that the first amendment right must give way only in the presence of a truly compelling government interest."); Joseph F. Schuster, The First Amendment in the Balance 2-3 (1992). Today, balancing no longer spawns heated debate, as the Supreme Court has applied the approach to a number of areas in constitutional law and academics have recognized its capacity to produce both liberal and conservative results. *See* Aleinikoff, *supra* note 33, at 944.

37. 376 U.S. 254 (1964). Prior to this time, libel and defamation were viewed as unprotected by the First Amendment. *See* Emerson, *supra* note 27, at 524 ("The Court unanimously agreed that libel laws would have to be brought into conformity with the system of freedom of expression.").

38. *N.Y. Times*, 376 U.S. at 256-57. The advertisement, entitled "Heed Their Rising Voices," appeared in the March 29, 1960 issue of the *New York Times* and described the "wave of terror" encountered by non-violent Civil Rights demonstrators. *Id.* at 257. Even though Sullivan's name was not mentioned anywhere in the advertisement, he claimed that the allegation against the police was imputed to him because of his position. *Id.* at 258. Following the publication, it was acknowledged that several of the events described in the advertisement contained inaccuracies. *Id.* at 258-59.

39. *Id.* at 264. The Supreme Court of Alabama had ruled that the statements were "libelous per se" and that they were "of and concerning" Sullivan. *Id.* at 263; *see* Bollinger, *supra* note 35, at 2 (describing *New York Times* as "the fullest, richest articulation of the central image of freedom of the press" for the modern era).

relating to his official conduct, it is necessary for the plaintiff to prove that the statement was made with actual malice.[40]

The Court considered the matter "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[41] Writing for the Court, Justice Brennan maintained that imposing this heightened burden of proof on public officials was driven by the well-established principle that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[42] Allowing recovery by public officials absent a showing of actual malice would result in self-censorship by would-be critics inconsistent with the spirit and goals of the First Amendment.[43] In adopting the actual malice standard, the Court allocated the cost of errors in favor of publication rather than silence.[44]

The Supreme Court tackled the burden of proof that should be imposed on public figures three years later in *Curtis Publishing Co. v. Butts*.[45] In a plurality opinion, the Court concluded that a public figure who was not a public official would be entitled to recover damages for a defamatory falsehood, the substance of which makes substantial danger to reputation apparent, only "on a showing of highly unreasonable conduct constituting an extreme departure from

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40. *N.Y. Times*, 376 U.S. at 279-80. "Actual malice" was defined as "knowledge that [the statement] was false or made with reckless disregard of whether it was false or not." *Id.* at 280. The Court found that the evidence offered by Sullivan was "constitutionally insufficient" to support a judgment in his favor. *Id.* at 265.

41. *Id.* at 270; *see* Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. Rev. 1275, 1360 (1998) (maintaining that "[f]rom a rights based perspective, *New York Times* was clearly correct to resolve the conflict strongly in favor of speech").

42. *N.Y. Times*, 376 U.S. at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

43. *Id.* at 279. Therefore, "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *Id.* at 271 (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)). The Court recognized that certain false statements made a valuable contribution to public debate, by contributing to the emergence of ideas and truth. *Id.* at 279 n.19; *see* Bollinger, *supra* note 35, at 6-7 (noting that *New York Times* and its progeny embody the premise that while regulating false speech is acceptable, as it does not possess constitutional value, extending protection to certain falsehoods is necessary to promote the free exchange of ideas and truthful information); Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 Cornell L. Rev. 291, 312-13 (1983) (same).

44. *See* Robert M. O'Neil, The First Amendment and Civil Liability 26 (2001) (pointing out that while a large judgment in favor of a plaintiff may not cripple a publisher of the *New York Times*'s stature, it could send a smaller publisher or other form of media into financial ruin).

45. 388 U.S. 130 (1967). Butts, an athletic director at the University of Georgia, was allegedly involved with fixing a football game. *Id.* at 135.

the standards of investigation and reporting ordinarily adhered to by responsible publishers."[46] In his concurrence, Chief Justice Warren asserted that he would have extended the *New York Times* rule to encompass public figures as well.[47]

*Gertz v. Robert Welch, Inc.*[48] marked the influence of *New York Times* in the realm of defamation claims brought by private individuals and solidified the distinction between "public" and "private" individuals. Gertz was an attorney representing a Chicago police officer accused of involvement in a Communist campaign to discredit local law enforcement agencies.[49] *American Opinion*, a monthly magazine, published a story alleging that Gertz was the chief architect of the "frame-up" of the officer and linked him to Communist activity.[50] While the matter was of public concern, Gertz was neither a public official nor a public figure.

Adopting the rationale set forth in Chief Justice Warren's concurrence in *Butts*, the *Gertz* Court extended the actual malice standard to encompass public figures.[51] The Court justified imposing this heightened standard on public figures on the grounds that both public officials and figures have a more realistic opportunity to counteract false statements than private individuals, as they typically enjoy significantly greater access to the channels of effective communication;[52] society has a heightened interest in public officials and figures; and by voluntarily stepping into the public light, they invite attention and comment.[53]

Recognizing a dichotomy between public and private individuals,[54]

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46. *Id.* at 155.
47. *Id.* at 162-64.
48. 418 U.S. 323 (1974).
49. *Id.* at 325-26.
50. *Id.*
51. *Id.* at 348-49. According to Heyman, this extension of the *New York Times* rule was reasonable in terms of a rights-based approach. Heyman, *supra* note 41, at 1362.
52. *Gertz*, 418 U.S. at 344.
53. *Id.* at 344-45. The Court further recognizes the difference between a "general" and "limited" or "special purpose" public figure. *See* Time, Inc. v. Firestone, 424 U.S. 448 (1976); Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287 (D.C. Cir. 1980); *see also* Schuster, *supra* note 36, at 227 (maintaining that taking *Gertz* and *Firestone* together appears to grant private individuals the ability to sue for libel without being held to the *New York Times* or any intermediate standard); Vitiello, *supra* note 30, at 1222 n.352 (stating that "[t]he effect of cases like *Firestone* and *Gertz* is that a state retains broad power to protect private citizens from harm while assuring vigorous public debate").
54. Because private individuals generally do not have access to the media and have not voluntarily stepped into the public eye, the Court stated they were "more vulnerable to injury" and "also more deserving of recovery." *Gertz*, 418 U.S. at 345. *See* Victor C. Romero, *Restricting Hate Speech Against "Private Figures": Lessons in Power-Based Censorship from Defamation Law*, 33 Colum. Hum. Rts. L. Rev. 1, 22 (2001) (maintaining that the distinction between private and public figures "hints at an underlying egalitarian concept: that self-help may not be as effective for private

the Court set out to resolve the competing First Amendment interests and the State's "strong and legitimate . . . interest in compensating private individuals for injury to reputation."[55] The Court asserted that extending *New York Times* to apply to private individuals, as suggested by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*,[56] would amount to an unacceptable abridgement of the State's interest in protecting the reputation of its citizens.[57] The Court concluded by holding that, so long as the States did not impose liability without fault, they were free to determine the appropriate standard of liability for a publisher or broadcaster when the defamatory falsehood injured a private individual.[58] When the statements involved a matter of public concern, however, First Amendment concerns commanded that the private individual show actual malice in order to recover awards of presumed and punitive damages.[59]

The Supreme Court refined the nature of this balance in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[60] holding that the First Amendment concerns advanced in *New York Times* and *Gertz* did not outweigh the state's interest in providing adequate protection for its citizens when the defamation did not address a matter of public concern.[61] Greenmoss filed suit against Dun & Bradstreet, a credit-reporting agency, pursuant to Dun & Bradstreet sending a report to five subscribers, which contained gross misstatements of Greenmoss's assets and liabilities.[62]

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figures who have achieved less societal prominence and have less access to media").

55. *Gertz*, 418 U.S. at 348-49.

56. 403 U.S. 29, 44 (1971). Justice Brennan's plurality opinion advocated extending the *New York Times* rule to apply to any "allegedly defamatory publication concern[ing] a matter of public or general interest," regardless of whether the subject was a public official, public figure or private individual. *See id.* at 79 (Marshall, J. dissenting). The Court's retreat from *Rosenbloom*'s "general or public interest" test reflected its position that an ad hoc determination of whether an issue was of "general or public interest" imposed an unnecessary burden on judges and such a determination would not serve either of the competing interests adequately. *Gertz*, 418 U.S. at 346; Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 Geo. Wash. L. Rev. 1, 11-12 (1990).

57. *Gertz*, 418 U.S. at 346. According to Heyman, "[b]ecause [the] rights [of free speech and reputation] are of the same order of value, it was reasonable for *Gertz* to hold that defendants may be held responsible for injury to reputation when they are at fault, that is, when they fail to use reasonable care to determine whether a defamatory statement is actually true." Heyman, *supra* note 41, at 1364.

58. *Gertz*, 418 U.S. at 347.

59. *Id.* at 349. The Court considered this an equitable balance, as it allowed a private individual to be compensated for actual injury while "shield[ing] the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 347-48.

60. 472 U.S. 749 (1985).

61. *Id.* at 763. The Court recognized the line between matters of public and private concerns with regard to recovery of punitive damages, despite eschewing this line in *Rosenbloom*. *See supra* note 56.

62. *Greenmoss*, 472 U.S. at 751-52.

In considering whether the *Gertz* rule applied to issues not of public concern, the Court stressed that it "has frequently reaffirmed that speech on public issues occupies 'the highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."[63] As defamatory statements targeting private individuals about issues not of public concern do not threaten robust and wide-open political debate, state interests overshadow First Amendment concerns: "In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'"[64] The *Gertz* holding marked a concession of First Amendment rights to a competing fundamental individual right where such a concession did not pose a threat to political debate or matters of public concern.[65]

### B. *Right of Privacy*

Balancing First Amendment rights with competing State interests is not unique to defamation. Frustrated by invasive press tactics, increasingly prevalent gossip columns and "yellow journalism" fostered by emerging technology, two young lawyers, Samuel Warren and Louis Brandeis, urged the courts to recognize a new right under the common law—the "right to be let alone" or the "right to privacy."[66] Attributed with the birth of the right to privacy,[67] the Warren/Brandeis article is regarded as "perhaps the most influential

63. *Id.* at 759 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980)).

64. *Id.* at 761; *see* O'Neil, *supra* note 44, at 29 (stating that this retreat reflected the emergence of unintended consequence following the privilege created in *New York Times*, which "had done more harm than good to public service and public discourse"); Malloy & Krotoszynski, *supra* note 30, at 1187 ("Careful consideration of *Sullivan* and its progeny demonstrates that the Free Speech Clause of the First Amendment displaces traditional common law tort principles only when necessary to protect democratic deliberation.").

65. While reputation is not a constitutional right, it has been held to be a fundamental right under a natural rights theory. *See* Heyman, *supra* note 41, at 1336-40 (discussing views on the right to reputation by leading scholars in the natural rights tradition); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691, 699-707 (1986) (discussing the right to reputation as a concept of honor).

66. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195-96 (1890); *see* Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 Cath. U. L. Rev. 703, 705-06 (1990) (discussing the limited protection and remedies available to victims of privacy invasion prior to formal recognition of a right to privacy).

67. *See, e.g.*, Kramer, *supra* note 66, at 703. In lobbying for broader recognition for the right to privacy, Warren and Brandeis relied primarily on English precedents, rooted in concepts of intellectual property and contract law. Warren & Brandeis, *supra* note 66, at 195-211; *see also* Kramer, *supra* note 66, at 710-14.

law journal piece ever published."[68] In advocating the need to enhance protection of individual privacy, the authors acknowledged that the right was not absolute and advanced four limitations to curtail intrusion on the press's free speech.[69]

Since its inception,[70] the right of privacy has experienced continuous attention and development in the face of increasing technology and media coverage.[71] The majority of jurisdictions adhere to the Restatement (Second) of Torts's formulation that one who publicizes a matter concerning the private life of another is subject to liability for invasion of his privacy if disclosure of the matter would be highly offensive to a reasonable person and is not of legitimate concern to the public.[72] The rule that the disclosed information consists of legitimate public concern, or newsworthiness, has been universally applied by courts and broadly read to ensure that the public's right to be informed on matters of public interest and the media's right to free press will not be chilled by fear of liability.[73]

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68. P. Allan Dionisopoulos & Craig R. Ducat, The Right to Privacy 20 (1976) (discussing the Warren and Brandeis article).

69. Warren & Brandeis, *supra* note 66, at 214-19. The limitations stated that the right to privacy would not prohibit publications relating to a matter of public or general interest; would not prohibit publications, while private in nature, which would be considered a privileged communication under the laws of libel and slander; would not allow for recovery from an oral publication absent the showing of special damages; and would cease to exist upon an individual's publication of the facts, or his consent to do so. *Id.* It has been argued, however, that the tort cannot coexist with constitutional freedoms of speech and press. *See* Zimmerman, *supra* note 43, at 293-94.

70. By 1939, the courts' reception to the right of privacy was so vast that the American Law Institute codified it in the Restatement of Torts. Restatement of Torts § 867 (1939).

71. The right of privacy has since evolved to be recognized as four separate torts: (1) "unreasonable intrusion upon the seclusion of another"; (2) "appropriation of the other's name or likeness"; (3) "unreasonable publicity given to the other's private life"; and (4) "publicity that unreasonably places the other in a false light before the public." Restatement (Second) of Torts § 652A (1977); *see* Martin E. Halstuk, *Shielding Private Lives from Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 1 CommLaw Conspectus 71, 72 (2003); Kramer, *supra* note 66, at 724. *But see* Zimmerman, *supra* note 43, at 296-99 (maintaining that the broad expansion of situations encompassed by the "'right to privacy'" by courts and legislatures bears "little resemblance to those encompassed in the vague Warren-Brandeis formulation").

72. Restatement (Second) of Torts § 652D (1977); *see* Patrick J. McNulty, *The Public Disclosure of Private Facts: There is Life After* Florida Star, 50 Drake L. Rev. 93, 99 (2001) (noting that the four elements of the tort—publicity, private facts, offensiveness and newsworthiness—are often scrutinized separately by courts); Zimmerman, *supra* note 43, at 299-303. With regard to publicity, most courts follow the Restatement's comments, requiring the information at issue be communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Restatement (Second) of Torts § 652D cmt. a. Conversely, the minority requires that the plaintiff show that he has a special relationship with the public to whom the information was disclosed in order to fulfill the publicity requirement. *See* McNulty, *supra* at 100-01.

73. *See* McNulty, *supra* note 72, at 106-09; Zimmerman, *supra* note 43, at 299-300.

Asserting the right to privacy often materializes as a direct challenge to free speech. While the elements of the public disclosure tort limit the amount of protection it affords, the right to privacy has been classified as one of society's fundamental rights.[74] Thus, the conflict between the right to privacy and the right to free speech is significant, as both are considered fundamental values of our society. Jurisprudence in this area of the law has attempted to create a proper balance between the competing rights.[75]

The established balance between the right to privacy and the right to free press endured a substantial transformation with the Supreme Court's creation of a new constitutional principle for the public disclosure privacy tort in *Florida Star v. B.J.F.*[76] B.J.F., a robbery and rape victim, brought suit against the *Florida Star* for violating a Florida statute making it unlawful to print, publish or broadcast the name of a victim of a sexual offense.[77] After being attacked by an unknown assailant, B.J.F. reported the incident to the Sheriff's Department ("Department").[78] A reporter-trainee for the *Florida Star* copied the police report from the Department's pressroom, including B.J.F.'s full name, which was then printed in the "Robbery" subsection of the *Florida Star*'s "Police Reports" section.[79] The

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The private facts requirement bars recovery for disclosure of facts already in the public domain. This was confirmed by the Supreme Court's refusal to impose liability for the publication of a rape victim's name obtained from records open to public inspection and related to a criminal prosecution in *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 497 (1975). The offensive element of the tort means, in essence, "only the most serious transgressions of privacy are deemed worthy of remedy." McNulty, *supra* note 72, at 104; *see* Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 Cal. L. Rev. 957, 984 (1989) (maintaining that social norms govern which revelations are considered inappropriate).

74. *See* Halstuk, *supra* note 71, at 71 ("The rise of American privacy law over the years reflects the profound importance of this fundamental value in modern society."); Heyman, *supra* note 41, at 1332-33 (discussing the reasons that privacy is considered a fundamental right); Kramer, *supra* note 66, at 724 (observing that the right to privacy "has earned a prominent place in American jurisprudence and is now regarded as one of society's most fundamental values"); Post, *supra* note 73, at 958-68 (discussing the tort in terms of civility).

75. *See* Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (Breyer, J., concurring); *id.* at 541 (Rehnquist, C.J., dissenting); Fla. Star v. B.J.F., 491 U.S. 524, 541 (1989) (Scalia, J., concurring); *id.* at 542 (White., J., dissenting); Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979); *Cox Broad. Corp.*, 420 U.S. at 469; *see also* McNulty, *supra* note 72, at 94 ("Courts endeavored for years to reconcile and balance the competing values represented by an individual's right to privacy and the public's right to know."); Post, *supra* note 73, at 967 (discussing the plaintiff's interests involved in the privacy tort).

76. 491 U.S. 524, 541 (1989) (Scalia, J., concurring); *id.* at 542 (White, J., dissenting). *See* McNulty, *supra* note 72, at 110.

77. *Fla. Star*, 491 U.S. at 526-27. B.J.F. also brought suit against the Department, but they settled prior to the trial. *Id.* at 528.

78. *Id.* at 527.

79. *Id.*

publication also violated the *Florida Star*'s internal policy of not publishing the names of assault victims.[80]

At trial, B.J.F. testified that she had heard about the article from co-workers and acquaintances, that her mother had received several phone calls from a man threatening to rape B.J.F. again and that these events resulted in the need for her to change her phone number and residence, seek police protection and obtain mental health counseling.[81] The *Florida Star*'s defense included evidence that it had obtained B.J.F.'s name from the report released by the Department and that violation of its internal rule was unintentional.[82] The trial court entered judgment in favor of B.J.F. and the District Court of Appeal of Florida affirmed.[83]

The Supreme Court reversed, holding that whether an individual's right to privacy outweighed a newspaper's First Amendment rights had to be determined on the facts of the case, rather than by a broad sweeping rule.[84] The Court's reluctance to formulate a broad holding "[r]espect[ed] the fact that press freedom and privacy rights are both 'plainly rooted in the traditions and significant concerns of our society.'"[85] In the eyes of the Court, the commission and investigation of a violent crime constituted a "matter of paramount public import."[86] The Court further held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."[87] Because *Florida Star* had lawfully obtained the information from a government source, thereby having a

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80. *Id.* at 528.

81. *Id.*

82. *Id.*

83. *Id.* at 528-29. The Supreme Court of Florida denied review. *Id.*

84. *Id.* at 532-33.

85. *Id.* at 533 (quoting Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975)). *See id.* at 551 (White, J., dissenting) (faulting the majority for attributing too little weight to B.J.F.'s side of the equation, and too much to the other, in its attempt to reach a balance); Bollinger, *supra* note 35, at 26 (questioning whether a Court more sensitive to the privacy issues involved would have attributed such a low value to the State's interest); McNulty, *supra* note 72, at 125 (maintaining that the Court offered no discussion or consideration of B.J.F.'s privacy rights).

86. *Fla. Star*, 491 U.S. at 536-37. *See* McNulty, *supra* note 72, at 111-12 (observing that the Court held public significance was determined by the general subject matter, rather than consideration of whether the plaintiff's identity was a matter of public interest and noting that no attempt to justify whether the disclosure of B.J.F.'s identity contributed to the public significance of the story); Schuster, *supra* note 36, at 231 (commenting that none of the three opinions even eluded to the question of how including the victim's name "reveals anything particularly relevant to the self-governing function").

87. *Fla. Star*, 491 U.S. at 541. The Court invoked the strict scrutiny test as articulated in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979). *Id.* at 540-41. In his dissent, Justice White charged that by invoking this standard, the majority rule will inevitably "obliterate one of the most noteworthy legal inventions of the 20th century." *Id.* at 550 (White, J., dissenting).

right to assume publication was lawful, and reporting the crime was a matter of public concern, the Court found that no such interest was served by imposing liability under the Florida statute in this particular case.[88] In closing, the Court noted that a different outcome could be reached on a different set of facts.[89]

While *Florida Star* appeared to suggest that it would be virtually impossible for an individual's right to privacy to outweigh First Amendment concerns when the information was lawfully obtained and involved a matter of public concern,[90] *Bartnicki v. Vopper*[91] embraced a more equitable balance of the competing rights. The case arose out of an intercepted cell phone conversation, during which Kane, president of a local teacher's union, informed his chief negotiator, Bartnicki, that if the school board did not meet their demands they were "gonna have to go to their, their homes . . . [t]o blow off their front porches."[92] The conversation had been illegally intercepted by an unknown person and passed along to school board members and Vopper, a local broadcaster.[93] Bartnicki and Kane claimed that by airing the tape on his radio show, Vopper had violated 18 U.S.C. § 2511(1)(c) and the analogous Pennsylvania statute.[94]

In its endeavor to strike a balance between First Amendment and

88. *Id.* at 541. The Court supported its ruling by pointing to other means through which the State could preserve the secrecy of a sexual assault victim's identity and asserting that requiring the press to determine whether publicly released information was in fact legally publishable posed a threat of self-censorship. *Id.* at 540-41; *see* Heyman, *supra* note 41, at 1365 (observing that the statute's aim was not to promote state interests, but to protect the rights of victims); McNulty, *supra* note 72, at 115 ("The message of *Florida Star* is clear and unambiguous: timidity and fear of self-censorship by the press in reporting the news of the day is to be avoided at nearly all costs.").

89. *Fla. Star*, 491 U.S. at 541. If, for example, *Florida Star* had obtained the information unlawfully, the Court may not have found it constitutionally protected speech. *Id.*

90. *See Smith*, 443 U.S. at 102 (stating generally that "state action to punish the publication of truthful information seldom can satisfy constitutional standards").

91. 532 U.S. 514, 535 (2001) (Breyer, J., concurring); *id.* at 541 (Rehnquist, C.J., dissenting).

92. *Id.* at 518-19.

93. *Id.* at 519.

94. 18 U.S.C. § 2511(1)(c) provides that:

> any person who intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished . . . .

18 U.S.C. § 2511(1)(c) (2001). The Pennsylvania statute contains a similar provision. 18 Pa. Cons. Stat. § 5725(a) (1988); *see* Timothy P. Terrell & Anne R. Jacobs, *Privacy, Technology, & Terrorism:* Bartnicki, Kyllo, *and the Normative Struggle Behind Competing Claims to Solitude and Security*, 51 Emory L.J. 1469, 1484 (2002) (noting that in cases like *Bartnicki*, the parties are generally in agreement as to the facts and legal issues and the dispute centers around how their competing rights should be valued).

privacy rights, the Supreme Court considered the purposes underlying the statute.[95] The government maintained that the statute furthered two interests: to remove the incentive for parties to intercept private conversations and to minimize the harm to people whose conversations have been illegally intercepted.[96] The Court rejected the contention that imposing liability on the disseminator of the information of public interest that they had lawfully obtained would deter illegal interception of private conversations.[97]

The Court was much more receptive to the government's second argument, recognizing that "[p]rivacy of communication is an important interest" and that "the fear of public disclosure of private conversations might well have a chilling effect on private speech."[98] Acknowledging that the disclosure of information may present a greater intrusion on privacy than the interception itself, the Court conceded that there was a valid independent justification for imposing liability for a person disclosing lawfully obtained information, even if that liability would not hinder the interceptions from occurring.[99]

Writing for the Court, Justice Stevens maintained that the case invoked "the core purposes of the First Amendment" and concluded that "privacy concerns give way when balanced against the interest in publishing matters of public importance."[100] The Court held that where the person publishing the information was not involved in its illegal acquisition, but had obtained the information through lawful means, and where the conversation pertained to a public issue, imposing liability violated the First Amendment.[101]

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95. *See* James C. Goodale, 'Bartnicki': *Publish News That's Private but True?*, N.Y. L.J., Aug. 3, 2001, at 3 (observing that *Bartnicki* was the first time the Court held that there is a right of privacy that may punish publication of truthful facts).

96. *Bartnicki*, 532 U.S. at 529. Because the statute involved the fundamental right of free speech, the Supreme Court applied the strict scrutiny standard of review, rather than the intermediate scrutiny applied by the Pennsylvania courts. *Id.* at 526-28. To survive strict scrutiny, the government must prove that the regulation is closely related to a compelling government interest and that the regulation achieves its intended purpose by the least restrictive means possible. *See* Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979); Halstuk, *supra* note 71, at 86-87 n.220; *see also* McNulty, *supra* note 72, at 133 (maintaining that by balancing two interests of the highest order, the Court strayed from the constitutional ground broken in *Florida Star* and returned to the common law balancing approach).

97. *Bartnicki*, 532 U.S. at 530-31. The Court held that sufficient deterrence would be achieved by imposing the appropriate sanctions. *Id.* at 529-30. Justice Stevens's opinion noted that this was an exceptional case, as the actions of the interceptor were not motivated by financial gain or public praise. *Id.* at 531.

98. *Id.* at 532-33.

99. *Id.* at 533.

100. *Id.* at 533-34; *see* Jesse A. Mudd, *Right to Privacy v. Freedom of Speech: A Review and Analysis of* Bartnicki v. Vopper, 41 Brandeis L.J. 179, 195 (2002) (labeling the public concern argument as weak because the intercepted conversation was publicized after the labor dispute had been settled).

101. *Bartnicki*, 532 U.S. at 535. Justice Breyer's concurrence summarized the balance struck by the majority opinion:

### C. *Freedom of Speech for Public Employees*

The First Amendment rights within the scope of public employment presents yet another area of law involving a clash between free speech and competing fundamental rights. As late as 1952, the Supreme Court's view that public employment was a privilege allowed the government to place restrictions on employees without offending their First Amendment rights.[102] The Court began to modify its position in 1952, but it was not until its landmark decision in *Pickering v. Board of Education*[103] that First Amendment rights were extended to public employees.[104]

Marvin Pickering was a high school teacher dismissed following a local newspaper's publication of his letter to the paper's editor, in which Pickering attacked the Board of Education's handling of bond issue proposals and allocation of financial resources.[105] The Supreme

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> Thus, in finding a constitutional privilege to publish unlawfully intercepted conversations of the kind here at issue, the Court does not create a "public interest" exception that swallows up the statutes' privacy-protecting general rule. Rather, it finds constitutional protection for publication of intercepted information of a special kind. Here, the speaker's legitimate privacy expectations are unusually low, and the public interest in defeating those expectations is unusually high.

*Id.* at 540; *see* Goodale, *supra* note 95 (asserting that *Bartnicki* raises more questions than it answers on the conflict between the right to privacy and the right to publish); Halstuck, *supra* note 71, at 90 (noting that while *Bartnicki* contributes to press rights by considering liability stemming from the publication of private information obtained by a nongovernmental source, the Court left two "overarching questions of fundamental importance" unanswered: (1) whether the media can ever be punished for publishing truthful information; and (2) whether the media has the right to publish truthful information if it was involved in its unlawful acquisition).

102. As Justice Holmes stated: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892); *see* Marcy S. Edwards et al., Freedom of Speech in the Public Workplace 27 (1998); D. Gordon Smith, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. Chi. L. Rev. 249, 250 (1990).

103. 391 U.S. 563 (1968).

104. *See* Edwards, *supra* note 102, at 29 (observing that the balancing approach adopted in *Pickering* remains the current standard); Tony M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. Cal. L. Rev. 1, 6 (1987) (identifying public employees as including employees of local, state or federal governments, the judiciary, executive appointees, military personnel, public school personnel, public university personnel, firefighters, police officers, postal workers and welfare workers).

105. *Pickering*, 391 U.S. at 566. In 1961, voters of the school district approved the Board of Education's bond issue proposal to raise money for the construction of two new schools. *Id.* at 565. In 1964 the Board submitted two proposals asking the voters to increase the tax rate to be used for educational purposes, both of which were defeated. *Id.* at 566. Prior to the second vote, a local newspaper had published letters submitted by the Teachers' Organization and the superintendent asserting that failure to adopt the proposal would result in a decline in the quality of education offered by the district's schools. *Id.* In response to these letters and the second failed vote, Pickering wrote a letter to the paper's editor, attacking the Board's handling of the 1961 bond issue proposals, its subsequent allocation of financial resources between

Court identified its task as drawing the proper balance between Pickering's interests as a citizen to comment on matters of public concern and the State's interests, as an employer, to provide efficient public services through its employees.[106] Due to the specific nature and facts inherent in cases requiring such a balance, the Court announced that its discussion would impart some general guidelines, as opposed to a general standard, for evaluating such competing interests.[107]

The Court squarely rejected the Board's contention that the letter compromised professional reputations and would cause conflict and dissension among the Board, administrators and teachers, as the criticisms were directly aimed at the allocation of funds and the methods by which voters were informed of the district's need for additional funding. The statements did not target any specific members of the Board or individuals whom Pickering would come into contact with through his employment.[108] While the Court agreed with the Board that certain portions of Pickering's letter contained false statements, these statements reflected a difference of opinion as to how funds should be allocated, which clearly concerned a matter of public interest.[109] The Court emphasized that, as free and open debate is essential to an informed voting process, the personal knowledge and insight of teachers required that they retain the right to speak freely about school operations without a fear that their views might culminate in their termination.[110]

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the schools' educational and athletic programs and the superintendent of schools' efforts to thwart teachers in the district from opposing or criticizing the proposed bond issue. *Id.*

106. *Id.* at 568. The Illinois courts reviewed the Board's proceedings to determine whether the evidence offered supported the Board's conclusion that Pickering's publication was "detrimental to the best interests of the schools." *Id.* at 566-67. Upon reviewing the decision rendered by the Illinois courts, the Supreme Court stated that the opinion appeared to suggest that in accepting their employment, teachers may constitutionally be compelled to relinquish First Amendment rights to discuss matters of public concern related to the operation of public schools in which they worked—a premise which the Court had unequivocally rejected in a number of prior decisions. *Id.* at 568 (citations omitted).

107. *Id.* at 569; *see* Richard Michael Fischl, *Labor, Management, and the First Amendment: Whose Rights Are These, Anyway?*, 10 Cardozo L. Rev. 729, 739 (1989) (commenting that the *Pickering* balance suggests that only the State, not the employee, "has a legally protected interest in the employment aspect of the government/public employee relationship"); Massaro, *supra* note 104, at 13 (stating that *Pickering* clarified the Court's position on the constitutional protections for public employees speaking as citizens, but left the protections for employees speaking as employees unresolved); Smith, *supra* note 102, at 251-52 (observing that the Court rejected the two extreme approaches—the State's capacity to compel employees to relinquish their First Amendment rights on one end of the spectrum, and employees maintaining their free speech rights enjoyed as citizens on the other—in balancing the rights at issue).

108. *Pickering*, 391 U.S. at 569-70.

109. *See id.*

110. *Id.* at 571-72.

The Court concluded that because Pickering's false statements involved a matter of public concern and were not shown or presumed to impede his capacity to perform as a teacher or interfere with the daily operations of the schools, the Board's interest in limiting Pickering's contribution to public debate was not significantly greater than its interest in limiting a similar contribution by a member of the general public.[111] Consistent with the premise that free and uninhibited discussion of matters of public concern requires the utmost First Amendment protection, the Court held that a public employee's right to comment on matters of public concern may not provide the basis for his termination from employment absent proof that he made false statements knowingly or with reckless disregard of the truth.[112]

The Court revisited the First Amendment rights of a public employee in *Connick v. Myers*.[113] Resisting a transfer, Sheila Myers, an Assistant District Attorney in New Orleans, voiced her opposition to several superiors and circulated a questionnaire to support her contention that many of her concerns were widely shared throughout the office.[114] The Fifth Circuit affirmed the district court's finding that Myers' questionnaire involved matters of public concern and that the State had not "clearly demonstrated" that circulating the questionnaire had "substantially interfered" with office operations.[115]

Embarking on its challenge of striking the appropriate balance between an employee's constitutional right to speak on matters of public concern and the State's right, as an employer, to efficiently serve the public through its employees, the Court reaffirmed its commitment to awarding speech on matters of public concern special attention, as it occupied the "highest rung of the hierarchy of First Amendment values."[116] If the speech could not be characterized as involving a matter of public concern, however, the First Amendment should not overshadow a government official's capacity to run the management of his office with wide latitude.[117] The Court held,

111. *Id.* at 572-73. The Court noted that had a member of the general public written the letter, the Board would have been held to the requirements of *New York Times*. *Id.* at 573.

112. *Id.* at 574.

113. 461 U.S. 138 (1983).

114. *Id.* at 140-41. The questionnaire sought to capture her co-workers views regarding the office transfer policy, morale, the need for a grievance committee, the level of confidence in supervisors, and if they had felt pressured to work in political campaigns. *Id.* at 141. Following the distribution of the questionnaire, Connick terminated Myers, citing her refusal to accept the transfer and her act of insubordination (distributing the questionnaire) as the reasons supporting his decision. *Id.* Myers filed suit under 42 U.S.C. § 1983, claiming that in exercising her right to free speech, she had been wrongfully terminated. *Id.*

115. *Id.* at 142.

116. *Id.* at 145 (internal quotations and citations omitted).

117. *Id.* at 146. Professor Massaro has noted that the Court's "analysis of employee

therefore, that when an employee's speech relates to a matter of personal interest rather than a matter of public concern, absent the most unusual circumstances, a public agency's personnel decision allegedly reacting to an employee's behavior will not be subject to judicial review.[118]

With the exception of one question, the Court found that the subject of Myers' questionnaire did not constitute a matter of public concern.[119] The questions were not intended to enhance the overall efficiency, but to fortify Myers' resistance to her transfer.[120] Balancing Myers' First Amendment right to free speech against the government's interest in "the effective and efficient fulfillment of its responsibilities to the public,"[121] the Court gave deference to Connick's decision that the insubordination manifested by Myers' questionnaire posed a threat to efficiency and close working relationships.[122]

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speech resembles its analysis of defamatory statements." Massaro, *supra* note 104, at 26. The "matter of public concern" requirement in public employee speech cases has been criticized for being vague and subjective. *See* Estlund, *supra* note 56, at 50-51; Massaro, *supra* note 104, at 27-33.

118. *Connick*, 461 U.S. at 147. Fischl has interpreted "[m]atters of personal interest" to mean "issues that involve the employment relationship between government and public employee." Fischl, *supra* note 107, at 737 (emphasis omitted). According to Fischl, protection for speech relating to such a topic is likely to be denied, even when the speech may arguably "'touch on a matter of public concern.'" *Id.* (quoting *Connick*, 461 U.S. at 148 n.8); *see* Estlund, *supra* note 56, at 8 (arguing that the public concern test formulated in *Connick* "recast the *Pickering* balance: What was, in *Pickering*, the announced purpose for protecting . . . employee speech became the minimum threshold for gaining protection in *Connick*").

119. *Connick*, 461 U.S. at 147-49. The Court held that whether the employee's speech addresses a matter of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48.

120. *Id.* at 148.

121. *Id.* at 150.

122. *Id.* at 151-52. In holding that Myers's termination did not offend the First Amendment, the Court emphasized that it was in no way creating a general standard against which such statements should be judged. *Id.* at 154. Fischl summarizes the implications of the *Connick* holding:

> In sum, then, when the employee "does politics," she can be viewed as a citizen legitimately involved in collective self-governance, and the government cannot silence her through the use of her vulnerability as an employee. But when the citizen speaks out about work, we view her as a mere employee, and she ceases to have any self-governance interest at all.

Fischl, *supra* note 107, at 740. In his dissenting opinion, Justice Brennan stated the Court's decision was flawed on three grounds: (1) distorting the balancing analysis required by *Pickering* by weighing the context in which the employee's statement was made twice; (2) narrowing the subject matter on which a public employee could express his views without the fear of retaliation; and (3) misapplying the *Pickering* balancing test in holding Myers's dismissal for circulating a questionnaire addressing at least one subject of public concern was constitutional without any evidence that Myers's conduct disrupted the efficient functioning of the office. *Connick*, 461 U.S. at 157-58 (Brennan, J., dissenting); *see* Massaro, *supra* note 104, at 18-19, 24 (discussing obstacles to an employee's success on a free speech claim and arguing that *Connick*

The First Amendment rights of public employees, like defamation and the right to privacy, mark an area of the law in which the Supreme Court deemed it necessary to balance First Amendment concerns with competing fundamental rights. While precedents in each of these areas have set forth guidelines to assist lower courts in striking an appropriate balance between competing rights, the Court has refrained from establishing standards to evaluate such interests.[123] As Professor Heyman has articulated, "the rights at issue should be delineated by applying the general concept of the right to the particular facts, or (what amounts to the same thing) by viewing specific facts in light of the general concept." [124] Academics consider this approach to balancing as providing the appropriate intermediate level between absolutism on one extreme and ad hoc balancing on the other.[125]

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imparts ample protection to public employers); Paul Ferris Solomon, Note, *The Public Employee's Right to Free Speech: A Proposal for a Fresh Start*, 55 U. Cin. L. Rev. 449, 468 (1986) (asserting that the *Connick* holding unjustifiably tips the *Pickering* balance in favor of the employer).

123. As explained by Craig R. Ducat, this approach to the balancing of interests proceeds on a case-by-case basis, eventually producing common principles as to how competing interests will be treated. Craig R. Ducat, Modes of Constitutional Interpretation 121 (1978). Future cases allow for these principles to be reconsidered, refined, abandoned or "qualified as varying fact situations in cases provoke modifications as to how certain interests will be treated under peculiar conditions." *Id; see* Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 Yale L.J. 1, 13 (1987) (observing that varying circumstances will affect the weights assigned to interests and the balance expressed in the general rule).

124. Heyman, *supra* note 41, at 1357. Heyman characterizes this valuation of rights as a reflection of human liberty and self-determination: "The aim of this approach is to harmonize the competing rights by protecting both insofar as possible and, to the extent that they conflict, by protecting the right that (at the margin) constitutes the most important aspect of liberty." *Id.* at 1356. Heyman explains that this approach is fundamentally different from a generalized weighing of social interests and supports a restriction on speech only when such restriction is necessary to protect another right, which emerges as more valuable as an aspect of freedom under the circumstances. *Id.*; *see* Ronald Dworkin, Taking Rights Seriously 193-94 (1977) (recognizing the need to balance competing rights). Ducat notes that "considerable leeway" often exists under this scheme and judges confronted with novel issues typically justify the precedent upon which their decision ultimately rests in terms of an analogy. Ducat, *supra* note 123, at 122-23.

125. Melville B. Nimmer has labeled this "definitional" balancing. Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 Cal. L. Rev. 935, 942 (1968); *see* Ducat, *supra* note 123, at 129 n.28; Heyman, *supra* note 41, at 1357. *But see* Aleinikoff, *supra* note 33, at 979-81 (arguing that while "definitional" balancing promises more certainty than "ad hoc" balancing, the distinction between the two approaches often proves to be artificial in reality). The obvious—and frequently voiced—criticism of balancing is that courts lack objective criteria for weighing or comparing competing interests. Without such criteria, subjectivity threatens to tip the scales. *See* Ducat, *supra* note 123, at 127-28; Aleinikoff, *supra* note 33, at 972-76, 992-94. In response to objections that a rights-based approach may undermine the protection of free speech, Heyman argues that the approach actually strengthens the normative basis of free speech in

The next part discusses the difficulties in analyzing implicit threats as illustrated through *Planned Parenthood v. ACLA*. The Supreme Court's formulation of the incitement to unlawful action and true threats doctrines and the level of First Amendment protection currently associated with each doctrine provide a backdrop to the complex issues posed by *Planned Parenthood*. Part II begins with an overview of these doctrines and then presents the facts and issues involved in *Planned Parenthood*, focusing on the role the doctrines played in the case's progression through the Ninth Circuit.

## II. INCITEMENT OF UNLAWFUL ACTION, TRUE THREATS AND *PLANNED PARENTHOOD V. ACLA*

*Planned Parenthood v. ACLA*,[126] branded "one of the most controversial [cases] in the U.S. struggle over abortion,"[127] surpassed the confines of the abortion debate and ultimately emerged as a case of First Amendment jurisprudence.[128] The case epitomizes the complexities involved in analyzing implicit threats embedded in what the speaker claims to be political speech. Whether the materials published by the ACLA are properly categorized as threats made to doctors by zealous pro-life advocates, or as incitement—as the violence allegedly threatened is by unknown third parties inspired to act from the messages relayed in the posters and website—remained a hotly contested issue throughout the case's progression through the Ninth Circuit.[129]

One of the reasons the case spawned so much controversy is that on their face, the ACLA's expressions clearly appear to comport with the

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two ways: (1) "free speech may enjoy the strongest status as a right when it must be exercised with due regard for the rights of others"; and (2) "free speech furthers the individual and social good most effectively when it is required to respect the rights of others." Heyman, *supra* note 41, at 1368-69; *see* John Rawls, A Theory of Justice 243-47 (1999). Another common objection to balancing is that it allows the judiciary to assume the role of the legislature. *See* Ducat, *supra* note 123, at 130-36; Aleinikoff, *supra* note 33, at 984-86, 991-92.

126. 290 F.3d 1058 (9th Cir. 2002) (en banc) (Reinhardt, J., Kozinski, J., Berzon, J., dissenting), *reh'g en banc denied*, No. 99-35320, 2002 U.S. App. LEXIS 13829 (July 10, 2002), *cert. denied*, 123 S. Ct. 2637, 2638 (2003).

127. Andrew Quinn, *Anti-abortion 'Terror' Tactics Ruled Illegal*, Nat'l Post, May 17, 2002, at A13.

128. *See* Berlin, *supra* note 3, at 26 (stating "this case illustrates how the intense public controversy over legalized abortion continues to test the limits of First Amendment jurisprudence and to press the boundaries of permissible forms of expression"); Tony Mauro, *Justices to Consider Hearing Anti-Abortion Free Speech Case*, Fulton County Daily Rep., Dec. 9, 2002, at 1 (quoting defense counsel Edward White III of the Thomas More Law Center as stating "[t]his case concerns free speech in America"); Volokh, *supra* note 3 (recognizing that "there's much more at stake here than this one particular movement"). The case's potential to redefine existing First Amendment jurisprudence ended with the Supreme Court's decision to deny certiorari in 2003. ACLA v. Planned Parenthood, 123 S. Ct. 2637, 2638 (2003).

129. *See* Berlin, *supra* note 3, at 28.

First Amendment. The sharp division among the Ninth Circuit judges and the fervent reactions in the wake of each decision exhibit how implicit threats may compromise a court's ability to discern with which type of speech it is dealing. The initial characterization of the ACLA's materials proved to play a decisive role in the outcome of the case.[130] The difficult issues presented by *Planned Parenthood* highlight the shortcomings of the true threats doctrine, particularly when the alleged threats are implicit and coupled with a political message.

This part discusses *Planned Parenthood v. ACLA* and the two categories of speech involved in its adjudication: incitement or advocacy of unlawful action and true threats. Part II.A. outlines the Supreme Court's formulation of the incitement of unlawful action and the true threats doctrines and the contrasting level of First Amendment protection currently associated with each doctrine. Part II.B. provides an overview of the facts and issues presented by *Planned Parenthood*. Part II.C. traces the controversial case's progression through the Ninth Circuit.

### A. *Incitement of Unlawful Action and True Threats*

While the First Amendment has been broadly interpreted to encompass a wide array of language and expression, the right is not absolute.[131] As stated by Professors Malloy and Krotoszynski: "The First Amendment does not guarantee an absolute right to anyone, to express their views any place, at any time, and in any way they want."[132] Certain categories of speech—fighting words,[133] obscenity,[134] defamation,[135] commercial speech,[136] speech likely to incite imminent lawless action,[137] and speech categorized as "true threats"[138]—have been identified as posing a potential risk to society.[139] The Supreme Court has held that proscribing these categories of speech—which arguably do not promote the values underlying the First

130. *See infra* Part II.C.

131. *See* Clay Calvert & Robert D. Richards, *Free Speech and the Right to Offend: Old Wars, New Battles, Different Media*, 18 Ga. St. U. L. Rev. 671, 675 (2002); Malloy & Krotoszynski, *supra* note 30, at 1178-79; Ashley Packard, *Threats or Theater: Does* Planned Parenthood v. American Coalition of Life Activists *Signify That Tests for "True Threats" Need to Change?*, 5 Comm. L. & Pol'y 235, 246 (2000).

132. Malloy & Krotoszynski, *supra* note 30, at 1178-79 (quoting Olivieri v. Ward, 801 F.2d 602, 605 (2d Cir. 1986)).

133. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

134. Miller v. California, 413 U.S. 15 (1973).

135. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

136. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

137. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

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

139. *See* Malloy & Krotoszynski, *supra* note 30, at 1183; Calvert & Richards, *supra* note 131, at 675-76.

Amendment[140]—on the basis of content is constitutional so long as the regulations remain viewpoint-neutral.[141]

### 1. Incitement of Unlawful Action

The modern incitement doctrine, formulated by the Supreme Court's *per curiam* opinion in *Brandenburg v. Ohio*,[142] evolved from the clear and present danger test articulated by Justice Oliver Wendell Holmes in *Schenck v. United States*[143] and invoked in a line of cases arising under the Espionage Act.[144] The clear and present danger test hinged upon a determination of "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[145] As Justice Holmes explained: "It is a question of proximity and degree."[146] The limited First Amendment protection offered under the clear and present danger test is magnified by the Espionage Act cases,[147] where the Supreme Court upheld several convictions of members of the Socialist and Communist parties for their efforts to encourage drafted men to resist the call to military service during times of war.[148]

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140. *See* Malloy & Krotoszynski, *supra* note 30, at 1183.

141. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382-84 (1992). Regulations that are viewpoint-neutral are based on the category of speech, rather than the particular viewpoint being expressed. *Id.* at 383-84. While the Constitution does not require that all categories of speech receive the same level of First Amendment protection, it does require that equal protection be afforded to all speech within a given category. *Id.* For example, regulations that only proscribe libel that criticizes the government would not be viewpoint-neutral. *Id.* at 384. In order to remain within its constitutional bounds, the government may only proscribe libel as a category, regardless of the view conveyed by a particular message. *Id.; see* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 643 (1994) (explaining that "[a]s a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based"); C. Edwin Baker, Human Liberty & Freedom of Speech 125 (1989) ("The constitutionality of regulating the time, place, and manner of assemblies and regulating the physical components of expressive conduct depends on the 'reasonableness' of a particular restriction."); Calvert & Richards, *supra* note 131, at 676 (noting that as a "general rule . . . speech may not be censored solely because some find it offensive").

142. 395 U.S. 444 (1969) (per curiam).

143. 249 U.S. 47 (1919).

144. *See* Frohwerk v. United States, 249 U.S. 204, 205 (1919); Debs v. United States, 249 U.S. 211, 212 (1919).

145. *Schenck*, 249 U.S. at 52.

146. *Id.*

147. *See supra* note 144.

148. *See* Dennis v. United States, 341 U.S. 494, 516-17 (1951) (upholding the conviction of eleven members of the Communist party for distribution of pamphlets and organization of classes to teach communist principles during World War II as violating the Smith Act of 1940, 54 Stat. 671 (1940) (current version at 18 U.S.C. § 2385 (1994))); *Debs*, 249 U.S. 211 (finding a speech delivered by Debs as violating the Espionage Act for inciting insubordination, disloyalty and refusal to serve among those called to serve in U.S. military forces during World War I); *Frohwerk*, 249 U.S.

The *Brandenburg* test shifted away from the clear and present danger test's focus on gravity and probability to encompass the quality and context of the challenged speech.[149] Additionally, the *Brandenburg* Court abandoned the significance that the clear and present danger test attributed to a "dangerous environment."[150] This resulted in a substantial increase of protection given to speech advocating unlawful action.[151]

Brandenburg was a Ku Klux Klan leader convicted under the Ohio Criminal Syndicalism statute for activities and hate speech targeting African-Americans and Jews that occurred at a Klan rally.[152] The Supreme Court reversed the Ohio Supreme Court's conviction, holding 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."[153] The Court stressed the fundamental difference between abstractly teaching a need to resort to violence and preparing and leading a group to take violent action in formulating its new test.[154]

The language invoked in the opinion stressed that the distinction between mere advocacy and incitement to imminent lawless action was an imperative element to safeguarding the right to speech as guaranteed by the First Amendment.[155] In failing to make this

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at 204 (upholding Frohwerk's indictment under the Espionage Act for mailing circulars to men who had been called and accepted for military service during World War I); *Schenck*, 249 U.S. at 47 (same).

149. *See* Kobil, *supra* note 18, at 237-38; Packard, *supra* note 131, at 248.

150. Whether the circumstances and audience of the speaker amounted to a "dangerous environment" was considered in the application of the clear and present danger test. *See* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the* Brandenburg *Test*, 29 Ga. L. Rev. 1, 4, 13 (1994). Delivering a hate speech in front of an angry, racially charged mob would be considered a "dangerous environment," as the circumstances and composition of the audience increased the likelihood that the speaker's message would be carried out. *Id.* In contrast, delivering the same speech in a quiet and peaceful park would not be considered a "dangerous environment," as there would be little likelihood that the speaker's words would be acted upon. *See id.*; Packard, *supra* note 131, at 248.

151. This evolution of the clear and present danger test consisted of a collaboration of Holmes and Brandeis, which "began in 1919 and culminated in Brandeis's *Whitney* opinion in 1927." Greenawalt, *supra* note 26, at 190; *see* Crump, *supra* note 150, at 12; Vitiello, *supra* note 30, at 1218-19 (predicting that if the cases arising under the Espionage Act (Dennis and its analogous contemporaries) were reheard today, "the results would almost certainly be different").

152. Brandenburg v. Ohio, 395 U.S. 444, 444-47 (1969). The events of the rally were filmed and subsequently aired by a television reporter in attendance as a result of an invitation extended by Brandenburg. *Id.* at 445-46.

153. *Id.* at 447.

154. *Id.* at 447-48 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

155. *Brandenburg*, 395 U.S. at 448-49. While the Court maintained that it upheld the constitutionality of the Smith Act, 18 U.S.C. § 2385, based on this theory in

distinction, the Court branded the Ohio statute as an unconstitutional intrusion on First and Fourteenth Amendment rights.[156]

Following the *Brandenburg* decision, the Court has only examined the elements of the incitement test on two other occasions.[157] The first, *Hess v. Indiana*,[158] arose out of an antiwar demonstration at the University of Indiana.[159] A group of 100 to 150 demonstrators had filtered into the streets, blocking traffic.[160] As the police were attempting to clear the street, Hess was overheard saying "'[w]e'll take the fucking street later'" or "'[w]e'll take the fucking street again.'"[161] The Supreme Court's *per curiam* opinion overturned Hess' conviction for violating Indiana's disorderly conduct statute.[162] The Court reasoned that the statement "at worst . . . amounted to nothing more than advocacy of illegal action at some indefinite future time,"[163]

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*Dennis*, Professor Rohr has pointed out the inconsistencies in this assertion:

> The Court had . . . articulated a verbal formula that appeared more protective of seditious advocacy than any statement ever before made in a Supreme Court majority opinion, yet it was simultaneously suggesting that (a) this was nothing new, and (b) it was fully consistent with a decision (*Dennis*) that had upheld the conviction of advocates of revolution without any concern for the "imminence" or "likelihood" of that revolution. Either the author of the opinion was being quite disingenuous, or the apparently highly-protective new test was not meant to provide as much protection as its words suggested.

Marc Rohr, *Grand Illusion? The* Brandenburg *Test and Speech That Encourages or Facilitates Criminal Acts*, 38 Willamette L. Rev. 1, 7-8 (2002) (footnotes omitted). According to Rohr, the rest of the opinion supports the latter alternative. *Id.* at 8; *see also* Redish, *supra* note 17, at 184 ("The Court mysteriously cited *Dennis* to support its understanding of proper analysis, but the difference in the two decisions' treatments of the imminence requirement rendered it doubtful that *Brandenburg* followed the *Dennis* rationale.").

156. *Brandenburg*, 395 U.S. at 449. Because the Court overturned Brandenburg's conviction on the basis that the Ohio statute was unconstitutional, it never stated whether the speech in question satisfied the imminence requirement it had articulated. *See* Vitiello, *supra* note 30, at 1232-33.

157. *See* Vitiello, *supra* note 30, at 1214; Rohr, *supra* note 155, at 10, 12.

158. 414 U.S. 105 (1973) (per curiam). Rohr designates *Hess* as "[t]he only Supreme Court decision that sheds any clear light on the meaning of the *Brandenburg* test." Rohr, *supra* note 155, at 10.

159. *Hess*, 414 U.S. at 106-07.

160. *Id.*

161. *Id.* at 107.

162. *Id.* at 109. Before overturning the conviction, the Court concluded that the words uttered by Hess could not be classified as belonging to the limited categories beyond the scope of First Amendment protection. *Id.* at 107-09. The Court noted that the statement was not directed toward any group or person in particular and did not amount to fighting words as defined by *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (defining "fighting words" as words whose "very utterance inflict injury or tend to incite an immediate breach of the peace").

163. *Hess*, 414 U.S. at 108. One can reasonably assume that the action Hess was advocating was intended to occur at some point later in the day. Even though "later" would occur relatively soon (within a few hours), it did not sufficiently satisfy *Brandenburg*'s imminence requirement. *See* Crump, *supra* note 150, at 18; Greenawalt, *supra* note 26, at 209; Rohr, *supra* note 155, at 12. Greenawalt contends that while the imminence requirement is not completely devoid of flexibility, *Hess*

and thus failed to meet the imminence requirement set forth in *Brandenburg*.

*NAACP v. Claiborne Hardware Co.*[164] presented the Court with its second opportunity to invoke—and possibly refine—the *Brandenburg* test. In March 1966, the black citizens of Claiborne County, Mississippi, imposed a boycott on white merchants of the county after the county's white elected officials failed to adequately respond to a list of particularized demands submitted in hopes of realizing racial equality and integration.[165]

On October 31, 1969, a number of the white merchants brought suit to recover losses incurred as a result of the boycott and to enjoin future boycott activity.[166] The merchants also sought to impose personal liability on Charles Evers, the NAACP's Field Secretary, claiming that he had perpetuated the boycott by threatening violence against members of the black community who had failed to participate.[167]

Evers voiced his alleged threats during NAACP meetings. On April 1, 1966, he was reported to have announced that blacks not participating in the boycott would be "answerable to him" and "would have their necks broken."[168] On April 19, 1966, violators were again warned that they would be "disciplined" and reminded that the sheriff "could not sleep with [them] at night."[169] In a third speech on April 21, Evers cautioned: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[170] It was the contention of the white merchants that Evers' violent threats had furthered the boycott and he should therefore be held personally liable for their economic losses.[171]

In considering Evers's liability, the Court observed that the First

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"represents an explicit reaffirmation of the *Brandenburg* standard and an interpretation of imminence that is very restrictive." Greenawalt, *supra* note 26, at 209; *see* Gey, *supra* note 18, at 547 (maintaining that the "highly protective nature of the *Brandenburg* standard was driven home" by *Hess*).

164. 458 U.S. 886 (1982).

165. *Id.* at 889.

166. *Id.*

167. *Id.* at 898. During the course of the boycott, "Black Hats" or "Deacons" would monitor the storefronts of white merchants and report the names of violators. These names were subsequently read aloud at NAACP meetings and published in the "Black Times." *Id.* at 903-04.

168. *Id.* at 900 n.28 (internal quotations and emphasis omitted).

169. *Id.* at 902.

170. *Id.*

171. *Id.* at 907-08. The merchants' claim for damages was based on three separate conspiracy theories—malicious interference with their business; violation of a state statute prohibiting secondary boycotts, on the theory that the defendants primary dispute was with the County's governing authorities and not the white merchants; and violation of the state antitrust statute, on the theory that the boycott had shifted black patronage to black merchants, thereby creating an unreasonable limitation on competition that once existed between black and white merchants. *Id.* at 890-91.

Amendment prohibited imposing liability on an individual based solely on his association with another.[172] For Evers to be held liable for belonging to a group comprised of some violent members, it would be necessary for the merchants to establish that the group possessed unlawful goals and that Evers had a specific intent to further those goals.[173] The Court identified three theories which would justify holding Evers liable for the unlawful acts of others: (1) he "authorized, directed or ratified" specific unlawful activity; (2) his public speeches were likely to incite unlawful actions and those actions occurred within a reasonable period of time; and (3) the speeches provided evidence that he had given other specific instructions to carry out threats or acts of violence.[174]

The lower court had concluded that despite the five incidents of violence occurring in 1966 and the five incidents of violence for which dates were not supplied, the boycott was generally executed in a "peaceful and orderly" manner.[175] The Court agreed with this conclusion, noting that the record demonstrated that most of the black community went along with the boycott on their own volition.[176] Accordingly, Evers's "emotionally charged rhetoric"[177] did not fall outside the scope of First Amendment protection as set forth in *Brandenburg*:[178]

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172. *Id.* at 918-19.

173. *Id.* at 920.

174. *Id.* at 927. Redish has stated that it would be unacceptable to render a statement unprotected merely on the basis that it may properly be characterized as "unlawful advocacy": "If the first amendment means anything, it represents a value judgment that the interchange of ideas, information and suggestions is to be kept free and open, at least if the interchange presents no real threat of harm to society." Redish, *supra* note 17, at 85. Vitiello has highlighted that with regards to the Court's second possible basis for liability, the First Amendment does require harm to actually have occurred before civil liability can be imposed—"[i]t is enough that the harm be imminent." Vitiello, *supra* note 30, at 1235-36.

175. *Claiborne Hardware*, 458 U.S. at 903-05. This assessment of the boycott was made despite the documentation of several acts of violence, including shots being fired into homes, people being beaten, and tires slashed. *See* Berlin, *supra* note 3, at 30; Volokh, *supra* note 3.

176. *Claiborne Hardware*, 458 U.S. at 922.

177. *Id.* at 928.

178. As the evidence failed to support a finding that either Evers or the NAACP had authorized, directed or ratified unlawful conduct (apart from Evers's speeches in question), both Evers's speech and the NAACP's rights to political association warranted First Amendment protection. *Id.* at 931. According to Gey, it is not the nature of the boycott that distinguishes it from other movements and disputes, but the fact that the Court found Evers's speeches to be worthy of First Amendment protection:

> despite the fact that Mr. Evers used explicitly threatening language, despite the fact that this language was used in the charged atmosphere of a small town where several acts of violence had already occurred, and despite the fact that those identified and threatened by Mr. Evers in his speeches had good cause to take the threats seriously.

Gey, *supra* note 18, at 551.

> An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."[179]

Justice Stevens noted, however, that had acts of violence followed Evers's speeches within a reasonable time, "a substantial question" as to his liability would have been presented.[180]

The *Brandenburg* test remains the predominant test for courts to determine whether advocacy or incitement of unlawful action is worthy of First Amendment protection.[181] According to *Brandenburg*'s standards, two conditions must be met for incitement to be deemed unworthy of First Amendment protection: (1) it "is directed to inciting or producing imminent lawless action," and (2) "is likely to incite or produce such action."[182] The two conditions have been understood to weave both objective and subjective elements into the standard.[183] The first condition relates to a subjective intent on the part of the speaker, and the second condition ties in an objective element.

The pivotal *Brandenburg* decision was handed down in the wake of *Watts v. United States*,[184] which remains the leading case governing true threats jurisprudence. Similar to advocacy or incitement of unlawful action, threats are not viewed as promoting the values

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179. *Claiborne Hardware*, 458 U.S. at 928 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); *see* Volokh, *supra* note 3 (stating that deciding whether or not to protect Evers's speech was "a genuinely difficult issue," but that the Court "got it basically right, because the alternative is so restrictive").

180. *Claiborne Hardware*, 458 U.S. at 928. In his application of *Brandenburg*, Justice Stevens replaced the term "imminence" with the phrase "reasonable period."

181. *See* Greenawalt, *supra* note 26, at 207; Gey, *supra* note 18, at 547; O'Neil, *supra* note 44, at 12.

182. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969); *see* Greenawalt, *supra* note 26, at 207; Crump, *supra* note 150, at 4. Other scholars have broken down these conditions into more than two parts. *See, e.g.*, Gey, *supra* note 18, at 547 (breaking the *Brandenburg* test down into three conditions); Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 Ariz. L. Rev. 231, 256 (1992) (interpreting the test as consisting of four elements). Kobil notes that under *Brandenburg*, a speaker has two possible ways to avoid liability: (1) to advocate for unlawful action at some future point, which functions as a "safe harbor" by evading the immanency requirement, (as seen in *Hess*), or (2) to advocate for unlawful action that is "objectively 'unlikely'" to occur due to surrounding circumstances (as demonstrated by *Claiborne Hardware*). Kobil, *supra* note 18, at 233.

183. Greenawalt, *supra* note 26, at 207; *see also* Gey, *supra* note 18, at 547 (identifying the speaker's subjective intent as comprising a necessary element of the *Brandenburg* test); Sims, *supra* note 182, at 256 (same). *But see* Rohr, *supra* note 155, at 15 (questioning whether *Brandenburg* requires that the speaker harbor a subjective intent to incite unlawful action or merely that the words explicitly compel the commission of the unlawful act, regardless of the subjective intent of the speaker).

184. 394 U.S. 705 (1969) (per curiam).

underlying the First Amendment. Accordingly, the Court determined that proscribing the category of threats did not infringe upon a speaker's First Amendment rights.

### 2. True Threats

Another variety of speech, comprising a separate, yet related category to incitement, is true threats. The Supreme Court established the "true threats" doctrine in *Watts v. United States*.[185] Watts, an eighteen year-old male, was convicted by a D.C. District Court jury for violating a statute prohibiting any person from "knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States" during a 1966 rally at the Washington Monument.[186] In opposition to his draft classification, Watts stated that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[187] The comment was met with laughter from his surrounding audience.[188]

In holding that "true threats" are not entitled to First Amendment protection, the Court proclaimed: "[A] threat must be distinguished from what is constitutionally protected speech."[189] Despite finding the statute constitutional on its face, the Court did not find that Watts's "political hyperbole" constituted the statutory term "true threat."[190] Reciting our nation's commitment to "uninhibited, robust, and wide-open" political debate, the Court recognized that this often entails "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[191] In light of the context in which the statement was made—the conditional nature and the audience's

185. *Id.* It is interesting to note that *Watts* does not contain language or reasoning resembling *Brandenburg*, even though *Watts* was decided only two months prior. *See* Robert Kurman Kelner, Note, United States v. Jake Baker: *Revisiting Threats and the First Amendment*, 84 Va. L. Rev. 287, 293 (1998); Rohr, *supra* note 155, at 22.

186. *Watts*, 394 U.S. at 705-06 (quoting 18 U.S.C. § 871(a)).

187. *Id.* at 706.

188. *Id.* at 707.

189. *Id.*

190. *Id.* at 708. The Court recognized the division in interpreting statute's willfulness requirement among the Court of Appeals judges. *Id.* (citing Watts v. United States, 402 F.2d 676, 686-93 (D.C. Cir. 1968) (Wright, J., dissenting)). The Court expressed "grave doubts" as to the majority's conclusion that the willfulness requirement was satisfied "if the speaker voluntarily uttered the charged words with 'an *apparent* determination to carry them into execution.'" *Watts*, 394 U.S. at 707 (quoting Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918). While the Court did not resolve the dispute, it appeared to be aligned with Judge J. Skelly Wright's contention that a showing of specific intent to carry out the threat was necessary so as not to infringe on protected speech. *See Watts*, 402 F.2d at 691 (Skelly, J., dissenting). Packard maintains that in adopting an objective standard, the lower courts have, in effect, "ignored the Supreme Court's dicta" and "side-step[ped]" the difficulty in determining a speaker's state-of-mind. Packard, *supra* note 131, at 258.

191. *Watts*, 394 U.S. at 708 (quoting N.Y. Times Co. v. Sullivan, 376 U.S 254, 270 (1964)).

reaction—the Court labeled Watts's expression as amounting to nothing more than "a kind of very crude offensive method of stating a political opposition to the President."[192] As Watts's comment did not amount to a "true threat," his expression was within his First Amendment right to free speech.

The Court later shared its rationale for holding threats unworthy of First Amendment protection in *R.A.V. v. City of St. Paul*.[193] The petitioner was charged with violating the St. Paul Bias Motivated Crime Ordinance[194] for constructing and burning a cross inside a fenced yard of a black family.[195] Despite declaring the ordinance facially unconstitutional for prohibiting otherwise permitted speech based only on the subjects being addressed,[196] the Court set forth its reasons for casting true threats beyond the scope of First Amendment protection: to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[197] Hence, the true threats doctrine was designed not only to protect potential victims from actual violence, but from the reasonable apprehension of fear as well.[198] If the target of the threat takes steps to protect himself or is in some way disrupted from his normal course of activities, the deliverer of the

192. *Id.* The Court further noted that "[t]he language of the political arena, like the language used in labor disputes, is often vituperative, abusive, and inexact" to support its holding. *Id.* (citation omitted); *see* Gey, *supra* note 18, at 548 (noting that no one in Watts's audience would "seriously believe that he intended the threatening statements to be taken literally," nor would the statement have prompted anyone at the White House to take protective measures).

193. 505 U.S. 377 (1992).

194. Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990). The ordinance provides:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

*Id.* (cited in *R.A.V.*, 505 U.S. at 380).

195. *R.A.V.*, 505 U.S. at 379-80.

196. *Id.* at 381.

197. *Id.* at 388. Models proposed by Greenawalt and Baker offer frameworks for identifying threats beyond the reach of the First Amendment. Greenawalt's model generally classifies "manipulative threats," which entail an intermediate situation-altering circumstance (as opposed to warning threats which entail a "natural response") as unprotected threats. Greenawalt, *supra* note 26, at 90-104. Baker's model, premised on the liberty theory, allows individuals to use speech in pursuit or furtherance of their substantive values so long as it is not accomplished in "a coercive manner or by invasions of other people's realm of decision-making authority." Baker, *supra* note 141, at 60-62.

198. *See* Berlin, *supra* note 3, at 28-29; Greenawalt, *supra* note 26, at 290; Kelner, *supra* note 185, at 291.

threat can be punished regardless of whether or not he had the actual intention or capacity to execute the threat.[199]

While *Watts* established that true threats were unworthy of First Amendment protection, the Court declined to define "true threat" or propose guidelines to assist lower courts in evaluating allegedly threatening speech.[200] The Court only suggested that a statement should be considered in context, taking into account its conditional nature and the reaction of listeners, when evaluated.[201] In light of the limited guidance provided by the Court, lower courts have been left largely to their own devices to develop true threats jurisprudence.[202] As a result, the standard by which threats are judged and the level of protection they are afforded varies throughout the country.[203]

One trend that has emerged among the lower courts is the focus on the general, rather than specific, intent of the speaker.[204] This is accomplished through either a reasonable speaker or reasonable listener test.[205] Interpreting threats using an objective standard, as opposed to a subjective standard based on the speaker's intent, is the common element, which exists regardless of whether it is the speaker or listener providing the perspective upon which the analysis will be based.[206] Employing an objective standard shifts the focus of the court's analysis from the speaker's intent to how the threat was perceived.[207]

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199. *See* Berlin, *supra* note 3, at 28.

200. *See* Packard, *supra* note 131, at 246; Kelner, *supra* note 185, at 297-98; Gey, *supra* note 18, at 545, 582 (noting that the discussion of threats in both Supreme Court jurisprudence and academic literature on the First Amendment is limited).

201. Watts v. United States, 394 U.S. 705, 708 (1969); Packard, *supra* note 131, at 246.

202. *See* Kelner, *supra* note 185, at 303 (documenting that the Supreme Court has denied certiorari in a number of cases that presented an opportunity to clarify its true threats doctrine).

203. *See* Gey, *supra* note 18, at 545; O'Neil, *supra* note 44, at 63; *infra* Parts II.A.2.a.-b.

204. *See* Packard, *supra* note 131, at 251; Kelner, *supra* note 185, at 296-97.

205. For example, the First and Ninth Circuits have adopted a reasonable speaker test, while the Second, Fourth and Seventh Circuits have opted for a listener-based test. *See* Packard, *supra* note 131, at 254-55; *infra* Parts II.A.2.a.-b.

206. As the Ninth Circuit observed in *Planned Parenthood*, all circuits take content into account, and whether the expression is approached from the reasonable speaker or listener point of view does not appear to produce different outcomes. Planned Parenthood of the Columbia/Willamette, Inc. v. ACLA, 290 F.3d 1058, 1076 (9th Cir. 2002). As the majority noted: "We, and so far as we can tell, other circuits as well, consider the whole factual context and 'all of the circumstances,' in order to determine whether a statement is a true threat." *Id.* at 1078 (citation omitted); *see* Packard, *supra* note 131, at 257.

207. *See supra* note 190; Rogers v. United States, 422 U.S. 35, 46-48 (1975) (Marshall, J., concurring) (warning that an "objective interpretation embodies a negligence standard, charging the defendant with responsibility for the effect of his statements on his listeners" and proposing a requirement of "proof that the speaker intended his statement to be taken as a threat, even if he had no intention of actually carrying it out"); Packard, *supra* note 131, at 256; O'Neil, *supra* note 44, at 63 (noting

Consideration of the standards used in the Second and Ninth Circuits provides valuable insight into the various approaches courts take, as the Second Circuit has adopted a listener-based test and the Ninth Circuit a speaker-based test. It is also noteworthy that the Second Circuit's standard has been modified to a more lenient standard than was initially required. Additionally, both Circuits' tests were invoked in *Planned Parenthood v. ACLA* and will be revisited in Part II.C.

a. *The Second Circuit: A Listener-Based Test*

Commentators regard the standard set forth by the Second Circuit in *United States v. Kelner*[208] as the most speech-protective test created by the lower courts.[209] Russell Kelner, a member of the Jewish Defense League ("JDL"), was convicted under 18 U.S.C. §§ 2, 875(c)[210] for threatening to assassinate Yasser Arafat, leader of the Palestinian Liberation Organization ("PLO").[211] At a JDL conference, held in response to Arafat's scheduled appearance at a United Nations General Assembly meeting, Kelner—dressed in military fatigues with a gun on the desk in front of him—confirmed the existence of a plan to assassinate Arafat.[212]

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that "lower courts have made clear that there must be substantial and reasonable apprehension on the part of the person claiming to have been threatened before a legal claim, civil or criminal, can be recognized"). It has been purported that under this standard, Greenpeace could potentially be held liable for reporting the names of polluters or newspapers for publishing the names of Nazis living in the United States, as such disclosures would foreseeably cause those named to fear retaliation. *See* Robyn E. Blumner, *Anti-Abortion Site Doesn't Cross the Line*, St. Petersburg Times, Feb. 7, 1999, at 6D; Nat Hentoff, *When 'Pro-Lifers' Threaten Lives*, Wash. Post, Feb. 27, 1999, at A21.

208. 534 F.2d 1020 (2d Cir. 1976).

209. *See* Gey, *supra* note 18, at 572 (explaining that despite offering more protection than other lower court standards, the *Kelner* standard still fell short of the protection ensured by the *Brandenburg* standard); Kelner, *supra* note 185, at 294-95; Packard, *supra* note 131, at 260.

210. 18 U.S.C. § 2 provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (a)-(b) (2000). 18 U.S.C. § 875(c) provides:

> Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 875(c).

211. *Kelner*, 534 F.2d at 1020-21 (describing Kelner's speaking of a detailed plan to assassinate Arafat).

212. *Id.* at 1021. The confirmation was made during an interview with reporter John Miller and aired on the evening news. *Id.*

In recognition of the First Amendment concerns advanced by the Supreme Court in *Watts*, the Second Circuit held that an expression may be considered a true threat "[s]o long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."[213] The court reasoned that a narrow construction of "threat" was intended by *Watts* and necessary to ensure the preservation of First Amendment rights.[214] The court further held that it did not require proof that Kelner harbored a specific intent to actually execute the crime, as "it is the utterance which the statute makes criminal, not the specific intent to carry out the threat."[215] Concluding that the language and nature of Kelner's statement was an unequivocal, unconditional and immediate threat upon the life or safety of Arafat and his aides, the court affirmed his conviction.[216]

The Second Circuit's holding in *United States v. Malik*,[217] however, marked a retreat from the protective test derived from *Kelner*'s narrow construction of the term "threat." Malik was charged for mailing threatening communications, in which he threatened the adversaries in his lawsuit and their families and a United States federal judge, in violation of 18 U.S.C. §§ 876, 115 (a)(1)(B).[218]

The first threat was expressed in a letter received by the Honorable Thomas P. Griesa, United States District Judge for the Southern District of New York, on December 26, 1989, in which Malik stated that he would interpret the court's intentional delay of handling his cases as telling him to "deal with each of these defendants [sic] family and them physically upon his soon prison discharge."[219] The second threat, contained in a letter dated September 3, 1990, and filed in the United States Court of Appeals for the Second Circuit on September 27, 1990, referred to the "Jewish Judges [sic] action of unfairness" in taking the defendant's twenty thousand dollars.[220] Judge Mahoney interpreted the letter as a threat to the members of the panel.[221]

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213. *Id.* at 1027.

214. *Id.*

215. *Id.* at 1025. Gey attributes this aspect of the decision as damaging the potentially protective standard: "The Second Circuit's assumption that proof of specific intent is not required in a true threat case misreads *Watts* and is inconsistent with the Supreme Court's strong protection of threatening language in both *Brandenburg* and *Claiborne Hardware*." Gey, *supra* note 18, at 573; *see supra* note 190.

216. *Kelner*, 534 F.2d at 1027-28. The court based its conclusion on the fact that Kelner's message was specific, immediate and reinforced by military fatigues and the presence of a gun. *Id.* at 1028.

217. 16 F.3d 45 (2d Cir. 1994).

218. 18 U.S.C. § 876 (2002); 18 U.S.C. § 115; *Malik*, 16 F.3d at 47-48.

219. *Malik*, 16 F.3d at 48.

220. *Id.* at 48-49.

221. *Id.* at 49.

The Second Circuit announced that the absence of explicitly threatening language does not necessarily preclude the finding of a threat.[222] In evaluating Malik's arguably ambiguous threats, the court adhered to a reasonable listener test, which allowed for contextual evidence to clarify whether ambiguous language constituted a true threat.[223] While the court noted that the charge to the jury—in which the jury was instructed to consider whether the language of Malik's statements and the circumstances in which they were made "were so [unequivocal], unconditional and specific as to convey to the recipient a gravity of purpose and apparent prospect of execution"[224]—embodied the language of *Kelner*,[225] *Malik* in effect reduced the rigorousness of the *Kelner* standard by allowing contextual evidence to clarify ambiguous language.[226] Through *Malik*'s acceptance of contextual evidence, the Second Circuit expanded upon *Kelner*'s narrow construction of a true threat and moved closer toward the objective standard employed by the Ninth Circuit's speaker-based test for analyzing threats as discussed below.

b. The Ninth Circuit: A Speaker-Based Test

The Ninth Circuit articulated its standard for determining a true threat in *United States v. Orozco-Santillan*.[227] Orozco-Santillan, a deportable alien, was convicted on three counts of threatening to assault a federal enforcement officer in violation of 18 U.S.C. § 115.[228] His conviction was based on statements made to Immigration Naturalization Service ("INS") Agent Vela on three separate occasions.[229] Counts I and II arose from phone calls made to Vela in which Orozco-Santillan made threatening comments relating to his arrest, including "you motherfucker . . . you will pay for this" and

222. *Id.*

223. *Id.* at 49-51. "The test is an objective one—namely, whether 'an ordinary, reasonable recipient who is familiar with the context of the letter would interpret it as a threat of injury.'" *Id.* at 49 (quoting United States v. Maisonet, 484 F.2d 1356, 1358 (4th Cir. 1973), *cert. denied*, 415 U.S. 933 (1974)).

224. *Malik*, 16 F.3d at 51.

225. *Id.*

226. *See* Gey, *supra* note 18, at 575-76.

227. 903 F.2d 1262 (9th Cir. 1990).

228. *Id.* at 1264. 18 U.S.C. § 115(a)(1)(B) provides:

> Whoever threatens to assault, kidnap, or murder, a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under such section, with intent to impede, intimidate, or interfere with such official, judge, or law enforcement officer while engaged in the performance of official duties, or with intent to retaliate against such official, judge, or law enforcement officer on account of the performance of official duties, shall be punished as provided in subsection (b).

18 U.S.C. § 115(a)(1)(B) (2002).

229. *Orozco-Santillan*, 903 F.2d at 1264.

"[s]omebody is going to die."[230] Count III materialized during Orozco-Santillan's arrest, at which time he told Vela to "take these handcuffs off and I'll kick your fucking ass" and "pinche emigra," ("fucking immigration") as he pushed Vela with his elbow.[231]

The court defined a threat as "'an expression of an intention to inflict evil, injury, or damage on another,'"[232] which "should be considered in light of [its] entire factual context, including the surrounding events and reaction of the listeners."[233] The court announced that whether a statement constituted a "true threat" would be determined by an objective speaker-based standard: "[W]here a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person, [the expression] is unprotected by the first amendment."[234] Finding sufficient evidence that a reasonable listener would interpret Orozco-Santillan's statements as threats, the court upheld his conviction.[235]

The Ninth Circuit confirmed this standard in *Lovell v. Poway Unified School District*.[236] Lovell, a fifteen year-old tenth grader, allegedly threatened to shoot guidance counselor Linda Suokko if she did not receive her requested schedule change.[237] In its review, the Ninth Circuit invoked the objective standard and contextual analysis as set forth in *Orozco-Santillan*. In light of the "unequivocal and specific" nature of the statement and the "increasing violence among school children today,"[238] the court concluded that a reasonable person would have foreseen that Suokko would construe the statement as a threat.[239]

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230. *Id.* (translated by Agent Vela).

231. *Id.*

232. *Id.* at 1265 (quoting United States v. Gilbert, 884 F.2d 454, 457 (9th Cir. 1989)).

233. *Id.* (citation omitted). The court stressed that "'[t]he fact that a threat is subtle does not make it less of a threat.'" *Id.* (quoting *Gilbert*, 884 F.2d at 457).

234. *Id.* at 1265-66. In response to implementation of this standard, some First Amendment scholars argue that it "is not as rigorous in protection of First Amendment rights as intended by the Supreme Court." Packard, *supra* note 131, at 245-46.

235. *Orozco-Santillan*, 903 F.2d at 1266.

236. 90 F.3d 367 (9th Cir. 1996).

237. *Id.* at 369. Testimony regarding the alleged threat varied. Suokko claimed that Lovell threatened: "If you don't give me this schedule change, I'm going to shoot you!" while Lovell claims to have stated: "I'm so angry, I could just shoot someone."

238. *Id.* at 372 (citing *United States v. Lopez*, 514 U.S. 549, 619 (1995) (Breyer, J., dissenting), for sources supporting the proposition that guns and violence is a widespread and serious problem in high schools). According to Kelner, the Ninth Circuit's use of the Second Circuit's language from *United States v. Kelner* was misplaced, as it treated the decision's definition of a true threat ("unequivocal, unconditional, immediate, and specific") "as if it were in accord with the 'reasonable person' test." Kelner, *supra* note 185, at 299-300; *see supra* note 213 and accompanying text.

239. *Lovell*, 90 F.3d at 372. This conclusion resulted in a reversal of the district court's judgment. Critics of the court's standard have argued that in focusing on the

True threats jurisprudence is driven by an objective standard, regardless of whether the focus is placed on the speaker or the listener. The lower courts generally fail to incorporate the subjective intent of the speaker when analyzing alleged threats. Commentators have criticized this failure and view it as diminishing the level of First Amendment protection intended by the *Watts* precedent. The divergent levels of First Amendment protection currently afforded by the incitement and true threats doctrines reinforce these criticisms of the true threats doctrine.

3. Contrast Between Current Threats and Incitement Doctrines

While the categories of speech at issue in the *Brandenburg* and *Watts* opinions are similar, the precedents have received divergent treatment. Commentators have acclaimed the *Brandenburg* test as a vast improvement over its predecessor, the clear and present danger test.[240] As Professor Kobil articulated: "One of *Brandenburg*'s virtues is that in most cases its rigor forces the state to focus on preventing or punishing unlawful action rather than prosecuting speech."[241] Commentators have also praised the level of First Amendment protection established by *Brandenburg*.[242]

Conversely, the lower courts' treatment of threats has drawn criticism from a number of commentators for failing to provide rigorous First Amendment protection as intended by the Supreme Court.[243] "Most often, [lower courts] cite *Watts* as support for the proposition that threats stand outside the coverage of the First

interpretation of the statement, the test is also a hearer-based test. Packard, *supra* note 131, at 253; *see also* Gey, *supra* note 18, at 572 (noting that under this standard, the Ninth Circuit would have found the statements made by Evers at issue in *Claiborne Hardware* unprotected).

240. *See* Kobil, *supra* note 18, at 236-37; Packard, *supra* note 131, at 248 (documenting that "*Brandenburg* was lauded for providing greater First Amendment protections for protesters using incendiary speech after a long history of very restrictive decisions by the Court relying on the clear and present danger test").

241. *See* Kobil, *supra* note 18, at 241. Kobil further defends the *Brandenburg* test as being workable, an improvement of content-sensitive approaches and permissive of provocative speech. *Id.* at 235. Similarly, Gey has remarked that "[b]y the 1970s, the Court was rigorously enforcing a constitutional standard that makes it virtually impossible for the government to win a case against a speaker making political pronouncements in the absence of some evidence that the speaker has participated directly in the planning or implementation of some specific criminal activity." Gey, *supra* note 18, at 544-45.

242. *See, e.g.*, Kelner, *supra* note 185, at 288-89 (maintaining that "[f]or advocates of the civil libertarian tradition and First Amendment law, *Brandenburg* . . . stands as a signal triumph").

243. *See, e.g.*, Gey, *supra* note 18, at 545, 548 (labeling the contradictory standards in the lower courts as "unjustified" and arguing that the implication of *Watts*, *Brandenburg* and *Hess* is that in order for speech to be beyond the scope of First Amendment protection, it must present an explicit threat when viewed objectively, and the speaker must both intend for the threat to be carried out and take immediate action to execute the threat). Packard, *supra* note 131, at 245-46.

Amendment, rather than casting it as a bulwark of First Amendment protection for heated political speech in the *Brandenburg* mold."[244] The objective test employed by the lower courts often overlooks the speaker's purpose or intention and instead focuses on the reaction of the listener. In order to remain consistent with *Watts* and our nation's commitment to "uninhibited, robust and wide-open" debate, critics assert that courts must give at least minimal consideration to the subjective intent of the speaker when attempting to distinguish true threats from political hyperbole.[245]

The shortcomings of the true threats doctrine highlighted by critics are further brought to light when the alleged threat is relayed in an implicit, rather than explicit, manner. In such cases, identification of a threat is dependent upon the context in which the speech takes place. Critics recognize that a test to identify threatening speech that ignores implicit threats may provide too little protection to victims of potential violence, but a test that is overly sensitive may trample the First Amendment rights of speakers entitled to engage in wide-open and heated debate.[246]

Additionally, when the expression at issue does not explicitly threaten its target, determining whether it should be properly analyzed under *Brandenburg* or *Watts* may prove a daunting task. On the one hand, the listener understands the message to be saying that he will be harmed and is instilled with a sense of fear. From this perspective, the statement looks like a threat to be analyzed under *Watts*. On the other hand, because the speaker refrains from explicitly threatening the target of the message, there is no evidence that the speaker is conveying that he or someone acting in concert with him will carry out the violence. In this light, the message appears to look more like incitement governed by *Brandenburg*.[247] Critics have observed that when faced with speech that approaches the somewhat blurry line separating threats from incitement, courts may "mix and match cases from both lines of precedent as if they were interchangeable."[248] Identifying the type of speech presents a significant challenge, as the categorization of the speech and the precedent under which it is analyzed will have a decisive impact on

244. Kelner, *supra* note 185, at 289 (citation omitted). Kelner observes that "[i]n striking contrast [to *Brandenburg*], *Watts* has withered. Lower courts, at both the federal and state level, have gradually chipped away at the speech-protective 'true threat' doctrine announced by the *Watts* Court." *Id.*

245. *See* Calvert & Richards, *supra* note 3, at 291 (citation omitted) ("[F]ear alone cannot justify dissolving First Amendment protections, especially when speech pertains to issues of public concern . . . "). *Id.* at 295.

246. *See* Packard, *supra* note 131, at 237.

247. Commentators have perceived that *Brandenburg* does not conclusively resolve the issue of whether indirect unlawful advocacy is punishable. *See* Crump, *supra* note 150.

248. Kelner, *supra* note 185, at 289 (citation omitted).

the final outcome.[249] The problem of how courts should deal with implicit threats is further strained when they are buried within political speech or involve a matter of public concern.

The existence of this gray area—and perhaps the root of the "mixing and matching" phenomenon—can be traced to the overlapping discussion of threats and incitement seen in *Claiborne Hardware*.[250] Despite the Court's acknowledgment of the threatening nature of Evers's speech, its analysis clearly followed *Brandenburg*, mentioning *Watts* only twice in footnotes.[251] While some have questioned the Court's use of *Brandenburg* in *Claiborne Hardware*,[252] it is important to note that it was the merchants, not the targets of the alleged threats, who raised the claim that Evers's speech fell outside the scope of First Amendment protection.[253] The merchants' claim was based on Evers's use of threats as a means to coerce the community into participating in the boycott.[254] As far as the merchants were concerned, Evers's speeches qualified as incitement of unlawful action.[255] If the members of the black community who were targets of the threatening speeches had initiated the suit, it is likely that the Court would have analyzed the case under *Watts*.[256] The plausibility that *Claiborne Hardware* could have been analyzed under *Watts* highlights the thin line separating the two doctrines and provides a potential source of confusion for lower courts confronted with implicit threats. As discussed in the next two sections, *Planned Parenthood* confirmed the existence of confusion in determining which doctrine to apply to the analysis of implicit threats.

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249. *See infra* Part II.C.; Kelner, *supra* note 185, at 289.

250. *See* Gey, *supra* note 18, at 552 (remarking that "[i]n light of the central role threats played in speech challenged in *Claiborne Hardware*, it is mystifying that *Claiborne Hardware* has had virtually no effect on the development of the law of threats in the lower courts"). *But see* Rohr, *supra* note 155, at 22-24 (acknowledging that while Gey's argument has "considerable force," the position that the Court intended for *Claiborne Hardware* to influence the treatment of threats is undercut by the opinion's failure to cite *Watts*, coupled with the Court's subsequent reference to threats in *R.A.V.* and *Madsen*).

251. *See* Kelner, *supra* note 185, at 303; Packard, *supra* note 131, at 248; Rohr, *supra* note 155, at 13-14 (noting that Justice Stevens addressed Evers's statements in terms of advocacy rather than threats).

252. *See, e.g.*, Rohr, *supra* note 155, at 14 ("All in all, the use of *Brandenburg* in the *Claiborne Hardware* decision is somewhat perplexing.").

253. *See supra* notes 166-67 and accompanying text.

254. *See supra* notes 167-71 and accompanying text.

255. *See supra* notes 167-71 and accompanying text.

256. *See* Berlin, *supra* note 3, at 30 ("[W]hen a threat is alleged to *cause* the listener to act *against a third party*, as in the actual facts in *Claiborne Hardware*, while the speaker may be liable to the recipient of the threat for making that threat, the speaker is liable to the third party only if the *Brandenburg* imminence test is satisfied.").

### B. Planned Parenthood v. ACLA: *Background*

In 1999, several physicians and two clinics offering reproductive services[257] filed suit in response to being featured in materials published and circulated by the ACLA in "a campaign of terror and intimidation."[258] The physicians alleged that when taken in context, the ACLA's acts violated the Freedom of Access to Clinic Entrances Act ("FACE").[259] FACE § 248(a)(1) prohibits any one who

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any other class of persons from, obtaining or providing reproductive health services.[260]

The physicians claimed that the "Deadly Dozen" poster, the "Wanted" poster featuring Dr. Crist and the "Nuremberg Files" website published by the ACLA constituted true threats in violation of FACE.

#### 1. The "Deadly Dozen" Poster

Reminiscent of the old Wild West posters issued to capture outlaws, the "Deadly Dozen" poster featured thirteen physicians "Guilty of Crimes Against Humanity."[261] Names, addresses and phone numbers of the thirteen individuals, along with a "$5,000 Reward for information leading to arrest, conviction and revocation of license to practice medicine" appeared in the poster.[262] *Planned Parenthood* plaintiffs, Dr. Elizabeth Newhall, Dr. James Newhall and Dr. Warren

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257. The plaintiffs, Planned Parenthood of the Columbia/Willamette, Inc. and Portland Feminist Women's Health Center (doing business as All Women's Health Services), Dr. Robert Crist, Dr. Warren Hern, Dr. Elizabeth Newhall and Dr. James Newhall will be referred to collectively as "the physicians" unless otherwise specified.

258. Planned Parenthood v. ACLA, 23 F. Supp. 2d 1182, 1185 (D. Or. 1998).

259. 18 U.S.C. § 248 (1996).

260. *Id.* § 248(a)(1); Planned Parenthood v. ACLA, 945 F. Supp. 1355, 1365 (D. Or. 1996) [hereinafter *Planned Parenthood I*]. The physicians also alleged violations of the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962 (1988), Oregon RICO, and intentional infliction of emotional distress (which they later dropped). *Planned Parenthood I*, 945 F. Supp. at 1362; *see* Hentoff, *supra* note 207. This Note will only address the plaintiffs' claims under FACE.

261. *Planned Parenthood I*, 945 F. Supp. at 1362; *see* Richard Raysman & Peter Brown, *Extreme Speech on the Internet*, N.Y .L.J., June 8, 1999, at 3; O'Neil, *supra* note 44, at 62; Berlin *supra* note 3, at 26-27.

262. *Planned Parenthood I*, 945 F. Supp. at 1362 (internal quotation marks omitted). Originally unveiled at a 1995 conference in Washington, D.C., the poster was republished several times at later events and in defendants' periodicals. *See* Fein, *supra* note 3; O'Neil, *supra* note 44, at 62 (noting that the information contained in the posters "would easily enable an anti-abortion activist to locate and harass the targeted physician").

Hern, were three of the listed physicians.[263] The poster disclosed Hern's city of residence and the home address of the Newhalls.[264]

Agents of the Federal Bureau of Investigation ("FBI") contacted doctors listed in the Deadly Dozen poster the day after its release.[265] The doctors were warned to take safety precautions and were offered 24-hour personal protection of the U.S. Marshal Service for them and their families.[266] The doctors heeded the warning.[267]

### 2. The Dr. Crist "Wanted" Poster

A similar poster featuring *Planned Parenthood* plaintiff Dr. Robert Crist was published by the ACLA during an August 1995 event in St. Louis, Missouri.[268] It offered $500 to "any ACLA organization that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines."[269] The physician's photograph, along with his home and business addresses, were displayed in the poster.[270] The St. Louis police alerted him immediately of the publication and warned him that it posed a threat to his personal safety.[271]

### 3. The "Nuremberg Files" Website

The Nuremberg Files website, modeled after the files compiled on Nazi officers following World War II,[272] disclosed the names and personal information of abortion providers, clinic employees and owners, law enforcement officials involved in protecting access to abortion services, judges, politicians and supporters of abortion rights.[273] The personal information furnished by the site about abortion providers—or "baby butchers," as the site had dubbed

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263. Planned Parenthood v. ACLA, 41 F. Supp. 2d 1130, 1132 (D. Or. 1999) [hereinafter *Planned Parenthood III*].

264. *Id.*

265. *Id.* *See* Berlin, *supra* note 3, at 26-27; Fein *supra* note 3.

266. *Planned Parenthood III*, 41 F. Supp. 2d at 1132.

267. Wearing bulletproof vests was among the precautions taken. *See* Berlin *supra* note 3, at 27; Fein, *supra* note 3; Quinn, *supra* note 127.

268. *See* Berlin, *supra* note 3, at 27; Raysman & Brown, *supra* note 261, at 3.

269. Berlin, *supra* note 3, at 27 (internal quotations and citations omitted).

270. *Id.*

271. *Planned Parenthood III*, 41 F. Supp. 2d at 1133.

272. *See supra* note 2 and accompanying text. Following World War II, information was gathered on Nazi officers being tried for crimes against humanity. The compilation of such material was known as the "Nuremberg Files," named for the German city in which the trials were being held.

273. *See* Raysman & Brown, *supra* note 261, at 3. The Nuremberg Files listed approximately 200 doctors and over 200 others. Bill Clinton, Al Gore, Mary Tyler Moore, Whoopi Goldberg and Justice White (despite his dissent in *Roe v. Wade*) and President George W. Bush were among the more notable names listed. *See id.*; Berlin, *supra* note 3, at 27.

them[274]—included their names, home and business addresses, pictures and license plate numbers, as well as the names of their spouses and children.[275]

The website encouraged its readers to "Visualize Abortionists on Trial," displayed images of fetuses and dripping blood and identified its main purpose as gathering information on abortion providers which would one day be used against them in legal courts.[276] The website's legend explained that doctors listed in black font were still working, those shaded in gray had been injured and names with strikethroughs represented fatalities.[277] Dr. George Tiller, who was shot in both arms by a pro-life activist in 1993, was one of the names in gray.[278] A strike was placed through the name of Dr. Barnett Slepian, an abortion provider shot by a sniper outside of his home in Buffalo, New York.[279]

### 4. Placing the Materials in Context: Violence Stemming from Prior Publications

While the posters and website do not contain any explicit threats against the physicians—a point the physicians conceded—the physicians contended that a threat may emerge in light of the surrounding circumstances. The formation of the ACLA arose out of a splintering within the pro-life movement regarding the use of

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274. *See* Raysman & Brown, *supra* note 261, at 3; Hentoff, *supra* note 207; Quinn, *supra* note 127.

275. *See* Mauro, *supra* note 128, at 1; Verhovek, *supra* note 2.

276. *See* Debra J. Saunders, *Pro-Life Murder Inc.*, S.F. Chron., Feb. 7, 1999; Volokh, *supra* note 3. Following the initial presentation of the Nuremberg Files at an ACLA event in January 1996, the Files were sent to Neal Horsley, the creator of the website. Horsley was not named as a defendant. *See* O'Neil, *supra* note 44, at 62; David Wastell, *Women at Risk in New Anti-Abortion Tactic: Web Site Publishes Photos of Women Seeking Abortions*, Nat'l Post, June 10, 2002, at A14, *available at* 2002 WL 22464154. The hard files were destroyed at the onset of the suit. *Planned Parenthood III*, 41 F. Supp. 2d at 1134.

277. *See* Berlin, *supra* note 3, at 27; Fein, *supra* note 3. As O'Neil describes: "The Nuremberg Files not only targeted doctors and clinic staff who performed abortions; they also celebrated the tragically frequent occasions on which the lives of doctors and other clinic staff members were taken by militant anti-abortionists." O'Neil, *supra* note 44, at 62.

278. *Planned Parenthood III*, 41 F. Supp. 2d at 1132. Dr. Tiller, or "Tiller the Killer" as the Nuremberg Files website referred to him, was also featured on the "Deadly Dozen" poster. *Id.* At the time of the shooting, Dr. Tiller's assailant had issues of *Life Advocate*, a magazine published by defendant ALM, that contained identifying information about him in her possession. *Id.* Following the incident, defendants ALM, Bray, Burnett, Dodds, McMillan and Stover publicly advocated for her acquittal, including an editorial piece published in the October 1993 edition of *Life Advocate* in which Burnett wrote: "Shelley was a courageous women [sic] that we were very proud to be associated with." *Id.*

279. *See* Saunders, *supra* note 276. A disembodied hand, used to draw strikes through the names of fatalities, crossed out Dr. Slepian's name on the *very day* of his murder. O'Neil, *supra* note 44, at 62.

violence.[280] Defendants Burnett, Foreman and McMillan were compelled to forfeit their positions as leaders of Operation Rescue[281] because of their resounding commitment to the use of force and justifiable homicide.[282] In his testimony during the *Planned Parenthood* trial, defendant Burnett stated: "[I]f someone was to condemn any violence against abortion, they probably wouldn't have felt comfortable working with us."[283] This declaration illustrates the nature of the sharp division among pro-life activists.[284]

The physicians were most alarmed not by the actual words employed in the posters and website, but by the connotations and implications the words had come to assume when taken in context.[285] The physicians' fears derived from the murders of several physicians featured in previous ACLA publications of a similar nature.[286] Prior to the publication of the Deadly Dozen poster, the ACLA had prepared and published a comparable line of wanted posters.[287]

On March 10, 1993, Dr. David Gunn was shot and killed outside of the Pensacola, Florida clinic where he performed abortions. A wanted poster, featuring his name, photograph and other personal information identifying him, had been released before his murder.[288] On August 21, 1993, Dr. George Patterson, whose name, physical description and address had also been divulged on a wanted poster, was shot and killed in Mobile, Alabama.[289] Dr. John Bayard Britton, who had replaced Dr. Gunn and whose name, photograph and physical description appeared on an "unwanted" poster, fell victim to

280. *See* Berlin, *supra* note 3, at 26; Vitiello, *supra* note 30, at 1243.

281. Operation Rescue is a pro-life advocacy group dedicated to furthering its agenda through non-violent means. *See Planned Parenthood III*, 41 F. Supp. 2d at 1136. Upon forfeiting their positions at Operation Rescue, the three named defendants founded the ACLA. *Id.*

282. *Id.*; *see* Berlin, *supra* note 3, at 26.

283. *Planned Parenthood III*, 41 F. Supp. 2d at 1136.

284. *See* Hentoff, *supra* note 207 (recalling that the late Cardinal Bernardin encouraged pro-lifers to unite in opposition against "assaults on life"); Saunders, *supra* note 276 (quoting executive director of the Life Legal Defense Foundation in Sacramento as stating that during her involvement in the pro-life movement over the past ten years, she knows nobody that would condone what Planned Parenthood defendants have done).

285. In the words of Maria Vullo, attorney for Planned Parenthood, crossing out the names of fatalities "is a hit list, a clear message to those not crossed out that 'you will be next.'" Hentoff, *supra* note 207.

286. *See* Mauro, *supra* note 128; O'Neil, *supra* note 44, at 62-63; Volokh, *supra* note 3.

287. These previous publications contribute to the physicians' claim that the materials at issue are part of a broader campaign of violence and intimidation. *See* Berlin, *supra* note 3, at 26; Vicki Saporta, *National Abortion Federation Statement*, U.S. Newswire, May 16, 2002, *available at* 2002 WL 4577588.

288. *See* Berlin, *supra* note 3, at 26; Fein, *supra* note 3. The individual defendants of *Planned Parenthood* endorsed the acquittal of Michael Griffin, who was later convicted for Dr. Gunn's murder, on a theory of justifiable homicide. *Id.*

289. *See* Berlin, *supra* note 3, at 26; Fein, *supra* note 3.

a shooting outside the same Pensacola clinic. Both Dr. Britton and his volunteer escort, James Barrett, were killed and Barrett's wife was wounded.[290]

In the wake of each murder, the ACLA publicly praised the murderers and advocated their acquittal on the theory of justified homicide.[291] Both the physicians and the ACLA were aware that posters had targeted the slain doctors preceding their deaths.[292] This knowledge, coupled with *Life Advocate*'s[293] chronicling of these events, supported the district court's finding in *Planned Parenthood III* that "[t]hese murders were not isolated events."[294]

The appropriate analysis to apply in *Planned Parenthood*—incitement or true threats—perplexed judges and commentators alike. The physicians presented their claim as one of true threats, urging an analysis following *Watts*.[295] Conversely, the ACLA asserted that the materials amounted to nothing more than political advocacy clearly within their First Amendment rights to free speech. As demonstrated by *Planned Parenthood*'s progression through the Ninth Circuit, because of the diverging standards of the incitement and true threats doctrines, the precedent applied had a determinative impact on whether or not the ACLA's materials were encompassed by their lawful exercise of free speech.

### C. Planned Parenthood*'s Progression Through the Ninth Circuit*

#### 1. The Trial Court

The district court identified its task as determining whether the ACLA's conduct amounted to a "true threat" as prohibited by FACE.[296] The court observed that the Ninth Circuit had recently confirmed that its test to analyze threats consisted of an objective inquiry as to how a reasonable person would foresee his statement would be interpreted, considered in light of its factual context.[297]

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290. *See* Berlin, *supra* note 3, at 26; Fein, *supra* note 3. Paul Hill, who had assisted with the preparation of posters, was convicted on two counts of murder and one count of attempted murder. *Planned Parenthood III*, 41 F. Supp. 2d 1130, 1135 (D. Or. 1999).

291. *Id.* at 1134-36. One means through which acquittals were advocated was the circulation of "Defensive Action" petitions. *Id.* at 1134.

292. *Id.*

293. *See supra* note 278.

294. *Planned Parenthood III*, 41 F. Supp. 2d at 1135.

295. 394 U.S. 705 (1969).

296. *Planned Parenthood I*, 945 F. Supp. 1355, 1370-71 (D. Or. 1996). The court noted that prohibiting "true threats" under FACE did not violate a speaker's First Amendment rights. *Id.* The court rejected the ACLA's assertion that the physicians were actually pursuing an incitement to violence theory to be analyzed according to *Brandenburg v. Ohio*. *Id.* at 1371 n.13.

297. *Id.* at 1371 (citing Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir.

Ultimately, the jury would resolve the issue of whether the ACLA's materials constituted a "true threat."[298]

The ACLA challenged the constitutionality of FACE under the Commerce Clause,[299] Fourteenth Amendment[300] and First Amendment.[301] The court considered the constitutionality of the FACE statute, which was designed to protect individuals obtaining or providing reproductive services from the threat of force, injury or intimidation.[302] In declaring FACE constitutional, the court recognized the government's "strong interest in protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy"[303] and in "protecting patients and staff from violence and harm and protecting reproductive health facilities from

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1996); *see supra* Part II.A.2.b. The court further noted that neither the fact that the threats were made implicitly, rather than explicitly, and that they were announced publicly, as opposed to privately, would affect the objective test for determining whether the threat constitutes a "true threat." *Planned Parenthood I*, 945 F. Supp. at 1372 n.14.

298. *Planned Parenthood I*, 945 F. Supp. at 1372 n14.

299. The ACLA contended that FACE violates the Commerce Clause by regulating activity insufficiently connected to interstate commerce. *Id.* at 1373. In light of Congress's findings when enacting FACE—"that violence, threats of force, and physical obstructions directed at persons seeking or providing reproductive health services substantially affect interstate commerce"—the court held FACE constitutional under the Commerce Clause. *Id.* at 1374-75.

300. The ACLA argued that the Fourteenth Amendment does not grant Congress the authority to regulate private conduct through FACE. *Id.* at 1373.

301. The ACLA advanced several reasons why FACE violates the First Amendment: (1) FACE impermissibly prohibits speech based on its anti-abortion viewpoint; (2) FACE creates a content-based restriction by regulating speech based on whether it frightens the listener; and (3) in failing to define key terms and regulating speech that cannot be categorized as "fighting words" or "imminent threats of lawless action," FACE is unconstitutionally vague and overbroad. *Id.*

302. Because the First Amendment generally prohibits the government from proscribing speech, content-based regulations are subject to strict scrutiny. *Id.* at 1375 (citations omitted); *see supra* note 141 and accompanying text. To prevent the government from driving ideas from the marketplace and infringing upon the fundamental right to free speech, "the most exacting scrutiny [is applied] to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994). To survive strict scrutiny, the government must demonstrate that "its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118 (1991) (citations omitted). Content-neutral regulations do not pose the same threat to First Amendment rights as content-based regulations, and are therefore reviewed under an intermediate level of scrutiny. A statute survives intermediate scrutiny if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U.S. 367, 377 (1968). The district court concluded that because FACE was neither content- nor viewpoint-based, an intermediate level of scrutiny was the appropriate standard for determining its constitutionality. *Planned Parenthood I*, 945 F. Supp. at 1377.

303. *Planned Parenthood I*, 945 F. Supp. at 1377 (quotations omitted).

physical destruction or damage."[304] This conclusion was consistent with previous determinations made by the Eighth, Fourth and Eleventh Circuits.[305]

Following its determination that FACE was constitutional, the court turned its focus to the ACLA's materials. The ACLA insisted that the court should not resort to a contextual analysis of the posters and website, as none of the materials explicitly threatened the physicians.[306] The ACLA asserted that the Ninth Circuit required "that a threat be 'unequivocal, unconditional, immediate, and specific' both on its face and in context before it can constitute a true threat."[307] The District Court, unpersuaded by this argument, adhered to the physicians' position that the Ninth Circuit maintained an objective speaker-based test, which allowed statements to be evaluated in full context.[308]

Applying the standard articulated by the Ninth Circuit in *Lovell v. Unified Poway School District*,[309] the jury was charged with the determination of whether a reasonable person would have foreseen that the physicians would have construed the materials published by the ACLA, when taken in context, as a serious expression of an intent

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304. *Id.* (citing Am. Life League, Inc. v. Reno, 47 F.3d 642, 651 (4th Cir. 1995)).

305. *See* United States v. Dinwiddie, 76 F.3d 913, 923-24 (8th Cir. 1996) (finding FACE a content-neutral regulation and therefore subject to an intermediate level of scrutiny); *Am. Life League*, 47 F.3d at 651 (same); Cheffer v. Reno, 55 F.3d 1517, 1521-22 (11th Cir. 1995) (same)

306. Planned Parenthood v. ACLA, 23 F. Supp. 2d 1182, 1189 (D. Or. 1998). [hereinafter *Planned Parenthood II*].

307. *Id.* (quoting United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976) (emphasis omitted)). In support of its argument, the ACLA cited *Lovell v. Poway Unified School District*, 90 F.3d 367, 372 (9th Cir. 1996), where the Ninth Circuit had cited *Kelner*, as in "accord" with Ninth Circuit precedent. *Planned Parenthood II*, 23 F. Supp. 2d at 1189. According to the ACLA, this language reflected the Ninth Circuit's adoption of the Second Circuit's narrow construction of the term threat as set forth in *Kelner*. *Id.* The physicians countered this argument, in part, by citing the Second Circuit's revised standard, established in *United States v. Malik*, 16 F.3d 45 (2d Cir. 1994). *Planned Parenthood II*, 23 F. Supp. 2d at 1190; *see supra* notes 217-26 and accompanying text.

308. *Planned Parenthood II*, 23 F. Supp. 2d at 1189-90, 1193-94. In support of their position, the physicians relied on standards set forth in *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990), and *Malik*. *Planned Parenthood II*, 23 F. Supp. 2d at 1189-90; *see also supra* notes 217-39 and accompanying text. The Oregon branch of the American Civil Liabilities Union ("ACLU") filed an amicus brief urging the court that, in order to ensure that the First Amendment right to political advocacy is not compromised in the name of threats, it must consider both objective and subjective intent. Brief of Amicus Curiae ACLU Foundation of Oregon, Inc., *Planned Parenthood II* (Civil No. 95-1671-JO) *available at* http://www.aclu-or.org/litigation/plannedparenthood/ppbrief.htm; *see supra* notes 243-45; *infra* note 321 and accompanying text. Despite the ACLU's effort, the District Court refrained from altering its test, viewing FACE as adequately factoring the issue of subjective intent into its analysis. *Planned Parenthood III*, 41 F. Supp. 2d at 1155 & n.1.

309. 90 F.3d 367, 373 (9th Cir. 1996) (holding that the Ninth Circuit adheres to an objective speaker-based standard in determining the presence of a true threat); *see supra* notes 236-39 and accompanying text.

to inflict or cause serious harm.[310] Based on the jury's conclusion that the Ninth Circuit's reasonable speaker standard had been satisfied, the District Court declared that the Deadly Dozen poster, Crist poster and the Nuremberg Files website each constituted a "true threat."[311] Accordingly, District Court Judge Jones issued a permanent injunction prohibiting defendants from: (1) publishing or distributing the Deadly Dozen poster; (2) publishing or distributing the Crist poster; and (3) contributing materials to the Nuremberg Files website with a specific intent to threaten.[312] The physicians were awarded $109 million in punitive damages.[313]

### 2. Three-Judge Panel of the Ninth Circuit

On appeal before a three-judge panel of the Ninth Circuit,[314] the ACLA stressed the highly protective nature of the *Brandenburg* standard. The ACLA again emphasized that the physicians' fear that the posters may prompt others to resort to violence was "nothing more than a disguised incitement theory" and further argued that allowing the temporal link between the previously published posters and acts of violence to determine whether the ACLA's political protest should be deemed as protected speech would greatly infringe upon their First Amendment rights.[315] Judge Kozinski, writing for the unanimous panel,[316] found that the case was clearly controlled by *Claiborne Hardware*.[317] In finding *Planned Parenthood* and *Claiborne Hardware* analogous, Judge Kozinski noted: "While Charles Evers and the defendants in our case pursued very different political goals, the two cases have one key thing in common: Political activists used

310. *Planned Parenthood II*, 23 F. Supp. 2d at 1194.

311. *Id.*

312. *See* Raysman & Brown, *supra* note 261, at 3. Because the plaintiffs did not sue Horsley or his site, the injunction did not apply directly to the website itself. In light of the controversy, however, MindSpring, Horlsey's Internet service provider, removed the Nuremberg Files website. Horsley responded with a lawsuit for abridgement of his free expression as a subscriber. *See* O'Neil, *supra* note 44, at 64; Byrne, *supra* note 18.

313. *See* Raysman & Brown, *supra* note 261, at 3.

314. Planned Parenthood v. ACLA, 244 F.3d 1007 (9th Cir. 2001) [hereinafter *Planned Parenthood IV*].

315. Portland Porcupine, *Transcript of the Planned Parenthood v. ACLA 9th Circuit Court of Appeals Arguments*, *available at* http://www.portlandporcupine.com/ppvacla/9thcircuitargument.shtml (last visited Feb. 1, 2004). At Oral Arguments, defense counsel asserted: "At the summary judgment stage, the District Court acknowledged that the communications at issue are devoid of any expressly or even apparently threatening language. That, in itself, is an unprecedented departure from prior case law.... This is a *sui generis* case involving nonthreatening speech in which a context of threatening opinions was used to make the nonthreatening speech a threat." *Id.*

316. *Planned Parenthood IV*, 244 F.3d at 1012.

317. *Id.* at 1019-20 (discussing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).

words in an effort to bend opponents to their will."[318] Thus, Judge Kozinski concluded that the posters and website did not satisfy the elements of *Brandenburg* and were worthy of First Amendment protection.[319]

While the posters and website may have facilitated violent anti-abortion activists' ability to locate and identify the doctors,[320] the fact that political speech increased the likelihood that someone would be harmed at an indefinite time in the future by an unrelated third party did not serve as sufficient grounds for denying the speech First Amendment protection.[321] Absent any evidence that ACLA "authorized, ratified, or directly threatened" the violence, the published materials were clearly protected by the First Amendment according to the rule set forth in *Claiborne Hardware*.[322]

Noting the difficulty in analyzing statements that do not explicitly threaten, Judge Kozinski queried: "Can context supply the violent message that the language alone leaves out?"[323] With regard to context, Judge Kozinski acknowledged that imposing a violent environment on a speaker posed a threat to free speech.[324] Through his opinion, Judge Kozinski joined the ranks of commentators concerned that basing the determination of a true threat solely on the fear it instills in the listener could significantly chill First Amendment rights.[325]

In his final point, Judge Kozinski emphasized the significance of statements made in public discourse as opposed to private interactions and offered two bases for supporting this distinction.[326] First, a speaker delivering a message in private leaves the target with no doubt that the message is intended for him.[327] In contrast, political statements delivered in public generally do not carry such a focus, because they are usually intended, at least in part, to draw support for the speaker's position.[328] Second, expressions concerning matters of

318. *Planned Parenthood IV*, 244 F.3d at 1014; *see* Volokh, *supra* note 3 (stating that the Ninth Circuit had to rule in favor of the speakers, as it was bound by *Claiborne Hardware*).

319. *See supra* Part II.A.1.

320. *Planned Parenthood IV*, 244 F.3d at 1013.

321. *Id.* at 1015. Labeling the posters and website as unprotected threats turned on "whether ACLA's statements could reasonably be construed as saying that ACLA (or its agents) would physically harm doctors who did not stop performing abortions." *Id.* at 1017; *see* O'Neil, *supra* note 44, at 65.

322. *Planned Parenthood IV*, 244 F.3d at 1014, 1019-20; *see* O'Neil, *supra* note 44, at 65; Volokh, *supra* note 3.

323. *Planned Parenthood IV*, 244 F.3d at 1018.

324. *Id.* at 1018; *see supra* notes 150-51. Judge Kozinski further noted that the violence documented in the record did not generally involve the named defendants. *Planned Parenthood IV*, 244 F.3d at 1018.

325. *Id.* at 1015; *see supra* note 207, 308 and accompanying text.

326. *Planned Parenthood IV*, 244 F.3d at 1018-20.

327. *Id.* at 1018-19.

328. *Id.* at 1019.

public concern delivered through the normal channels of communication lie at the core of the First Amendment and are afforded the maximum level of protection.[329] As the three-judge Ninth Circuit panel found that *Planned Parenthood IV* was controlled by *Claiborne Hardware*, it held that the jury verdict could not stand.[330]

### 3. En Banc Panel of the Ninth Circuit

The jury verdict of $109 million in favor of the physicians was subsequently reinstated on a second appeal in front of a deeply divided en banc panel of the Ninth Circuit in July 2002.[331] Writing for the narrow majority, Judge Rymer dismissed the argument that *Claiborne Hardware* was closely analogous, thereby holding *Watts* as the only precedent binding the court.[332] No longer encumbered by the strict standards of *Brandenburg*, the Wanted posters and Nuremberg Files website were once again cast outside the protective reach of the First Amendment.

The majority maintained that it was well-established that the Ninth Circuit's test focused on whether a reasonable speaker would foresee that the listener would perceive the statement as a threat in light of its entire factual context, including the surrounding events and reactions of the listeners under the circumstances.[333] The majority maintained that context provided the basis for finding that the Wanted posters were not merely a political statement.[334] While not explicitly threatening, "they connote something they do not literally say, yet both the actor and the recipient get the message."[335] Under the Ninth

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329. *Id.*

330. *Id.* at 1019-20.

331. *Planned Parenthood v. ACLA*, 290 F.3d 1058 (9th Cir. 2002) (en banc) [hereinafter *Planned Parenthood V*]. En banc hearings are not favored in the Ninth Circuit and ordinarily will not be granted unless: (1) en banc consideration is needed to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. *See* Fed. R. App. P. 35; *see also* Mauro, *supra* note 128, at 1 (noting that the opinion "ran 118 pages long, with three dissents, including those by ideological opposites Stephen Reinhardt and Alex Kozinski"). The punitive damages portion of the decision was remanded to determine if the award was excessive. *See id.*; Quinn, *supra* note 127.

332. *Planned Parenthood V*, 290 F.3d at 1072.

333. *Id.* at 1075-76. The majority held that "threat of force," as used in FACE, was consistent with the Ninth Circuit's definition of a threat. *Id.* at 1077. The ACLU's appellate brief supported affirmance of the district court, despite the court's adherence to an objective test, because the jury instruction included a subjective intent element with regard to FACE. Brief of Amicus Curiae ACLU Foundation of Oregon, Inc., *Planned Parenthood IV* (No. 99-35320), *available at* http://www.aclu-or.org/litigation/plannedparenthood/pp9thCircBrf.html. The majority declined from modifying its test, however, concluding that subjective intent was sufficiently covered by FACE. *Planned Parenthood V*, 290 F.3d at 1075-76.

334. *Id.* at 1079. Judge Berzon objected to the extent of the majority's contextual analysis. *Id.* at 1114 (Berzon, J., dissenting).

335. *Id.* at 1085.

Circuit standard, the Deadly Dozen poster, Crist poster and Nuremberg Files website qualified as true threats unworthy of First Amendment protection.[336]

The dissenting opinions proffered by Judges Kozinski, Berzon and Reinhardt chastised the majority's reasoning as fatally flawed.[337] Due to the implicit nature of the threats and lack of evidence that ACLA or someone in association with them would carry out the threats, the dissent dismissed the majority position as an unjustified deviation from the central holding of *Claiborne Hardware*.[338] Additionally, the dissent vehemently rejected the majority opinion for its failure to distinguish between threats voiced in a public arena and those relayed within private confines.[339] Judge Reinhardt opined: "Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not. The majority's unwillingness to recognize the difference is extremely troublesome."[340]

Following the denial for a rehearing en banc,[341] the ACLA applied for certiorari to the Supreme Court. On June 27, 2003, the Court entered its decision to deny certiorari.[342]

The next part argues that applying the Supreme Court's approach to competing rights in the areas of defamation, privacy and First Amendment rights of public employees to true threats would improve the current state of the doctrine. Part III proposes introducing the public-private dichotomy developed in *New York Times* and its progeny to alleged threats accompanied by an expression of political

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336. *Id.* at 1088.

337. *Id.* at 1092.

338. *See* O'Neil, *supra* note 44, at 63 (noting "[s]uch menacing but unfocused statements would almost certainly be viewed as protected speech in other federal circuits and many state supreme courts").

339. *Planned Parenthood V*, 290 F.3d at 1089; *see* Quinn, *supra* note 127. The need for a distinction between publicly and privately stated threats remains a source of discord among First Amendment scholars. *See* Gey, *supra* note 18, at 592-94 (supporting drawing such a distinction); Rohr, *supra* note 155, at 90-91 (finding the distinction unnecessary).

340. *Planned Parenthood V*, 290 F.3d at 1089 (Reinhardt, J. dissenting). Judge Berzon's dissent proposed special rules for analyzing alleged threats expressed in public discourse, which entailed: (1) eliminating a prerequisite of imminence or immediacy of the threatened action for a statement made as part of a public speech to be found a true threat; (2) a subjective intent on the part of the speaker that the victims would understand the statement as an unequivocal threat that would be executed by either the speaker or one of their agents or cohorts; and (3) that unequivocal should be taken to mean unambiguous within the context. *Planned Parenthood V*, 290 F.3d at 1106-11 (Berzon, J., dissenting). She noted that these rules are consistent with *Claiborne Hardware*. *Id.* at 1111.

341. Planned Parenthood of the Columbia/Willamette v. ACLA, No. 99-35320, 2002 U.S. App. LEXIS 13829 (July 10, 2002).

342. ACLA v. Planned Parenthood, 123 S. Ct. 2637, 2637-38 (2003). Before rendering its decision, the Court requested that the Solicitor General submit a brief reflecting the government's view. The Solicitor General suggested denying certiorari.

debate or matter of public concern. The application of the public-private distinction, coupled with the Court's approach to balancing competing interests discussed in Part I would provide greater protection for targets of alleged threats without unnecessarily infringing on the First Amendment rights of the speaker.

## III. A NEW STANDARD FOR EVALUATING THREATS

In *Watts v. United States*,[343] the Supreme Court unequivocally cast "true threats" beyond the protective reach of the First Amendment.[344] The *Watts* precedent, however, provided lower courts with little more than a directive to distinguish true threats from constitutionally protected speech.[345] Critics disparage true threats jurisprudence, shaped significantly by the lower courts, for failing to provide rigorous First Amendment protection.[346] In sharp contrast to the protective incitement doctrine, the shortcomings of the current state of true threats jurisprudence poses a substantial threat to a speaker's capacity to engage in heated political debate as guaranteed by the First Amendment. The argument that the Court had intended for *Watts* to establish a speech-protective rule is supported not only by the opinion's own affirmation of our nation's unwavering commitment to "uninhibited, robust, and wide-open" political debate,[347] but by the rigorous standard devised to evaluate incitement only two months later in *Brandenburg*.[348] It is illogical to infer that the *Watts* and *Brandenburg* standards, formulated within a two-month period of one another for similar categories of speech by a Court with an undeniable commitment to First Amendment rights, were intended to be as divergent as *Watts* and *Brandenburg* have proven to be.

The extent of this divergence is illuminated by cases like *Planned Parenthood v. ACLA*. *Planned Parenthood*'s potential to emerge as a defining case in First Amendment jurisprudence has earned it a great deal of attention and stirred controversy among First Amendment scholars and judges alike.[349] Fueling the fervent debate is the question

343. 394 U.S. 705 (1969).

344. *Id.* at 708; *see supra* notes 185-92 and accompanying text.

345. In refraining from defining a "true threat" or proposing guidelines under which alleged threats should be evaluated, the Supreme Court in effect bestowed the development of the true threats doctrine on the lower courts. *See supra* notes 200-07 and accompanying text. While the argument has been raised that the language employed in *Watts* did not actually grant lower courts a wide latitude to shape the true threats doctrine, that the lower courts have in fact had a significant impact is generally accepted by critics. *See supra* notes 243-44.

346. *See supra* notes 204-39, 243-46 and accompanying text.

347. *Watts*, 394 U.S. at 708.

348. 395 U.S. 444 (1969) (per curiam); *see supra* notes 181-82, 240-42 and accompanying text.

349. *See supra* note 3 and accompanying text. That potential, however, ended with the Supreme Court's denial of certiorari.

as to how the ACLA's materials should properly be analyzed.[350] Had the current state of the true threats doctrine not been widely criticized as an erosion of *Watts*, perhaps the precedent under which the ACLA's materials are analyzed would not be the source of such heated contention.

The decisive impact that this characterization of the ACLA's materials had on the ultimate outcome of the case signals that the First Amendment protection offered by the true threats doctrine is inadequate. It is clear that if classified as incitement, the ACLA's materials warrant First Amendment protection, as *Brandenburg*'s imminence requirement cannot be satisfied.[351] Regardless of whether one thinks *Planned Parenthood* was correctly decided, there is no question that an objective standard—whether the ACLA would have reasonably foreseen that the targeted physicians would believe that they would be subject to physical violence[352]—is substantially less rigorous than the standards of *Brandenburg* and *Claiborne Hardware*.

This part argues that true threats jurisprudence could be improved by adopting a new standard for evaluating implicit threats that are accompanied by political debate or matters of public concern. Part III.A. outlines the new standard, which imports the public-private dichotomy developed in the constitutionalization of defamation[353] and calls for a balance between First Amendment and competing fundamental rights similar to the balance invoked by the Supreme Court in several areas of the law. Part III.B. applies the standard to *Planned Parenthood*.

### A. *A New Standard for Evaluating True Threats*

Similar to cases arising in the areas of defamation,[354] privacy[355] and public employment,[356] true threats typically involve a clash between First Amendment and other fundamental rights. The rationale for denying First Amendment protection to true threats—to "protect[] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur"[357]—acknowledges that threats infringe on the fundamental rights to life and liberty. While the use of balancing tests in the adjudication of First Amendment rights is generally avoided, the Supreme Court has held balancing to be necessary in the resolution of

350. The nature of this debate is captured by the sharp division among the Ninth Circuit judges. *See supra* Part II.C.3.
351. *See supra* Part II.A.1.; Berlin, *supra* note 3, at 28.
352. *See supra* Part II.A.2.b.
353. *See supra* Part I.A.
354. *See supra* Part I.A.
355. *See supra* Part I.B.
356. *See supra* Part I.C.
357. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 388 (1992).

First Amendment and competing fundamental rights in several areas of the law.[358] Recognition of the need for such a balance reflects the value and significance that the Court attributes to these other fundamental rights.

The Court "has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."[359] Where the speech in question does not involve issues of public concern, however, the Court has repeatedly confirmed that competing fundamental rights may overshadow First Amendment concerns.[360] Allowing competing fundamental rights to prevail under such circumstances does not threaten robust or wide-open political debate or compromise the values underlying the First Amendment.[361] The Court's dedication to striking an appropriate balance between First Amendment and competing fundamental rights is manifest in the areas of defamation, right to privacy and free speech within the scope of public employment. The weight and consideration afforded to individual rights in these areas of the law, coupled with the rationale for denying First Amendment protection to true threats, supports the position that such a balance should be factored into the adjudication of true threats.

Protecting individuals from true threats without compromising First Amendment protection could be achieved by importing the private-public dichotomy developed in the constitutionalization of defamation to the evaluation of implicit threats embedded in expressions involving political debate or matters of public concern.[362] While the objective standard may provide a sufficient framework for explicit threats, *Planned Parenthood* highlights the complexities of evaluating implicit threats.[363] Distinguishing between implicit threats aimed at private individuals as opposed to public officials or figures would assist courts in identifying speech attacking individuals rather than voicing a political message.[364]

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358. *See supra* Part I.

359. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980)); *see supra* notes 60-65 and accompanying text.

360. *See supra* notes 60-65, 111-12 and accompanying text.

361. *See supra* notes 60-65, 111-12 and accompanying text.

362. In discussion of threats, analogies to defamation have been made, but none have suggested importing the public-private dichotomy to the true threats doctrine. *See Planned Parenthood IV*, 290 F.3d at 1102-04 (Berzon, J., dissenting); Calvert & Richards, *supra* note 131, at 681-85; Vitiello, *supra* note 30, at 1229; *see also* Romero, *supra* note 54 (advocating the application of the public-private dichotomy to majorities and minorities in the analysis of hate speech).

363. *See* Part II.C.

364. It is important to note that with the exception of *Claiborne Hardware*, *Watts* and the incitement cases reviewed by the Supreme Court "all involved speech that could be characterized as political dissent." Vitiello, *supra* note 30, at 1220. In light of this, how analogous these precedents are to cases such as *Planned Parenthood* is debatable.

This distinction is based on the assumption that while statements targeting public officials and figures are usually categorized as core political speech warranting the highest level of First Amendment protection (and properly so), statements aimed at private individuals do not necessarily deserve this label and level of protection.[365] Generally, private citizens are not involved in matters of public concern to the degree that they would be included in a speaker's political message. Individuals involved in matters of public concern more typically consist of public officials and figures.[366] This assumption does not encompass private individuals that have voluntarily become involved in a matter of public concern to the extent that they would be classified as a "limited" or "special purpose" public figure.[367] Additionally, the distinction should only be invoked when the statement targets specific individuals, as opposed to a statement referring abstractly to a group of private individuals.

Accepting the presumption that political debate does not generally entail expressions targeting private individuals, a speaker expressing an alleged threat targeting a private individual should be required to show that the defense of political debate is more than a mere pretext before the statement is awarded the highest level of First Amendment protection. Supreme Court jurisprudence in defamation, privacy and public employment definitively establishes the need to strike an appropriate balance between competing First Amendment and individual rights.[368] Precedents in these areas consistently reiterate the special level of protection granted to speech concerning public issues. In circumstances where the speaker's expression consists of

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365. Vitiello's observations support this proposition:

> [J]ust as in the defamation cases involving private figures, protection of individuals' interests increases as the area of discussion is further from legitimate public debate. As the speaker moves from discussion of issues of public concern, such as governmental policy, to revelation of private data about individuals, a fact-finder is more justified in finding that the speaker's intent is not to engage in public discourse.

Vitiello, *supra* note 30, at 1229; *see supra* Part I.

366. The Supreme Court's justification for applying the public-private dichotomy to defamation, as articulated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974), can be applied to threats. The Court reasoned that the heightened standard placed on public figures was justified because they had a more realistic opportunity to combat a reputation-attacking statement through effective channels of communication; society had a greater interest in public figures and officials; and they had, to a certain extent, invited comment and attention by stepping into the public light. *Id.; see supra* notes 52-54 and accompanying text. Considering these justifications in light of the reasons set forth for denying First Amendment protection to threats—to protect individuals from the fear and disruption of violence and the possibility that violence may actually occur—supports importing the dichotomy to threats jurisprudence, as private citizens generally have not invited nor have the means to publicly counter threats contained in a political message.

367. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976); Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1292 (D.C. Cir. 1980).

368. *See supra* Part I.

core political speech or matters of public concern, the speaker's First Amendment rights invariably trump the competing rights of the individual.[369] As the expression in question moves from core political speech towards the periphery of the First Amendment's reach, the rights of the individual assume a greater weight. In cases where the Court was faced with balancing individual rights against speech that was not classified as core political speech or matters of public concern, the weight attributed to First Amendment rights diminished, and the Court exhibited a greater sensitivity to the rights of the individual.[370]

Speech targeting private individuals that is not accompanied by a legitimate political message does not promote the principles underlying the First Amendment, and thus is not compelling enough to defeat the competing fundamental rights.[371] When the target of the message is a private individual, blindly accepting the speaker's defense that he was engaging in political debate or addressing a matter of public concern may compromise the rights of the individual and award the speaker a higher level of First Amendment protection than he actually deserves. Accordingly, if a speaker of an alleged threat can satisfy the court that the portion of his statement targeting a private individual does in fact express a valid and legitimate political message, the speech warrants the highest level of protection. If, however, the court finds that the claim of political debate is pretextual, the speech warrants a lower level of protection and must be balanced against the competing individual rights of the target.[372] An inquiry into whether a message targeting a private individual claiming to be political debate or involving a matter of public concern is in fact pretextual prevents a clever speaker from employing the First Amendment as a means of attacking individuals by coupling the less favored speech with an expression deserving the utmost protection.

Applying the public-private dichotomy to true threats and requiring a speaker targeting a private individual to demonstrate that a claim of political debate or matter of public concern is more than a pretextual guise would strengthen the degree of protection currently afforded to First Amendment concerns without trampling on competing rights. First Amendment concerns played a pivotal role in the development of defamation, privacy and public employment jurisprudence.[373] The rationale underlying Supreme Court precedents in these areas justifies

369. *See supra* notes 37-58, 84-89, 98-101, 109-12 and accompanying text.

370. *See supra* notes 60-65, 116-22 and accompanying text.

371. *See supra* notes 60-65, 116-22, 123-25 and accompanying text; Greenawalt, *supra* note 26, at 272 ("The communicative value of [factual disclosures intended to produce specific crimes] is relatively slight.")

372. If political debate is pretext, the speech in question is not worthy of the highest level of protection as it is not furthering the principles underlying the First Amendment.

373. *See supra* Part I.

taking a similar approach to threats. The language employed in *Watts* and *Brandenburg*, reflecting the same First Amendment concerns advanced in *New York Times* and its progeny,[374] further supports the implementation of this framework. Additionally, in considering whether the political debate or matter of public concern defense is pretextual, the framework incorporates an element of the speaker's subjective intent into the analysis—thereby correcting the principal drawback associated with the objective standard and bridging the gap between the *Watts* and *Brandenburg* precedents.[375]

### B. *Application of the New Standard to* Planned Parenthood

The materials at issue in *Planned Parenthood* provide an ideal example of where individuals who threaten and intimidate private individuals may be using the First Amendment as a shield.[376] The ACLA's previous publications championing justifiable homicide and advocating the acquittal of the assailants of abortion providers leave no question as to their position on abortion.[377] While abortion constitutes an issue of public concern, the ACLA should be required to demonstrate to the court that the inclusion of information relating to the physicians, as private citizens, comprised a legitimate aspect of their engaging in political debate.[378] More specifically, the ACLA should have to prove that the inclusion of the physicians' photographs, phone numbers, addresses, license plate numbers and names of family members relayed through the posters and website played a legitimate role in the ACLA's protest against the practice of abortion.[379]

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374. In all of the opinions, the Supreme Court manifested its dedication to ensuring that speech involving political debate or matters of public concern would receive special protection.

375. *See supra* Part II.A.3.

376. As Ira Glasser, Executive Director of the ACLU, points out:

> It is one thing to say that all abortion providers deserve to die. It is quite another to publish detailed information on wanted posters about particular doctors—their photos, names, cars (with license plate numbers), home addresses, names of their children, where their children go to school, etc.—and then triumphantly cross out their names when particular doctors are killed.

Glasser, *supra* note 18.

377. The content of these statements epitomizes the type of political dissent that the First Amendment seeks to protect. *See* Vitiello, *supra* note 30, at 1242-43 (describing defendant Bray's publication, *A Time to Kill*).

378. The ACLA would be able to circumvent this requirement upon a showing that the physicians' participation in public debate on abortion issues qualified them as "special purpose" public figures. *See supra* note 53.

379. *See* Vitiello, *supra* note 30, at 1229 (maintaining that while Planned Parenthood defendants are free to write about killing an abortion provider and demonstrate near clinics, "[w]hat they cannot do, consistent with the First Amendment, is to provide potential assassins with useful information about abortion providers with the intent to increase the risk of violence against their targets"); Saunders, *supra* note 276 (quoting Lois Backus of Planned Parenthood in Portland:

This Note argues that the inclusion of personal information regarding the physicians on the ACLA's posters and website in no way contributed to its position on abortion issues and amounted to nothing more than a transparent attempt to attain the highest level of protection for speech of lesser constitutional value. In finding the ACLA's defense of political debate a pretext, the materials at issue do not warrant the highest level of First Amendment protection afforded to core political speech. The ACLA's effort to target private citizens under the guise of political debate does not embrace the spirit and goals underlying the First Amendment.[380]

*Planned Parenthood* requires that the ACLA's First Amendment rights be balanced against the physicians' fundamental rights to life and liberty. Upon a determination that the ACLA's claim to political debate was pretextual, the portions of its materials targeting the physicians warrant the lower level of constitutional value attributed to speech at the periphery of the First Amendment's reach.[381] Supreme Court precedents strongly suggest that the balance in this case be weighed in favor of the physicians, as the competing First Amendment rights do not involve a matter of political or public concern.

## CONCLUSION

The controversy stemming from *Planned Parenthood* has brought the diluted level of First Amendment protection associated with our true threats jurisprudence to light. With the Supreme Court closing its doors to the issue, the Ninth Circuit's final verdict stands. While the fate of the ACLA's materials may be sealed, the same cannot be said for true threats jurisprudence.

Rectifying the shortcomings and criticisms of the true threats doctrine may be achieved by looking to the Supreme Court's consideration of First Amendment and competing fundamental rights in several other areas of the law. Precedents from the areas of defamation, privacy and public employment impart a sense of the factors and considerations that must be taken into account when attempting to strike a proper balance between First Amendment and competing fundamental rights. Importing the public-private dichotomy to true threats jurisprudence and allowing for a balance between First Amendment and competing fundamental rights would

"I think it was glaringly obvious to the jury that these folks were hiding behind a thin veil of acceptable behavior and they were really frightening extremists.").

380. *See supra* notes 26-31.

381. Under this framework, the ACLA's practices of endorsing justifiable homicide through publications such as *A Time to Kill* and posting pictures of bloody fetuses in pursuit of rounding up more zealots would still be protected as core political speech worthy of the highest level of First Amendment protection. These materials would not trigger the public–private dichotomy, as the advocacy is done in an abstract and general matter.

improve the adjudication of true threats. This new standard provides rigorous First Amendment protection without unnecessarily infringing upon competing fundamental rights.