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2016

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Recommended Citation
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A Blurred Distinction: *United States v. Turner* and Distinguishing Between True Threats and Incitement of Imminent Unlawful Conduct

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Introduction

True threats and incitement are distinct but closely related categories of punishable speech. Although these classifications began from distinct doctrines, the line between them has blurred considerably over time. Often, when courts are confronted with menacing speech, they are able to classify the speech as either a threat or advocacy, and then apply the appropriate analysis. For example, a man who threatens to punch or kill another person face to face may be convicted for making a "true threat." On the other hand, a political activist who sends out mass messages and causes riots or violence may be convicted of "incitement to imminent violence."

Speech, however, is rarely so black and white that it fits neatly into one category. Courts, understandably, often struggle with cases that present speech containing elements of both threats and advocacy of unlawful conduct. While the line between the two forms of speech may be difficult to draw sometimes, before we determine whether speech is punishable as a true threat or advocacy of unlawful conduct, we must determine whether the speech should be categorized as a threat or advocacy. Only then can we determine whether the speech is protected or unprotected under the appropriate test.

United States v. Turner, a case out of the Second Circuit, epitomizes this problem.[2] Hal Turner, a shock jock DJ from Chicago, Illinois, was arrested and convicted for threatening a

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[1] Submissions Editor, Seton Hall Law Review, Vol. 46. J.D. Candidate, Seton Hall University School of Law, 2016; B.S., Montclair State University, 2013. I would like to thank Professor Healy for his guidance and assistance. Special thanks to Professor Riccio for his role in this Comment's inception. This Comment is dedicated to my parents – without their support, this would not have been possible.

[2] See United States v. Turner, 720 F.3d 413, 414 (2d Cir. 2013).

federal judge in a blog posted to his website.[3] Following a decision by the Seventh Circuit,[4] Turner posted a blog to his website calling for the deaths of the judges involved in the decision.[5] Though the speech in question was certainly despicable and vituperative in nature, upon examination it was not so obvious that these comments were a threat rather than advocacy of unlawful conduct.[6] Nevertheless, the Second Circuit chose to analyze Turner's speech strictly under a "true threats" analysis from the start, leading to an affirmation of his conviction.[7]

By ignoring the complex nature of the speech and presupposing it is a threat by applying a "true threats" analysis, the court potentially undermined the distinction between "true threats" and "advocacy of unlawful conduct." In response, this Comment will create a test to help remediate this issue, using an analysis of principles established in case law, as well as a recognition of challenging factual scenarios and doctrinal justifications. This test will prove useful in appropriately classifying and analyzing ambiguous speech that toes the line between threats and advocacy. As a result, the line between "true threats" and advocacy of unlawful conduct will be clarified, while ensuring that a proper level of Constitutional protection is afforded to speakers.

In Part I, I will define true threats and advocacy of unlawful conduct through an examination of the cases that sprung their distinct analyses, and identify the modern versions of these tests. In Part II I will examine several cases, including *U.S v. Turner*, that represent instances where courts confronted ambiguous speech, and examine how they approached the issue of categorizing said speech. I will also identify factual scenarios present in these cases that

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[3] *Id.*
[4] Turner's comments were in reaction to the Seventh Circuit's ruling that the Second Amendment was not applicable to the States. *See National Rifle Association of America v. Chicago*, 567 F.3d 856 (7th Cir. 2009), *rev'd sub nom. McDonald v. City of Chicago*, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).
[5] *See id.* at 413.
[6] *See id.* at 414-17.
[7] *See id.* at 413.

present a more challenging endeavor to courts attempting to appropriately classify and analyze speech. In Part III I will identify several relevant factors used by courts in distinguishing between threats and advocacy through case law. In Part IV, in light of the doctrinal beginnings, relevant case law principles, and complicating factual scenarios set forth in the preceding sections, I will outline a three part test that courts will be able to use to more effectively distinguish between threats and advocacy. I will then apply this test to *U.S. v. Turner*. Part V is my conclusion.

I. Defining "True Threats" and "Incitement"

Over the past 100 years, the Supreme Court has addressed the question of what speech may be proscribed by law countless times.[8] Nevertheless, the individual tests used by courts to analyze true threats and incitement are still developing areas of law. What we do know at this point is that there are two guideposts for any threatening-speech analysis: 1) true threats are unprotected under the Constitution, and 2) advocacy of force or law violation that is intended to and likely to produce imminent unlawful activity is likewise unprotected under the Constitution.[9] This section will flesh out these two doctrines and provide several justifications for the separation of the two.

a. Watts and True Threats

In *U.S. v. Watts*, a Vietnam War protester was arrested during a public demonstration on the grounds of the Washington Monument for stating: "They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[10]

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[8] *See* Scott Hammock, Article, *The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 Colum. J.L. & SOC. PROBS. 65, 68 (2002).
[9] *See id.*
[10] Watts v. United States, 394 U.S. 705, 89 S.Ct. 1399 (1969).

On the basis of this statement by the defendant, he was convicted of "knowingly and willfully threatening the President," thereby violating federal law.[11] In a brief per curiam opinion, the Supreme Court overturned Watts' conviction.[12] Although the nation has a strong interest in protecting the President, a statute such as this one, which criminalizes speech, must be interpreted within the command of the First Amendment.[13] The Court recognized that a true threat is not protected under the Constitution and must be distinguished from its constitutionally protected progeny.[14] It concluded that Watts' speech did not constitute a true threat, but rather political hyperbole protected under the Constitution.[15] The language of the political arena "is often vituperative, abusive, and inexact."[16] Thus, the language used by Watts, although a "very crude offensive method of stating a political opposition to the President," was a protected form of speech under the Constitution.[17]

Although the Supreme Court established that true threats were not Constitutionally protected under *Watts*, the exact method for analyzing such speech was left unanswered.[18] As such, the lower courts developed various tests for determining whether speech constituted a true threat as opposed to protected speech. The majority of circuits have adopted an objective approach, where a true threat will be found if "an ordinary, reasonable recipient who is familiar with the context…would [interpret] the statement as a threat of injury."[19]

However, this has not stopped other courts from constructing their own adaptations of the reasonable recipient test. Following the Supreme Court's decision in *Virginia v. Black*, the First

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[11] *Id.*
[12] *Id.*
[13] *See id.* at 707.
[14] *See id.*
[15] *Id.*
[16] *Watts*, 394 U.S. at 707.
[17] *Id.*
[18] *See* Hammock, *supra* note 1 at 78.
[19] *See id.*

and Ninth Circuits adopted a speaker-based objective approach, examining whether it is "reasonably foreseeable…to a speaker that the listener will seriously take his communication as an intent to commit serious bodily harm."[20]

The Second Circuit in *U.S. v. Kelner* created the narrowest interpretation of a true threat.[21] In Kelner, the appellant, a member of the Jewish Defense League, was convicted of "causing to be transmitted in interstate commerce a communication containing a threat to injure the person of another."[22] Here, the threat was made against Yassar Arafat, the leader of the Palestine Leadership Organization.[23] During a radio broadcast, the appellant stated that, "[w]e have people who have been trained and who are out now and who intend to make sure that Mr. Arafat and his lieutenants do not leave this country alive….We are planning to assassinate Mr. Arafat….Everything is planned in detail."[24] Although the speech at issue was publicly proclaimed, the court held that the speech in question constituted an unprotected true threat.[25] The speech, "on its face and in the circumstances in which it was made," was so "unequivocal, unconditional, immediate, and specific" to the person threatened that it conveys a "gravity of purpose and imminent prospect of execution."[26] This test constitutes a much narrower version of the test adopted by the other circuits, making it more difficult to proscribe speech, as it must be an "unambiguous threat."[27]

b. *Brandenburg* and Incitement

In the months following *Watts*, the Supreme Court revisited threatening speech once again. The Court reversed the conviction of the appellant, a Ku Klux Klan leader, for making hateful

[20] *See id.* (internal citation omitted).
[21] *See id.*
[22] United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976)
[23] *Id.*
[24] *Id.* at 1021.
[25] *Id.* at 1027.
[26] *Id.*
[27] *See* United States v. Turner, 720 F.3d 411, 433 (2d Cir. 2013) (Pooler, J. dissenting).

comments about blacks and Jews.[28] The appellant stated, among other things, that"[t]he Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[29] He also stated that he believes that "the nigger should be returned to Africa, the Jew returned to Israel."[30]

The appellant was convicted under the Ohio Criminal Syndicalism statute that made it a crime to "advocate or teach the duty, necessity, or propriety of violence as a means of accomplishing industrial or political reform."[31] The Supreme Court reversed the conviction and set forth what remains the test to determine whether a person can be arrested for political advocacy that causes or may cause illegal activity.[32] In recognition of the Constitutional guarantees of free speech and free press, a State may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent unlawful conduct and is likely to incite or produce such action."[33] The "mere abstract teaching…of the moral propriety or even moral necessity for a resort to force or violence, is not the same as preparing a group for violent action and steeling it to such action."[34] Measured by this standard, the statute in question purported to punish mere advocacy and thus fell outside the bounds of constitutional protection.[35]

c. Doctrinal Differences

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[28] *See* Brandenburg v. Ohio, 395 U.S. 444, 449 89 S.Ct. 1827 (1969)
[29] *Id.*
[30] *Id.*
[31] *Id.* at 444.
[32] *See id.* at 447-49.
[33] *See Brandenburg*, 395 U.S. at 447.
[34] *Id.* at 448.
[35] *Id.* at 449.

In sum, we know there are two categories of unprotected speech: true threats and incitement, under which we distinguish true threats from protected political speech, and incitement from protected advocacy of violence.[36] Courts rightfully treat these doctrines as distinct from one another.

The primary conceptual distinctions between true threats and incitement derive from the harm the speech conveys and the way that it gets to the listener.[37] Incitement creates a risk that third parties, as opposed to the speaker, will injure the listener.[38] True threats, on the other hand, create apprehension that the violence will come from the speaker themselves, thus engendering a more direct fear in the listener.[39] As such, the two doctrines offer differing Constitutional levels of protection. As mentioned previously, the majority of circuits employ a true threats analysis that examines whether a reasonable person would, under the circumstances as given, consider the speech a threat of injury. On the other hand, the *Brandenburg* analysis demands evidence not only that there was advocacy of violence, but also that it presented an imminent threat to the listener. This standard allots a greater degree of protection to the speaker as opposed to a true threat analysis, which is less speech protective and more ambiguous.

There are a number of purported justifications for keeping these doctrines distinct. First is the purpose of the speech.[40] For the inciter, the goal is to promote or prompt unlawful action to be undertaken by third parties not under the control of the speaker.[41] The speaker is seeking to motivate and mobilize these third parties with some semblance of immediacy or imminence.[42]

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[36] *See Turner*, 720 F.3d at 430 (Pooler, J. dissenting).
[37] See *First Amendment - Freedom of Speech - Second Circuit Affirms Threats Conviction in Internet Speech Case*, 127 HARV. L. REV. 2585, 2589 (2014)
[38] *See id.*
[39] *See id.*
[40] *See* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 565 (2004).
[41] *See id.*
[42] *See id.*

These third parties are the means by which the speaker can achieve his goal.[43] Without these third parties, the speaker will not be successful in achieving a violation of the law.[44]

The purpose of the threat maker is to force the listener to act.[45] Generally, the threat-maker wants the listener to perform a non-volitional act, or to not perform a volitional act.[46] The threat-maker accomplishes this by two means: by delivering the message to the target, and by instilling fear in said target.[47] Actual harm is not the goal of the threat-maker.[48] By communicating the message to the target and instilling fear or apprehension of serious harm in the target, the threat-maker uses threatened harm as a means to accomplish an end: to force the victim to perform a non-volitional function.[49] To this end, threats can be viewed as a way "of doing things, not saying things."[50] Furthermore, the threat-maker does not concern himself with third parties because they cannot achieve his goal – it is the target's actions which the threat-maker seeks to control.[51] In furtherance of this goal, the threat-maker seeks out or identifies the target.

Second is the location of the communication. The inciter is often in a public setting and speaking extemporaneously, while implicating First Amendment values of free speech and public discourse.[52] The public address is infamous for predominantly charged rhetoric concerning matters of public interest, which lies at the base of our First Amendment values.[53] Public speech seeks to move those of like opinion and to encourage others to take up their cause. In order to

[43] *See id.* at 568.
[44] *See id.*
[45] *Id.*
[46] *See* Elrod, *supra* note 39 at 568.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *See* Thomas Healy, *BRANDENBURG IN A TIME OF TERROR*, 84 Notre Dame L. Rev. 655, 669 (2009).
[51] *See* Elrod, *supra* note 39 at 568.
[52] *Id.* at 566.
[53] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (Kozinski, J. dissenting) (internal citation omitted) (internal quotation omitted).

honor this privilege, we as citizens must be privy to the realization that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases," and may even retain overtones of menace at times.[54] On the contrary, threats are often privately communicated directly to their target.[55] Threats have a specific target in mind; they are spoken as a means to an end, and must at some point be communicated to the target, whether that happens directly or indirectly.[56]

Finally, persuasion presents an additional justification. Professor Strauss of University of Chicago Law School posited that the First Amendment should be more protective of speech that endears to the will of a person.[57] The violation of law that attaches to the suppression of speech may only hold up in the face of speech that bypasses the rational process of deliberations.[58] If people are "truly *persuaded*" to violate the law, then the government should not punish the speaker for such speech, for it appeals to the reason of the listener, and it is their decision whether or not to act on such speech, not the speaker's.[59] Thus, advocacy, which seeks to persuade third parties to violate the law, commands greater protection under the First Amendment as opposed to threats.

II. A Common Problem

Having explained the origins of the twin doctrines, I believe the best way to shed light on the issue this Comment tackles is through examples. The following three cases, though preeminently authored, highlight the difficulties involved with categorizing speech before a proper analysis regarding the level of protection afforded to it can commence. In Part IV(b) I will re-examine *U.S. v. Turner* in lieu of the test I craft in Part IV(a).

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[54] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928, 102 S.Ct. 3409, 3434 (1982)
[55] *See* Elrod, *supra* note 39 at 567.
[56] *Id.*
[57] *See PERSUASION, AUTONOMY, AND FREEDOM OF EXPRESSION*, 91 Colum. L. Rev. 334, 338 (1991).
[58] *See id.*
[59] *See id.*

a. *NAACP v. Claiborne*

In 1966, a local branch of the National Association for the Advancement of Colored Persons (NAACP) organized a boycott of white merchants.[60] The boycott sought to acquire equality and racial justice through the compliance of civic and business leaders.[61] The boycott was largely supported by speeches encouraging community members to join the boycott through nonviolent picketing, but violent demonstrations did occur.[62]

Following the death of a boycotter at the hands of police, Charles Evers, the field organizer of the NAACP for the state of Mississippi and a political organizer of the boycotts, led several rallies in condemnation of the police's actions, calling for a tighter boycott.[63] During one speech, Evers proclaimed that people who shopped at the boycotted stores "would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night."[64] During a different speech, Evers also said, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[65] Although the speech by Evers was not accompanied by violence, there were several incidents of violence during the boycott years that revealed a possible "atmosphere of fear" surrounding boycott violators.[66] The majority of these violent incidents involved damage to the violators' houses from gunfire and other objects.[67]

Seventeen white merchants filed suit against the NAACP and a host of other defendants involved in the boycotts, seeking damages for lost profits caused by the defendants over the four-year span of the boycotts.[68] The Mississippi Supreme Court imposed liability on the defendants

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[60] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 898(1982)
[61] *Id.* at 892.
[62] *Id.*
[63] *Id.* at 893.
[64] *Id.*
[65] *Id.*
[66] *Clairborne Hardware Co.*, 458 U.S. at 893 – 4.
[67] *See id.*
[68] *Id.* at 886.

for damages “resulting from the boycott” on the ground that the defendants had agreed to use “force, violence, and threats to effectuate the boycott.”[69]

On cert, the United States Supreme Court held that the speech by the NAACP leader could not give rise to liability.[70] Evers’ speech could only be proscribed if it was deemed to be an advocacy of force or law violation that was directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[71] Although some acts of violence occurred during the boycott and the speech was "emotionally charged," the "rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg*."[72] An advocate must be free to stimulate his audience with emotional appeals for unity towards a common cause.[73] When such actions do not incite unlawful activity, they must be regarded as protected speech.[74] “To rule otherwise would ignore the ‘profound national commitment’ that ‘debate on public issues should be uninhibited, robust, and wide-open.’”[75]

This case presented an interesting scenario for the Court to analyze, and some lasting results as well. From the outset, the Court analyzed this case under a *Brandenburg* analysis. The court showed great deference to the political nature of Evers’ speech in its analysis. The public forum used by Evers also lent heavily to the Court’s choice of a *Brandenburg* analysis.

However, an examination into the speech itself reveals a more difficult analysis. Regarding individuals whom Evers had known were involved in dealings with white suppliers, Evers stated that, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.” The language itself carried an explicit threat – there was no prediction apparent in the

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[69] *Id.* (internal quotation omitted).
[70] *Id.* at 909.
[71] *Id.* at 911.
[72] *Claiborne Hardware Co.*, 458 U.S. at 911.
[73] *Id.*
[74] *Id.*
[75] *Id.*

message, nor was this a call to others to take action. Evers referred to him and his organization members as "we" and threatened to break the necks of specific individuals, who, although not directly named, were specifically referred to in the speech. Setting aside the public nature of the forum, this language could very well be characterized as "threatening" as opposed to advocacy.

b. *Planned Parenthood*

Four doctors and two health clinics brought suit under the Freedom of Access to Clinic Entrances Act of 1994 ("FACE") against the American Coalition of Life Activists ("ACLA"), claiming they were the targets of threats by the ACLA.[76] There were two purported threats at issue: the so called "Deadly Dozen" posters with the word "Guilty" emblazoned across the front in large, red font; and the "Nuremberg Files," a website maintained by the ACLA containing filings of all known practitioners providing abortions, in the event these individuals would one day be put on trial for crimes against humanity.[77]

The "Guilty" posters followed in the wake of several murders which had occurred following the circulation of several posters containing the photograph and names of physicians, their ties to legal abortion procedures in the state, their place of employment, and the tagline of either "WANTED" or "unWANTED" for the "charges" of "crimes against humanity."[78] The doctors who were the subject of these posters interpreted the posters and website as a sign that their lives were at risk.[79] As one doctor commented, "that the posters…were followed by the doctor's assassination, emphasized for me the danger posed by this document, the Deadly Dozen

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[76] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1059 (9th Cir. 2002).
[77] *Id.*
[78] *See id.* at 1063–65.
[79] *Id.* at 1065.

List, which meant to me that – that, as night follows day, that my name was on this wanted poster… and that I would be assassinated, as had the other doctors been assassinated."[80]

The district court ruled that although the posters were not a threat on their face, in consideration of the context of the situation a reasonable person could "foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm."[81] A panel of the Ninth Circuit (hereinafter "Panel Opinion") reversed on appeal.[82] The Panel Opinion stated that due to the ambiguous nature of the speech, the public nature of the communication was determinative that the speech was political hyperbole protected by the First Amendment.[83]

In response to the controversial nature of the case, the Ninth Circuit (hereinafter "Full Court") reviewed the Panel Opinion en banc, and reversed the decision.[84] The Full Court looked to *Watts*, *Brandenburg*, and *Claiborne Hardware* for guidance, noting that "[i]f ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected."[85] However, while advocacy of force is protected, "threatening a person with violence" is not.[86] The Full Court reviewed the record and found that the use of the posters and the Nuremberg Files constituted a true threat.[87] Taking context into account, three physicians had been murdered upon the circulation of a similar poster.[88] As such, the plaintiff physicians interpreted the circulation of posters identifying them as threats on their life.[89] In conjunction with the "Guilty" posters, being

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[80] *Id.*
[81] *Id.* at 1066.
[82] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 244 F.3d 1007, 1019–20 (9th Cir. 2001).
[83] *Am. Coal. of Life Activists*, 290 F.3d at 1019.
[84] *Id.* at 1063.
[85] *Id.* at 1071–72.
[86] *Id.* at 1072.
[87] *Id.*
[88] *Id.* at 1079.
[89] *Am. Coal. of Life Activists*, 290 F.3d at 1079-80.

listed "on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list."[90]

This case presented a factual scenario that confounded the court as to whether the speech should be classified and analyzed as either a true threat or incitement. The court in this case was presented with speech presented through a public medium – the Internet. The majority goes to great lengths to use the context in which the speech occurred to turn seemingly non-threatening speech into threatening speech. Examining the speech in question, it would appear that the "Guilty" posters and Nuremberg Files were not direct threats made by the makers of the posters and database against these doctors. Instead, the speech appears to create a risk of harm to these doctors by putting them in the spotlight, severely criticizing them, and providing information that enhanced the likelihood that a reader - someone other than the speaker - would be able to identify, locate, and harm them.[91] This would seem to be more indicative of advocacy for harm to befall the doctors, as opposed to a threat to harm them.

c. *U.S. v. Turner*

On June 2, 2009, Hal Turner published a blog post to his website, halturnershow.com, entitled, "OUTRAGE: Chicago Gun Ban UPHELD; Court says 'Heller' ruling by Supreme Court not applicable to states or municipalities!"[92] This blog post vehemently condemned the decision of Judges Posner, Easterbrook, and Bauer that very same day.[93] In his post, Turner admonished the Judges for their decisions, stating that "[g]overnment lies, cheats, manipulates, twists and outright disobeys the supreme law and founding documents of this land because they have not, in

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[90] *Id.* at 1080.
[91] *See* Marc Rohr, *Grand Illusion? The Brandenburg Test And Speech That Encourages Or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 48, 59–60
[92] *Turner*, 720 F.3d at 413.
[93] *See id.*

our lifetime, faced REAL free men willing to walk up to them and kill them for their defiance and disobedience."[94] Turner also stated that the Judges "deserve to be killed. Their blood will replenish the tree of liberty."[95]

Turner then referred to the infamous murder of Judge Joan Lefkow's husband and mother.[96] Following her role in a court case involving the "World Church of the Creator," Judge Lefkow was targeted by the leader of the WCC, Matthew Hale, who would later be convicted of the solicitation of the aforementioned murders.[97] In his reference, Turner described the crime and stated, "[i]t appears that another lesson is needed," and that his statements should be taken seriously because there are "[p]eople with nothing to lose by hunting you down and murdering you...."[98] And while he "would never use this blog for such an endeavor," his "eight years on the radio and on the internet ha[d] gotten [him] in touch with enough of the right people to get it done.[99] [He knew] how to get it done.[100] Federal District Judge Joan Humphrey Lefkow in Chicago is proof."[101] Turner would then post photos of the judges as well as their work addresses, alongside information on the location of bomb barriers protecting the courthouse.[102]

Turner was indicted on July 22, 2009, for "threatening to assault and murder three United States judges with the intent to impede, intimidate, and interfere with such judges while engaged in the performance of official duties and with intent to retaliate against such judges on account of the performance of official duties," in violation of 18 U.S.C. § 115(a)(1)(B).[103] A jury convicted

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[94] *Id.* at 415.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Turner*, 720 F.3d at 415.
[99] *Id.* at 417.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 416.
[103] *Id.* at 417.

him under the instruction that, "a statement is a threat if it was made under such circumstances that a reasonable person hearing or reading the statement and familiar with its context would understand it as a serious expression of an intent to inflict injury…." [104]

Turner appealed his conviction to the 2nd Circuit Court of Appeals, which affirmed his conviction as an unprotected true threat.[105] Viewed in the context of his statements, the court believed that Turner's speech constituted more than political hyperbole or common political discourse: these were references to actual acts of violence that constituted true threats.[106]

The majority further rejected an attempt by Turner to categorize his speech as unprotected incitement because it was not an explicit threat and was directed at third parties (which, although unprotected, would have been acceptable under a "threat" statute). [107] The Court found unpersuasive that he did not explicitly threaten the judges, nor that his speech was directed at third parties, and would not get hung up on "syntax," instead stating that you do not need to have the "grammatical precision of an Oxford don."[108]

U.S. v. Turner presented a unique and challenging situation for the Second Circuit. The first issue arose from the speech in question itself. The dissent, penned by Judge Pooler, brought forth the very issue this Comment addresses: the fallacy in presupposing the classification of speech. Before any analysis by the majority had taken place, the speech should have been classified to insure that the proper level of Constitutional protection was being afforded to the defendant.[109] Judge Pooler was correct in stating that it should not be presupposed that the speech at issue was a true threat and not possible protected advocacy.[110] Mr. Turner's speech did not

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[104] *Turner*, 720 F.3d at 418.
[105] *See id.* at 429.
[106] *See id.* at 421-23.
[107] *Id.* at 422.
[108] *Id.*
[109] *Turner*, 720 F.3d at 430-31 (Pooler, J. dissenting).
[110] *Id.*

present an obvious case for the court to analyze; his speech was vague, inexplicit, and careful.[111] Nonetheless, the speech in question does not, at any point, indicate a threat made by Turner against the judges, nor could it readily be characterized as such. Rather, Turner calls for the deaths of or violence towards the judges, and even expressly rejects any hand he would have in such acts. The majority, similar to *Planned Parenthood*, relies heavily on the introduction of context into the analysis, and puts more weight on the reaction of the listeners than it does on Turner's actual speech.

The second issue Turner confronted was ambiguous speech communicated through a unique and challenging medium – the Internet. The Internet, as a public medium, has introduced a wealth of new issues in the legal world since its inception in the mainstream world over a decade ago. As opposed to giving a speech in a public forum with a large, but limited audience, the Internet broadcasts a message to thousands, if not millions, thus increasing the risk of action. The majority and dissent took opposing views on the public nature of Turner's speech. In stark contrast to *Claiborne*, the majority stated that the public nature of the speech "does not make it any less threatening." On the contrary, the dissent believed the public nature of the speech to be a deciding factor in its decision to analyze the speech under *Brandenburg*, stating that unless the speech in question is clearly a threat, deference should be given to the public nature of the speech.

III. Drawing a Line

To this point, this Comment has identified the roots of these two doctrines, and provided the proffered justifications for why these doctrines enjoy different levels of protection. Many courts, however, have had trouble distinguishing threatening speech from advocacy/incitement.

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[111] *Turner*, 720 F.3d at 415-17.

Instead, many courts presuppose that speech should be characterized under a certain analysis.[112] While "the line may be difficult to draw at times,"[113] and there is no distinct analysis that courts engage in, there are principles spread throughout the case law that provide guide posts. This section will lay out the existing general framework – including the areas where courts are divided in their analyses – that courts use to classify speech before engaging in a true threats or incitement analysis.

As mentioned earlier, true threats and incitement are formed by different actions and elicit different reactions from their victims. True threats cause the victim to be fearful that violence will come from the speaker.[114] This fear can be as a result of the nature of the speech itself, or by an implied causal connection.[115]

However, it is not enough to establish that the intended target is put in fear by the speech at issue. The speaker must put the victim in fear that the violence will come from them.[116] In this sense, the speaker controls the violence;[117] it will come from them or someone on their behalf or associated with them.[118] On the other hand, incitement consists of predictions or exhortations to others.[119] In sum, the speech directed towards the object constitutes a threat, whereas speech communicated to third parties constitutes incitement.

[112] *See Turner*, 720 F.3d at 431 (Pooler, J. dissenting) ("Application of the "true threats" test presupposes that the speech at issue is a purported threat and only evaluates its seriousness.") (citing *Virginia v. Black*, 538 U.S. 343, 358 (2003)).
[113] United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1983).
[114] *See* Am. Coal. of Life Activists, 290 F.3d at 1058.
[115] *See, e.g., Turner*, 720 F.3d at 422.
[116] *See* Am. Coal. of Life Activists, 290 F.3d at 1058.
[117] *See id.*
[118] *See id; see also* New York v. Operation Rescue Nat'l, 273 F.3d 184, 196 (2d Cir. 2001); *Turner* 720 F.3d at 432 (Pooler, J. dissenting).
[119] *See* United States v. Bagdasarian, 652 F.3d 1113, 1119 (9th Cir. 2011).

This leads to the syntax of the speech.[120] For example, the phrase "I will kill you," in the active voice, appears to insinuate that the harm will come from the speaker.[121] On the other hand, "You deserve to die," in the passive voice, is ambiguous as to who will do the "killing."[122] To that effect, the speech is more properly characterized as a prediction or exhortation, commanding a Brandenburg analysis.[123] However, courts are not necessarily convinced that syntax should be a relevant concern when classifying speech.[124] Many courts remain committed to the notion that "[r]igid adherence to the literal meaning of a communication without regard to its reasonable connotations derived from its ambience would render the statute powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat."[125]

What is relevant to courts when classifying speech is the distinction between public speech and private/private communications. In most cases of a showing of a true threat the speech was targeted at specific individuals or communicated directly to the victim.[126] If threatening speech is communicated in a public setting, this "bears heavily" on whether the speech may be interpreted as a threat or not.[127] On the other hand, instances of threatening speech communicated directly to

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[120] *See Turner*, 720 F.3d at 432 (Pooler, J. dissenting).
[121] *See id.*
[122] *See id.*
[123] *See* United States v. Bagdasarian, 652 F.3d 1113, 1122 (9th Cir. 2011) ("[n]either of Bagdarasian's statements statements on its face constitutes a true threat unprotected by the First Amendment…[because] one is predictive in nature and the other exhortatory.").
[124] *See Turner*, 720 F.3d at 424 (dismissing Turner's syntax argument, while at the same time acknowledging that "[w]e do not hold and do not mean to suggest that syntax is not a relevant factor for consideration in appropriate cases.")
[125] United States v. Malik, 16 F.3d 45, 50 (2d Cir. 1994).
[126] *See* Fogel v. Collins, 531 F.3d 824, 830 (9th Cir. 2008); *see, e.g., id.* (letter containing a threat was addressed and mailed to federal judge); *United States v. Dinwiddie*, 76 F.3d 913, 925 (8th Cir. 1996) (finding a true threat where the defendant sent over fifty messages over a bullhorn to the victim, including "Robert, remember Dr. Gunn. . . . This could happen to you. . . .Whoever sheds man's blood, by man his blood shall be shed."); *United States v. Davila*, 461 F.3d 298, 305 (2d Cir. 2006) (finding a true threat where the defendant sent a letter specifically addressed to a federal judge).
[127] *See* Am. Coal. of Life Activists, 244 F.3d at 1018 (because the speech was facially ambiguous, the public nature of the comments was probative in the court declaring the speech to be protected advocacy).

the target are much more likely to be true threats, instead of speech communicated as part of a public protest.[128] The reason for this distinction is that private speech – face-to-face communication, a letter, an email, etc. – is aimed only at its target.[129] This point is further established by the fact that an ambiguous threat privately delivered to the target has been primarily categorized and successfully analyzed as a true threat by many courts.[130] Public speech, in contrast, seeks to move public opinion and recruit those of like mind.[131] Therefore, coercive speech that is part of the public discourse enjoys far more protection than the same speech privately communicated.[132]

However, not all public speech is analyzed under the *Brandenburg* analysis. *Claiborne* proposes strong deference to public speech. However, in this day and age we are presented with such intriguing mediums as the Internet, which present a different scenario than a public rally. There is a general discrepancy as to how to categorize and subsequently analyze these situations. As evidenced by the majority in *Turner*, some courts will ignore the public nature of the speech when they are of the belief that the speech rises to such a level of menace that it cannot be diminished by the fact that it was communicated as part of a public protest.[133] To the contrary is the dissent in *Turner*, which states that there should be great deference to the public setting or medium, relying on the Supreme Court's analysis in *Claiborne*.[134] The Turner dissent claims that when speech is unambiguously directed at a target, the distinction between private or public communication is irrelevant.[135] However, a public statement must be clearly in the form of a threat

[128] *See* Am. Coal. of Life Activists, 290 F.3d at 1099 (Reinhardt, J. dissenting).
[129] *See id.*
[130] *See, infra* Part IV.
[131] *See* Am. Coal. of Life Activists, 290 F.3d at 1099.
[132] .*See id.*
[133] *See, e.g., id.* at 1076; *Turner*, 720 F.3d at 423.
[134] *See Turner*, 720 F.3d at 434-34 (Pooler, J. dissenting); *see also* Am. Coal. of Life Activists, 244 F.3d at 1018.
[135] *See Turner*, 720 F.3d at 434 (Pooler, J. dissenting).

in order for it to be analyzed as a true threat as opposed to under Brandenburg.[136] To this extent you are walking a thin line – you want to protect the ability of citizens to advocate through public forums and mediums; however, you also do not want to allow a loophole for people to stand on a soapbox and threaten others without fear of liability for their words.

IV. Adjusting the Line

The question remains whether or not this line is sufficient to distinguish threatening speech from purported advocacy. This Comment answers that question, "kind of." There are two main issues with how the case law distinguishes threats from advocacy. First, many courts do not engage in this examination. Many "presuppose" the speech to be analyzed as a "true threat" or incitement, and rather than properly analyze whether the speech should be subject to a true threats or *Brandenburg* analysis, the speech is subject to a true threats test.[137] If the true threats analysis fails, it is often then analyzed under *Brandenburg*.[138] This is a mistake – these twin doctrines apply to two different types of speech, and should be analyzed under the proper standard. In order to afford speakers the proper level of protection, their speech should be analyzed under the appropriate test. This is accomplished through an analysis of the speech in question itself before it is applied to a specific test.

Second, when courts do engage in speech classification, it is not a fluid task. Courts are often unsure of how to proceed, and often times blend a true threats analysis with a *Brandenburg* analysis in an attempt to obtain a more just result. Other times, courts use factors such as context

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[136] *See id* (quoting *Kelner*, 534 F.2d at 1027 (publicly threatening speech must be so "unequivocal, unconditional, immediate, and specific" to the person threatened that it conveys a "gravity of purpose and imminent prospect of execution.")
[137] *See id.* at 431.
[138] *See id.*

and the public nature of the speech in varying ways and at varying times during the analysis, creating inconsistent approaches among courts in approaching these situations.

As such, in this section, I propose a new test for analyzing ambiguously threatening speech by examining the countervailing approaches in the case law, as discussed in Part III. The goal of this new test is to create a synthesized, consistent test for approaching cases involving ambiguous speech that ensures a proper level of Constitutional protection by determining which speech test ("true threats" or *Brandenburg*) is appropriate in each case.

The test will consist of two parts. The first part is a two-factor test that examines the speech itself, based on an analysis of the general framework developed through case law and in light of the doctrinal justifications identified in Part I. Specifically, this two-factor test will first examine the target of the speech, and then examine the speech's mode of communication, to determine whether the speech should be classified as "threatening" or "advocacy."

The second part is the implementation of either the reasonable objective person test, for speech classified as "threatening," or a *Brandenburg* analysis, for speech deemed "advocacy." Following this illustration, I will re-examine *Turner* in light of the new test I articulate.

To preface, this test need not be implemented whenever a court is tasked with determining whether speech in a given case is proscribable or not. Rather, this test becomes effective when a court is confronted with threatening speech that is difficult to characterize. Failure to monitor the lines between threatening speech and potential advocacy violates basic tenants of First Amendment case law in that it may afford less protection to speech that deserves more, or vice-versa. "We must make an initial determination of the category of speech under which our analysis lies because the Constitutional question turns on the source of the [] fear."[139] To presuppose that

[139] *See Turner*, 720 F.3d at 433 (Pooler J. dissenting) (quoting Am. Coal. of Life Activists, 244 F.3d at 1018).

the issue at hand is a threat warranting an application of the "true threats" test neglects the premise that threats and incitement warrant different Constitutional protections, and those afforded to advocacy and incitement will have less force if all speech is initially categorized as a threat.[140]

A. Two-Factor Test

Although a clear test for categorizing speech has never been explicitly created, case law over the years has relied on several principles for distinguishing threats from protective advocacy, as outlined in Part III. This two-factor test will examine and synthesize these approaches into two primary inquiries. The first factor will inquire into the "target" of the speech. This factor will first address why uncovering the "target" of the speech is imperative to classifying speech. Next, this factor examines how the "target" of the speech is uncovered, and how much weight should be afforded to the context of the speech.

The second factor will inquire into the "mode of communication." This second factor will examine how and/or when the classification of speech should differ depending on whether the speech is publicly communicated. Once each factor has been analyzed, the speech will be classified as either "threatening" or "advocacy" and will be subject to the appropriate test for determining whether the law proscribes the speech.

i. The Target of the Speech

This first factor inquires into the "target" of the speech. However, in order to uncover the target of the speech, it is imperative to understand *why* uncovering the target of the speech is essential to classifying speech. That understanding revolves around one of the most basic human emotions implicated with threatening speech – fear.

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[140] *See Turner*, 720 F.3d at 431 (Pooler, J. dissenting) (noting that Constitutional protections afforded to advocacy "would have less force if we analyzed all speech under the 'true threats' test.")

The sin qua non of a threat is fear. When a speaker wishes to communicate a threat to another person, he uses fear as his tool. However, several courts and judges have held that fear alone is not, and cannot, be enough to create a threat. In his *Planned Parenthood* dissent, Judge Kozinski addressed this concern through the use of examples. For example, when a doctor informs a patient that he has cancer, the patient will surely be placed in a state of fear.[141] Similarly, when a person informs a third party that the third party is in danger, that speech is not a threat, even though the third party will surely be placed in a fearful state.[142] It follows then that where a protestor tells the objects of protest that they are in danger and further indicates political support for the violent third parties, he has also not made a threat, but merely advocated violence or harm that he will not control.[143]

These courts that follow Judge Kozinski's rationale rely on the element of control to separate such speech from speech that is a "true threat." They hold that the court must be sure that the speaker herself or one under her control has placed the listener in fear.[144] Without evidence of control, resulting punishment is not aimed at the threat, but rather at the effect of the fear itself, a rather speech-chilling predicament.

However, reliance on the element of control is misguided. When a speaker is charged with making a threat or inciting unlawful conduct, their guilt or culpability does not depend on the causal chain between the speech and any harm that results from the speech, because we do not require harm to result from the speech. Instead, when we punish someone for their threat, we are punishing them for the fear that they place their victim in. And when we punish a speaker for

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[141] *See Am. Coal. of Life Activists*, 290 F.3d at 1089 (Kozinski, J. dissenting).
[142] *See id.*
[143] *See id.*
[144] *See* New York ex rel. Spitzer v. Operation Rescue Nat'l, 273 F.3d 184, 196 (2d Cir. 2001); *Turner*, 720 F.3d at 431.

incitement of unlawful conduct, although the victim may feel "fear," we punish the speaker for the risk of harm that is created towards the victim.

The distinction between threatening speech and advocacy/potential incitement of unlawful conduct turns on the *fear* that is involved.[145] When someone informs another that they are going to kill or harm him or her, it engenders a greater level of fear in that person than if the speaker had encouraged others to kill or harm that person. They know that you have the desire and willpower to kill or harm them, and that increases the level of fear. But when a speaker encourages others to kill or harm someone, that person does not know whether the listeners will carry through on the speaker's wishes. Although they may be afraid, there is not the same level of "fear" implicated as if they had been the target of the speech, because fear alone is not the goal of the inciter; instead, the inciter targets third-parties to will them to action and create an increased risk of harm.

Thus, in order to properly classify speech, we must uncover the target of the speech. With threatening speech, the speaker's target is also the object of her speech. For example, if a disgruntled citizen tells a politician, "If you run for office I will kill you," the politician is the object of the speech, and since the speech is directed only at the politician, he constitutes the target as well. When the object of the speech is also the target, the level of fear that is generated by the speech is greater, and the speech is rightly classified as "threatening."

On the contrary, advocacy is not aimed at the object of the speaker's message, but at third parties, who may or may not be known to the speaker. It is through these third parties that the speaker can accomplish his goal. To change the scenario of the above example, if a disgruntled politician says, "If that candidate runs for office, he should be killed," the object of the speech remains the politician, as in the prior example. However, the target of such speech is now unclear.

[145] The following analysis came to fruition through numerous discussions with Professor Thomas Healy.

It would seem that such speech is targeted not at the politician, but at third parties, whom the speaker wishes to act on his behalf. The requisite level of fear is not generated by this speech on behalf of the speaker to the object – instead, a risk of harm is created, because the object of the speech does not know whether or not the third parties will act on the speaker's wishes.

a. Facial Examination

In order to uncover the target of the speech, a facial analysis of the language in question will be implemented. The goal will be identifying the target of the speech through two examinations of the speech in question: examining the "voice" of the speech; and examining whether or the not speech consists of a "prediction" or "exhortation."

The first examination is the "voice" of the speech in question. Speech in the "active" voice connotes that the speaker or speakers mean to carry out the speech in question. For example, "I will kill you"[146] connotes that "you," the listener, is the target. On the other hand, speech in the "passive" voice, for example, "You should be killed,"[147] connotes a passiveness on the part of the speaker, who, though he may desire death or injury to befall the listener, does not necessarily threaten harm from himself. Instead, it is ambiguous as to the target of speech, and such encouragements or inducements to others should be analyzed as advocacy of unlawful conduct as opposed to threats.

The second examination is whether the speech is an "exhortation" or "prediction." In essence, an "exhortation" is the direction of speech to third parties, even though the subject of the speech is a different person. For example, in the case of *U.S. v. Bagdarasian*, the U.S. Court of Appeals for the Ninth Circuit was confronted with several comments posted to a popular blog. In reference to President Obama's election, the user posted a comment, stating, "[Sh]oot the nig" to

[146] *See Turner*, 720 F.3d at 432 (Pooler, J. dissenting).
[147] *See id.*

the blog.[148] By examining the speech facially, the court determined that the speech in question was not a threat, because the speech was directed at third parties, though President Obama remained the subject.[149] "'[S]hoot the nig' is…an imperative intended to encourage others to take violent action, if not simply an expression of rage or frustration."[150] Though sure not to win the sympathy of many, the defendant's speech was directed at third parties, for whom his wish may be acted upon, and thus subject to a *Brandenburg* analysis.[151]

A trickier proposition is that of the "prediction." Both "exhortations" and "predictions" are speech typically associated with advocacy of unlawful conduct and incitement. To return to *U.S. v. Bagdarasian*, the speaker in that case also predicted that President Obama would be assassinated due to his political positions. Nevertheless, the court construed the speaker's message not as a threat on behalf of Bagdarasian, but as a prediction. "The 'Obama fk the niggar' statement is a prediction that Obama 'will have a 50 cal in the head soon.'[152] It conveys no explicit or implicit threat on the part of Bagdasarian that he himself will kill or injure Obama." Predictions may have a subject, but they do not specify a target; like passive speech, they are ambiguous as to the target of the speech, and do not generate the level of fear that speech targeted at the object does.

Where predictions may get complicated is when a conditionality factor is introduced into the mix. In its simplest form, a conditional statement states that, "If you do not do X, you will be killed." In *U.S. v. Hoffman*, the court dealt with a similar situation. The speaker in question sent a letter to then President Ronald Reagen, stating, "Ronnie, Listen Chump! Resign or You'll Get Your Brains Blown Out."[153] Though the majority properly analyzed the speech as a threat, they

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[148] *See Bagdarasian*, 652 F.3d at 1119.
[149] *See id.*
[150] *See id.* at 1120.
[151] *See id.*
[152] *See id.*
[153] *See United States v. Hoffman*, 806 F.2d 703, 704 (7th Cir. 1986).

did not analyze the speech, but rather determined that the speech, combined with the resulting context, created a true threat.

The dissent, penned by Senior District Judge Will, strongly opposed the condemnation of Hoffman's speech as a true threat. To Judge Will, based on an examination of the speech itself, Hoffman's speech was a passive prediction devoid of any intent on the writer's part to kill the president, and should have been analyzed under the *Brandenburg* standard as opposed to the true threats test.[154] Though I would agree with Judge Will's method of first analyzing the speech facially to determine the target of the speech, I disagree with his result. First, unlike the prediction in *U.S. v. Bagdarasian*, the conditionality of the statement conveys to the listener that the speaker will kill or injure the President. The message is directed to the President, implying that if the President does not comply with his demands, he will kill him. Second, as noted in Section I, one of the key doctrinal distinctions between threats and advocacy is the purpose of the speech. Whereas advocacy seeks to persuade third parties to act in violation of the law, threats attempt to force the listener to act or not act against his own volition. Identifying and targeting the listener accomplishes this goal. With a conditional statement, the goal is clear – it is not just mere encouragement or a passive prediction of death or injury, but a veiled attempt to force the listener to act or not act. Threats are ways of doing things, as opposed to saying things. Conditional statements are an example of "ways of doing things," and unlike predictions, they should be analyzed under a true threats analysis.

It will not always be the case that speech can be readily examined on its face. As noted in *Turner*, threats are often not "conveyed with the grammatical precision of an Oxford don."[155]

[154] *See id.* at 719-21 (Will, J. dissenting) ("Hoffman's statement is expressly conditioned on an event outside his control – here the President's resignation – and suggests that the author did not intend to act upon it.").
[155] *See Turner*, 720 F.3d at 425.

However, judges need not also approach these issues with the precision of an English professor. Instead, an intuitive characterization of the speech in question will aid in the facial examination of ambiguous speech to ensure that a proper level of protection is afforded to the speech. Justice Hatchett of the Florida Supreme Court illustrated an example of this approach:

> Indeed, the question must be asked: What is the proper characterization, for purposes of constitutional analysis, of the words "two, four, six, eight, who shall we assassinate?," followed by one or more names of specific persons? Comparing that utterance to some slightly reconfigured variations thereof, does it not resemble "X should be assassinated" more closely than "We are going to assassinate X"? The former statement, of course, constitutes advocacy of the commission of a crime, and would presumably be analyzed pursuant to Brandenburg.[156]

Such an approach allows for the aforementioned analysis to proceed, even though the language is not completely clear.

b. Context

In dismissing a facial examination of the speech in question, many courts, like the majority in *Turner*, rely on the proposition that "[r]igid adherence to the literal meaning of a communication without regard to its reasonable connotations...would render the statute powerless against the ingenuity of threateners who can instill in the victim's mind as clear an apprehension of impending injury by an implied menace as by a literal threat."[157] That is, they believe that context should be a key factor in determining whether speech is a threat or advocacy because it reveals the speakers actual message. This proposition is true and imperative to any true threats analysis. Often, threatening speech is conveyed implicitly; courts must be cognizant of the fact that while speech may not facially appear threatening, when one accounts for the context of the message, the curtain is pulled back to reveal the true message.[158]

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[156] Matthews v. State, 363 So. 2d 1066, 1078 (Fla. 1978).
[157] *See Turner*, 720 F.3d at 432 (Pooler, J. dissenting) (quoting *Malik*, 16 F.3d at 50).
[158] *See Malik*, 16 F.3d at 50.

However, when making the initial determination of whether to analyze speech as a threat or as incitement, greater weight should be given to the characterization of the speech in question, as opposed to its context, because the characterization of the speech lends directly to determining the target of the speech. When classifying speech the use of context should be reined in. The purpose of this section is to uncover the target of the speech based on a facial analysis – it is not to determine whether the speech itself is a proscribed threat. Once classified, context will then be taken into account under the appropriate test. At this stage, context should be limited to proffering evidence that the true target is not third parties, but the listener.

Use of additional context at this stage would distract from properly uncovering the target of the speech and, in turn, classifying the speech. Returning to the *Planned Parenthood* decision briefly, and facially examining the speech without the shadow of context, a different message is perhaps revealed than the one decided by the court. The "WANTED" posters and Nuremburg Files alone do not convey the message that these doctors are being targeted, and are in danger of harm from the speakers.[159] Rather, it appears more likely that the posters and website appear to create a risk of harm to those physicians by putting them in the spotlight, severely criticizing them, and providing information that enhanced the likelihood that a reader - someone other than the speaker - would be able to identify, locate, and harm them.[160] That situation corresponds more closely with the danger associated with advocacy of violence than that associated with threats of violence, and therefore the speech in question appears to be the kind of speech whose suppression is to be limited by the Brandenburg test.[161]

[159] *See* Rohr, *supra* note 91 at 58.
[160] *See id.*
[161] *See id.*

"When our law punishes words, we must examine the surrounding circumstances to discern the significance of those words' utterance, but must not distort or embellish their plain meaning so that the law may reach them."[162] It is true that threats will engender a greater amount of fear in a listener than advocacy of force, which creates an increased risk of harm. However, it could also be said that most advocacy has attached to it a tinge of menace, likely to put the listener in some state of fear. Reliance on contextual analyses at this point can distort the distinction between threatening speech and advocacy of force. As such, in order to properly classify threatening speech and ensure a proper level of protection is afforded to the speaker, the use of context at this stage of the analysis should be restricted.

ii. The Mode of Communication

The second factor examines the mode of communication that encapsulates the speech. Specifically, this factor is concerned with the issue of whether or not (or more specifically, when) speech should be subject to a different analysis because it is conveyed privately as opposed to publicly, and vice versa. Though analyses over the private/public nature of speech differ, the mode of communication is a factor generally raised at some point when courts are tackling cases involving more ambiguous speech. Though some courts, such as the majority in *Turner*, disagree, the mode of communication implicated is an essential factor that should hold great weight in these analyses, for two reasons: first, distinguishing between speech conveyed privately as opposed to publically helps to resolve ambiguities that remain following the analysis of the target of the speech (factor 1), by illuminating the speaker's true intentions; and second, privately communicated speech is more likely to generate the level of fear associated with true threats, as opposed to publicly communicated speech.

[162] United States v. Bagdasarian, 652 F.3d 1113, 1120 (9th Cir. 2011).

a. Privately Communicated Speech

Courts traditionally are more inclined to subject privately communicated speech to a true threats analysis, as opposed to publicly communicated speech.[163] I agree with this analysis, and believe it should apply to all forms of threatening speech – explicit threats, implicit threats, purported advocacy, and ambiguous speech, because when a speaker communicates his message privately, the true intentions behind the speech may come to light.

As to explicitly threatening language, the intentions that are revealed are somewhat obvious – the choice of private communication is only further evidence of the speaker's desire to communicate a threat to a specific target. Where privately communicated speech is more important to classifying ambiguous language is when the court is faced with speech involving implicit threats, ambiguous language, and purported advocacy.

With implicit threats, ambiguous language, and purported advocacy, it is a trickier situation. If X receives a communication that says "death to X," X will undoubtedly feel threatened by it.[164] But isn't that statement properly viewed as advocacy of X's death, rather than as a threat to kill him?[165] Should the fact that the "advocacy" is communicated to the "target" change the analysis?[166] Some commentators posit that such "advocacy" should not always be altered based on the private nature in which the speech is conveyed.[167] Oftentimes such communications will still be guised in serious political discussions that may warrant retention of some First Amendment protection.

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[163] *See id.* ("'Public speeches advocating violence' [are allowed] substantially more leeway under the First Amendment than 'privately communicated threats.'") (internal citation omitted).
[164] *See* Rohr, *supra* note 91 at 51.
[165] *See id.*
[166] *See id.*
[167] *See id.* at 90 ("I would eschew any attempt to distinguish between "public" and "private" speech.").

However, when a speaker privately communicates an ambiguous message to a target, the purposes behind the speech are elucidated and greater weight is added both to the message and to its effects. Furthermore, although the language itself my be directed at third parties, when such language is communicated directly to the target there is effectively no "advocacy." The goal of advocacy is to sway the minds of third parties to act. If such "advocacy" is not presented to those third parties, but rather directly to the target, such speech is not in fact advocacy, but perhaps a clever attempt at a veiled threat. Accordingly, such speech should be properly analyzed as a true threat as opposed to advocacy. This rationale also solves the issue touched on at the end of factor 1. Although non-explicitly threatening language operates in a sort of "twilight zone," as it is generally unclear as to whether the speaker is directing his speech at the target, or whether the speech is a prediction or exhortation to others, if such speech is privately communicated to the target it will be analyzed as a true threat.

Not only does private communication elucidate the intentions of the speaker, but it also engenders a greater amount of fear in the listener, as opposed to publicly communicated speech. When a message is communicated to a listener that contains overtones of or direct references to violence, that listener is going to be put into a greater level of fear than if that message had been communicated publicly or to another person. There is no general risk of harm present that we typically see in advocacy of unlawful conduct cases – these messages put the listener in a state of fear sufficient to warrant a true threats analysis as to whether they are punishable or not.

b. Publicly Communicated Speech

Publicly communicated speech, on the other hand, consists of speech conveyed through a public medium or in a public forum. The direct connection between the speaker, the speech, and the target is broken by the message being broadcast beyond just the object of the speech.

Traditionally, substantial deference is afforded to public speech.[168] Public speech, in the attempt to sway the opinions of others, typically implicates core First Amendment principles, which command the utmost protection afforded by the First Amendment.[169]

More importantly, for purposes of this test, is the diffusion of speech by way of the public medium or forum. Public speech, though it may only concern one person, is more likely to be directed not just at one person, but at many, in an effort to rally others of like mind to join the cause or act on the beliefs of the speaker. Similar to the way that privately communicated speech can illuminate the true intentions of the speaker, publicly communicated speech acts in a similar way – it perhaps reveals that the speaker intends to direct his speech at third parties in an effort to rally them behind the speaker's message.

Furthermore, unlike privately communicated speech, the level of fear that is generated by public speech is generally not as severe as that associated with a privately communicated message. Surely the listener may be placed in some state of fear – however, the primary result of this speech is not a level of fear associated with true threats, but instead, a risk of harm similar to advocacy of force. By spreading their message by way of a public medium or forum, speakers are able to access countless third parties who may follow through on their calls to action. This creates an increased risk of harm typically associated with advocacy of force, and such speech should be accordingly analyzed under *Brandenburg*.

But does that mean that public speech can never be analyzed as a true threat? It does not; to do so would allow a rather large loophole for clever individuals to possibly threaten while under the guise of incitement. This entails using publicly communicated speech as a shield – devious

[168] *See Claiborne*, 102 S. Ct. at 3433 ("Since respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.")
[169] *See id.*

threat-makers could threaten others through a public forum or medium, such as the Internet, and then hide behind *Brandenburg*'s protection.

Furthermore, unlike private communications, speakers can still use public speech to accomplish their objectives. As mentioned earlier, when a speaker communicates a message to someone privately, it would be contradictory to claim that such speech is advocacy. The message is targeted at the listener alone; without third parties to accomplish the speaker's objective, there can be no advocacy of force. With public communications—though it is more likely that speech is directed at third parties because of the numbers of listeners and the types of messages involved—that does not necessarily need to be the case. Unlike private communications, speakers can still target the subject of their message through public communications, not just third parties.

Additionally, public mediums have dramatically changed in recent years, notably with the advent of the Internet and the immediate accessibility and ease with which a person can publicly transmit information and messages through it. As seen above in both *Planned Parenthood* and *Turner*, the Internet provides its users with the ability to access and communicate a potentially threatening message to millions of people at the click of a mouse. This has opened up a new avenue for speakers to threaten targets, while also providing an effective escape measure for avoiding liability.

Nevertheless, this issue remains one of contention for many courts because of the history of strong deference courts give to public speech. Cases such as *U.S. v. Kelner* and *Claiborne* look to public speech and its ties to quintessential First Amendment values and principles and require clear evidence of a threat in order to negate the protections afforded to public speech. However, in the past, public communication was more easily defined – public speeches, rallies, and protests that contained a large, but limited, audience, and where the speech was generally portrayed against

a backdrop of political unrest. Courts were quick to afford this speech the utmost protection because it underscores the basic principles of American freedom – the ability to strongly and effectively speak out against the government and those who are impeding on your rights.

In recognition of these competing issues, this factor will attempt to strike a balance between the two. When threatening public speech is specifically targeted at an individual, there should be no deference given to the public nature of the speech, and the speech should be analyzed as a threat as opposed to advocacy or incitement. However, it is not enough that the speech be directed at a target in accordance with factor 1. The speech not only may not consist of a prediction or exhortation to others, but it must be specifically directed at the target. This includes not only directing the message at the target, but the message must be specific in identifying the target. In these cases, when a listener is specifically targeted by a direct communication or through identification, the level of fear associated with this speech rises to a level where a "true threats" analysis should apply, regardless of the presence of an increased risk of harm. The specific targeting of the listener creates a fear in the listener that outweighs any deference to the public forum or medium, warranting a "true threats" analysis. If the specificity requirement is not met, such speech should otherwise be analyzed as advocacy of unlawful conduct under *Brandenburg*.

Iterations of this requirement have previously sprung up in case law, albeit not for speech classification purposes. The *Kelner* court required a showing of "specificity" in order for public speech to be proscribed. Likewise, the majority in *Planned Parenthood* relied on the fact that, though public speech was implicated, the doctors were "personally targeted," and the court in *NAACP* noted that Evers did not specifically identify any of the people he was admonishing. Compared to courts like the majority in *Turner*, which outright rejected deference to public speech in their analyses, and courts such as *NAACP* and the *Turner* dissent, that require extreme deference,

this factor finds a middle ground. Requiring an additional showing of specificity toes the line between deference to public speech and recognition of the changing times, technologies, and tendencies of speakers in order to more effectively distinguish between threats and advocacy of unlawful conduct.

iii. Implementation of either objective "reasonable person" true threats test or *Brandenburg* analysis

In sum, the examination will look to two factors: first, whether the speech is directed at a specific target, or directed at third parties over whom the speaker does not have control; and finally, whether the speech was a public or private communication. In the end, the speech may be classified as either a threat or advocacy, and appropriately analyzed. However, the analysis of the speech is not done yet. Upon completion of the aforementioned factor test, the court will be presented with a categorized message they must now further analyze under either the true threats test or the *Brandenburg* analysis, pending the conclusion of the factor test, to determine whether law protects such speech.

Should the speech be classified as "advocacy of unlawful conduct" it will be subject to a *Brandenburg* analysis to determine whether or not it is proscribable advocacy of unlawful conduct. We will know at this point that the speech is directed at others. The prominent factors that remain to be evaluated will be the "imminence" of the speech in question, as well as the context surrounding the speech.

Should the speech be classified as "threatening," a true threats analysis will follow. As mentioned in Section I, although the objective-listener test is the most popular, there remain several fringe tests used by courts and circuits around the country. The important factor to be taken into consideration, no matter what test is implemented, will be an analysis of the content of

the speech, to determine whether such speech is in fact threatening. At this point, a more open examination into the context surrounding the speech will take place. Context will play a crucial role in determining whether the speech in question is the expression of ideas or a serious threat of violence towards the target.

B. Re-examining *U.S. v. Turner*

As touched on earlier, *U.S. v. Turner* certainly did not present an easy case for the court to navigate. Turner's nebulous, aggressive language, while difficult to swallow, did not present as cut-and-dry of a case as one might suspect on first glance. Add to that the context of previous blog posts tainted with violent imagery and language, and his use of an Internet blog to convey his message, and *U.S. v. Turner* presents an optimal case for this new test. As mentioned previously, this test need not always be implemented; however, when confronted with a complicated factual scenario such as the one seen in *Turner*, in order to protect the Constitutional rights of speakers and guard First Amendment doctrine, a more exacting analysis, such as the one proposed, should commence.

i. Target

The starting point is a facial examination of Turner's speech. Although Turner posted a lengthy blog condemning the decision reached by the three judges in question, Turner's allegedly threatening speech presents itself in three sentences: First, Turner proclaims that"[t]hese Judges deserve to be killed.[170] Their blood will replenish the tree of liberty."[171] Second, after referring to the murder of Judge Lefkow's husband and mother at the hands of Matthew Hale, he writes, "These

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[170] *See* U.S. v. Turner, 720 F.3d 411, 415 (2d Cir. N.Y. 2013)
[171] *See id.*

Judges deserve to be made such an example of as to send a message to the entire judiciary: Obey the Constitution or die."[172]

Throughout his blog, Turner calls for the deaths of these three judges. It is quite obvious that he wishes for these judges to be killed. It is very likely that this speech was intended to, and did in fact, strike fear into the minds of the judges implicated. However, though the judges are the objects of his disdain, his speech seems to be not directed at these judges, but at third parties. "These Judges *deserve to be killed*."[173] "These Judges *deserve to made such an example of*…."[174] Turner's comments, all made in the passive voice, are more appropriately classified as exhortations to third parties - third parties willing and able to act on the violence he so wishes upon Judges Easterbrook, Posner, and Bauer.

The majority primarily relied on the "seriousness" of Turner's statements and actions, as well as previous comments made by Turner to supply a violent context, in pronouncing Turner's statements as "true threats."[175] Though the "seriousness" of the speech is not a relevant inquiry at this stage in the analysis, a contextual analysis remains proper. However, unlike the contextual analysis conducted by the majority in *Turner*, under this test it will be more restricted. Applicable context at this point will serve only to assist in uncovering the true target of the speech.

Previous blog posts provide that context, "from which a reader might infer Turner's intentions in writing the post."[176] Turner's posts cover various topics and individuals, including a

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[172] *See id.*
[173] *See id.* (emphasis added).
[174] *See id.* (emphasis added).
[175] *See id.* at 421 (noting that the majority took great pains to distinguish the instant case from that of a political candidate who was quoted in a newspaper as stating of his opponent, "[i]nstead of running for governor of Florida, they ought to have him and shoot him. Put him against the wall and shoot him."). *See* Christopher J. Kelly, *Kanjorski Ponders 'Nuts,' Bolts from Blue*, TIMES-TRIB. (SCRANTON) (Oct. 23, 2010, 9:37am), http://thetimes-tribune.com/opinion/editorials-columns/roderick-random/kanjorski-ponders-nuts-bolts-from-blue-1.1052739.
[176] *See* U.S. v. Turner, 720 F.3d 411, 416 (2d Cir. N.Y. 2013)

Connecticut legislator and the “major players behind the financial meltdown.”[177] Turner wrote, "I intend to incite revenge…Vicious, brutal, savage, revenge with malice aforethought." [178] Furthermore, Turner again referenced the tragedy that befell Judge Lefkow, stating, “While I can't legally undertake killing, I may—just MAY—be able to say enough of the right things, to enough of the right people, to make it happen: People who have lost everything on account of you,” and, “Judge Lefkow made a ruling in court that I opined made her "worthy of death. After I said that, someone went out and murdered her husband and mother inside the Judges Chicago house.”[179] Turner’s comments are certainly distasteful and invite scorn – however, these contextual comments aid the theory that Turner’s intentions were not to threaten the judges, but rather to incite third parties to commit violence.

ii. Mode of Communication

Being that his speech was conveyed through the Internet, a public medium, there is no issue as to the private/public communications distinction. Because of the circumstances of this case, this section does not require much in the way of analysis. Turner’s speech was classified under factor 1 as being targeted at third parties. Additionally, the public nature of the speech, in that it is aimed at the public at large and not targeted at an individual, resolves any potential ambiguities regarding factor 1. Under this examination, Turner’s speech is best classified as advocacy of unlawful conduct and subject to a *Brandenburg* analysis to determine its protection.

iii. “True threat” or *Brandenburg* test

Though a *Brandenburg* analysis is appropriate, the circumstances of this case do not warrant one. Turner was charged under 18 U.S.C. § 876(c) for "threaten[ing] to assault and murder

[177] *See id.*
[178] *See id.*
[179] *See id.*

three United States judges with the intent to impede, intimidate, and interfere with such judges while engaged in the performance of official duties and with intent to retaliate against such judges on account of the performance of official duties…."[180] Save for one decision out of the Fourth Circuit (which classified its own reasoning as dicta),[181] no circuit has held that the word "threaten" under § 876 includes punishment for incitement of illegal activity.[182] Though Turner's speech does not constitute a threat, it may in fact be unprotected under an incitement statute—as both the district court and the *Turner* dissent alluded to.[183] Nevertheless, that is not the case here. Thus, the author agrees with the *Turner* dissent that Turner's conviction should be vacated.

V – Conclusion

U.S. v. Turner constitutes a missed opportunity. The court had an opportunity to truly tackle the confusing conflux of true threats and incitement. Instead, we received a blurred distinction between the two, further muddying an already ambiguous and confusing field of law.

In response, this Comment has attempted to craft a synthesized analysis for the courts to implement when they are confronted with ambiguous speech that treads the line between threats and advocacy/incitement. The distinction is an essential one; improper application of the "true threats" test over *Brandenburg*, or vice versa, blurs the line between the two doctrines, possibly diminishing the force of the respective doctrine and assigning an improper level of Constitutional protection to the defendant's case. Courts should take heed of this common pitfall and apply a

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[180] *See id.* at 417.
[181] *See* U.S. v. Patillo, 438 F.2d 13, 16 (4th Cir. 1971).
[182] *See Turner*, 720 F.3d at 435 (Pooler, J. dissenting) ("[n]o . . . circuit," except for perhaps the Fourth Circuit, "has concluded that incitement can be punished under a threat statute.") (internal citation omitted).
[183] *See id.* at 435 ("To be clear, I need not and do not say that Turner's speech is constitutionally-protected. Turner's speech may lose Constitutional protection under *Brandenburg* and, indeed, the district court felt that it did….").

two-step analysis, such as the one proffered in this Comment, to ensure the protection of not only these crucial doctrines, but the First Amendment rights of U.S. citizens.