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True Threats - A More Appropriate Standard for Analyzing First Amendment Protection and Free Speech When Violence Is Perpetrated over the Internet

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TRUE THREATS— A MORE APPROPRIATE STANDARD FOR ANALYZING FIRST AMENDMENT PROTECTION AND FREE SPEECH WHEN VIOLENCE IS PERPETRATED OVER THE INTERNET

I. INTRODUCTION

The introduction of the Internet to mainstream society has brought several new and controversial issues to light.[1] Those issues include the illegal dissemination of pornography,[2] the fraudulent use of personal financial information,[3] workplace privacy,[4] and even threats of bodily harm or death.[5] The Internet provides a place of relative anonymity. For example, it is relatively easy to post altered pictures of celebrities, publish personal information about public figures, or even incite violence on the Internet behind the veil of a false identity. Often, trained professionals cannot trace the origin of an e-mail message or a web site. These and several other characteristics make the Internet a unique form of communication.

Over the past several decades, speech broadcast over the traditional news media outlets—television, newspaper, and radio—has been regulated by several well-established, but often debated, doctrines.[6] However, the Internet presents new and unique questions with regard to the regulation of

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1. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849 (1997). The Internet originally began as a project of the United States military. *Id.* In the event the United States engaged in a war, the government devised a defense-related information system that would secure and maintain information in one electronic database. *Id.* at 850. The electronic system used to exchange and store information was originally called ARPANET, and it linked hundreds of computers, which enabled all defense-related entities to communicate with one another, even if some of those networked computers were lost at war. *Id.*

2. JOHN R. LEVINE ET AL., THE INTERNET FOR DUMMIES 53 (4th ed. 1997).

3. KEVIN F. ROTHMAN, COPING WITH DANGERS ON THE INTERNET, STAYING SAFE ON-LINE 16-17 (2001).

4. LEVINE ET AL., *supra* note 2, at 42.

5. CNET News.com Staff, *Jodie Foster Threatened in Chat Rooms* (Dec. 4, 1995), *available at* http://news.com.com/2100-1023-278956.html?legacy=cnet [hereinafter CNET News.com].

6. *See* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (holding the defendant not liable for statements made at a Ku Klux Klan rally and then televised); N.Y. Times v. Sullivan, 376 U.S. 254, 280 (1964) (holding that libelous statements made about a person regarded as a public figure would be actionable if false); Belli v. Orlando Daily Newspapers, Inc., 389 F.2d 579, 584-87 (5th Cir. 1967) (discussing liability for statements made about a prominent attorney and printed in a newspaper); Hartmann v. Winchell, 73 N.E.2d 30, 31 (N.Y. 1947) (holding that the utterance of defamatory remarks, read from a script into a radio microphone and broadcast, constituted libel).

speech, and the standard used to determine whether threatening or "hate" speech broadcast over the Internet should receive First Amendment protection needs to be reevaluated.

This note will address the Internet as a new media "frontier" and the ways that First Amendment interpretation may necessarily need to be modified in order to accommodate this new broadcast medium. More specifically, this note will address threats of violence made over the Internet, to what degree those threats should be protected by the First Amendment, and what standard of review should be used to evaluate them. By looking at the history of both the First Amendment and the Internet, this note will assess the similarities and differences between the Internet and traditional means of mass media and propose a standard for measuring incitement with regard to the Internet.

Section II of this note will examine the history of the First Amendment, three standards for analyzing speech, and the current standard used to determine whether speech should receive constitutional protection under the First Amendment. Section III will give a brief overview of the Internet and its implications on the First Amendment. Section IV will discuss the need for a reformulated test, and Section V will look at two of the most prominent Internet speech cases to date and how they would have been decided under that test.

II. FIRST AMENDMENT HISTORY AND THE INCITEMENT DOCTRINE

The First Amendment states in part, "Congress shall make no law abridging the freedom of speech or of the press."[7] The government can, in certain circumstances, regulate individuals' ability to express their ideas through verbal expression, actions, or association with others.[8] However, the First Amendment does not protect incitement to riot and other types of speech that might be dangerous or pose a threat to national security.[9] When analyzing speech that contains a violent tone, the Supreme Court has

7. U.S. CONST. amend. I.

8. *See, e.g.*, Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372-73 (9th Cir. 1996) (holding that the angry statement, "if you don't give me this schedule change, I'm going to shoot you," made by a high school student to a guidance counselor, could be reasonably considered a serious expression of intent to harm and was not entitled to First Amendment protection).

9. *Brandenburg*, 395 U.S. at 447; Gitlow v. New York, 268 U.S. 652, 665-67 (1925); Schenck v. United States, 249 U.S. 47, 49 (1919).

established two primary categories of unprotected speech: speech that incites[10] and speech that poses a "true threat."[11]

The following is a review of a series of First Amendment cases that demonstrate the incitement doctrine.[12] They evolved from the British common law's bad tendency test into the clear and present danger test, and finally into the "incitement to imminent lawless action" test.[13] The bad tendency test permitted the government to prohibit speech before it could create a real danger; the mere tendency to create evil justified suppressing the speech.[14] The clear and present danger test required a showing that the danger of speech or writing was clear and could cause damage in the relatively near future.[15] The incitement to imminent lawless action test requires a showing that the speech can and has incited lawless action.[16]

A. THE BAD TENDENCY TEST

State and federal courts in the United States used a bad tendency test to evaluate speech until the 1930s.[17] The government could ban any material if "the tendency of the matter charged as obscenity [was] to deprave and corrupt those whose minds [were] open to such immoral influences and into whose hands a publication of this sort [could] fall."[18]

Two cases, *Gitlow v. New York*[19] and *Whitney v. California*,[20] confirmed the bad tendency test's validity in the United States.[21] Under the

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10. *See Brandenburg*, 395 U.S. at 447 (noting the original case establishing the incitement doctrine).

11. Watts v. United States, 394 U.S. 705, 707-08 (1969) (looking at intent to carry out the threat as the standard to determine whether speech will fall outside of First Amendment protection under the true threats doctrine).

12. *Brandenburg*, 395 U.S. at 453-54; *Gitlow*, 268 U.S. at 668; *Schenck*, 249 U.S. at 51.

13. *Brandenburg*, 395 U.S. at 447; *Gitlow*, 268 U.S. at 668; *Schenck*, 249 U.S. at 49.

14. *Gitlow*, 268 U.S. at 671.

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

16. *Brandenburg*, 395 U.S. at 449. Brandenburg, a leader of the Ku Klux Klan, was convicted of advocating criminal activity to bring about political change. *Id.* at 447-49. He challenged the state law on First and Fourteenth Amendment grounds. *Id.* at 445. The Supreme Court reversed the conviction because mere advocacy, as distinguished from incitement to imminent lawless action, is not punishable by virtue of the constitutional guarantees of free speech and press. *Id.* at 445-46.

17. ACLU Briefing Paper #14 Artistic Freedom, *available at* http://www.lectlaw.com/files/con04.htm (last visited Oct. 28, 2002).

18. *Id.*

19. 268 U.S. 652 (1925).

20. 274 U.S. 357 (1927).

21. *Gitlow*, 268 U.S. at 668; *Whitney*, 274 U.S. at 380. Benjamin Gitlow had been a prominent member of the Socialist party during the 1920s. *Gitlow*, 268 U.S. at 655. He was arrested and convicted for violating the New York Criminal Anarchy Law of 1902, which made it

bad tendency test, the First Amendment did not protect disturbing the public peace, attempting to subvert the government, inciting crime, or corrupting morals.[22] The danger was no less real and substantial because the effect of a given utterance could not be seen.[23] Just as with the offense of conspiracy, the government did not need to wait until the spark kindled the flame.[24] It could act toward any threat to public order, even those that were remote.[25]

The bad tendency test made membership in any subversive organization punishable in itself.[26] Tougher laws followed, such as the Smith Act,[27] which made it unlawful to even joke about overthrowing the United States government.[28] Some literature was banned, such as the *Communist Manifesto*, which simply said, "Workers of the world unite."[29] *Whitney* and *Gitlow* confirmed what we still use today as the basis for an analysis under the bad tendency test.[30]

In *Gitlow*, a case decided two years before *Whitney*, Gitlow was arrested for publishing the *Left Wing Manifesto*, a pamphlet proclaiming the inevitability of a proletarian revolution.[31] Gitlow was convicted in state court because the publication violated New York's Criminal Anarchy Act of 1902.[32] On appeal to the United States Supreme Court, Justice Sanford stated that freedom of speech and of the press were among the fundamental personal rights and liberties protected from impairment by the states under

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a crime to attempt to foster the violent overthrow of government. *Id.* at 625-26. Gitlow's publication and circulation of sixteen thousand copies of the *Left Wing Manifesto* violated the Criminal Anarchy Act. *Id.* at 655-56. The pamphlet advocated the creation of a socialist system through the use of massive strikes and "class action . . . in any form." *Id.* at 659.

22. *Gitlow*, 268 U.S. at 667-68.

23. *Id.*

24. *Id.* at 669.

25. *Id.*

26. *Whitney*, 274 U.S. at 371.

27. 18 U.S.C. § 2385 (2000) (regulating advocating the overthrow of the government). The Alien and Registration Act of 1940 was proposed by Congressman Howard Smith of Virginia, a poll tax supporter and a leader of the anti-labor bloc in Congress, and is generally referred to as the Smith Act. Michael Stephen Smith, *About the Smith Act Trials*, MODERN AM. POETRY (1998), *available at* http://www.english.uiuc.edu/maps/poets/g_l/jerome/smithact.htm. Signed into law by President Franklin Roosevelt, it was the first statute since the Alien and Sedition Acts of 1798 to make mere advocacy of ideas a federal crime. *Id.*

28. *Whitney,* 274 U.S. at 370-72.

29. *Id.* at 371.

30. *Id.* at 371-72; Gitlow v. New York, 268 U.S. 652, 661-62 (1925).

31. *Gitlow*, 268 U.S. at 654.

32. *Id.* New York law banned advocating, orally or in writing, the overthrow of a government by assassination or other violent means. *Id.*

the Due Process Clause of the Fourteenth Amendment.[33] Thus, the right to free speech was incorporated via the Fourteenth Amendment's Due Process Clause to the states.[34] Despite this, the Court upheld Gitlow's conviction, reasoning that the New York law did not in fact violate the First Amendment.[35]

In *Gitlow*, the Court relied on the bad tendency test to interpret the scope of First Amendment protections.[36] This test, based on the common law presumption of the constitutionality of legislative restrictions on speech, allowed the government to restrict communication that had a natural tendency to produce "substantive evils."[37] Under this test, the Court would uphold legislative restrictions on free speech so long as they were reasonable and proscribed expressions that Congress or state legislatures believed could have harmful effects or cause substantive evils.[38] Even before *Whitney*, *Gitlow*, and the bad tendency test, the Court established another category of speech for those instances when words presented a clear and present danger that actual violence would ensue.[39]

B. THE CLEAR AND PRESENT DANGER TEST

In *Schenck v. United States*,[40] Justice Holmes set forth a clear and present danger test to judge whether speech should be protected by the First Amendment.[41] "The question," he wrote, "is 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

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33. *Id.* at 664.

34. *Id.*; U.S. CONST. amend. XIV, § 1.

35. *Gitlow*, 268 U.S. at 672. The clear and present danger test of *Schenck* was only to be applied in those cases where the statute merely prohibited certain acts involving the danger of substantive evil, without any reference to the speech itself. *Id.* at 671. In *Gitlow*, by contrast, the legislature had already determined that certain types of language posed a risk that substantive evils would result. *Id.*

36. *Id.* at 670-71.

37. *Id.* at 671.

38. *Id.* at 670.

39. Schenck v. United States, 249 U.S. 47, 52 (1919).

40. 249 U.S. 47 (1919).

41. *Schenck*, 249 U.S. at 52. Schenck was the general secretary of the Socialist Party. *Id.* at 49. He sent out about 15,000 leaflets to men who had been called to military service, urging them to assert their opposition to the Conscription Act. *Id.* He was indicted on three counts under the Espionage Act of 1917: (1) conspiracy to cause insubordination in the military service of the United States, (2) using the mails for the transmission of matter declared to be illegal to mail under the Espionage Act, and (3) the unlawful use of the mails for the transmission of the same matter as mentioned above. *Id.* at 48-49.

has a right to prevent. It is a question of proximity and degree."[42] The Supreme Court affirmed the convictions of the defendants for conspiring to violate certain federal statutes by attempting to incite subordination in the armed forces and interfering with recruiting and enlistment.[43]

However, in 1969, the Supreme Court narrowed the circumstances under which a defendant could be held liable for his words or actions.[44] Defining the current standard for hate speech and the standard upon which this note is based, the *Brandenburg v. Ohio*[45] Court held that it was no longer enough to simply associate with members of any subversive organization, as was held in *Whitney*.[46]

C. THE IMMINENT LAWLESS ACTION TEST

Brandenburg established the modern test for determining whether speech falls into the incitement category.[47] In *Brandenburg*, the Supreme Court established the modern version of the clear and present danger doctrine, holding that states could only restrict speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[48]

The *Brandenburg* Court overturned the punishment of a Ku Klux Klan leader, holding that the statute under which he was convicted did not draw a sufficient line between incitement, which is not protected by the First Amendment, and advocacy, which is protected.[49] The Ku Klux Klan leader challenged his conviction for making the statement, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there

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42. *Id.* at 52.

43. *Id.* at 52-53. By enacting the 1917 Espionage Act, Congress made it a crime to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, or to obstruct the recruiting or enlistment service of the United States. *Id.* at 48-49. The Court unanimously found that the defendants could constitutionally be convicted of conspiracy to violate the statute. *Id.* at 52. Justice Holmes stated that whether a given utterance was protected by the First Amendment depended on the circumstances. *Id.*

44. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

45. 395 U.S. 444 (1969).

46. *Brandenburg*, 395 U.S. at 449; Whitney v. California, 274 U.S. 357, 380 (1927).

47. *Brandenburg*, 395 U.S. at 447-49.

48. *Id.* at 447.

49. *Id.* at 449. The Ohio Criminal Syndicalism Act made it unlawful to "'advocat[e] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and [to] 'voluntarily assembl[e] with any society, group, or assemblage of persons formed to teach or advocate the doctrine of criminal syndicalism.'" *Id.* at 444-45 (quoting OHIO REV. CODE ANN. § 2923.13 (1919)).

might have to be some revengeance taken."[50] The *Brandenburg* Court reformulated the clear and present danger test into its present form.[51] The Court held:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[52]

Thus, the *Brandenburg* Court held that the First Amendment allows the government to prohibit advocacy of illegal conduct if (1) it is directed to inciting others to imminently engage in illegal conduct, and (2) it is imminently likely to bring about such conduct.[53] The "directed to" language imports an intent requirement; the speaker must intend to bring about the unlawful conduct.[54] Therefore, to satisfy the imminence requirement, harm must be likely to result immediately after the incitement.[55]

Brandenburg's imminence requirement raises several issues. First, its limitation on the government's power to suppress speech is based on the marketplace of ideas principle that counter-speech is preferable to censorship.[56] If speech is not likely to immediately result in unlawful conduct or if the listener is given time to rebut the speech, then there is no basis for restricting the speaker's freedom to voice his views.[57]

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50. *Id.* at 446.

51. *Id.* at 447.

52. *Id.*

53. *Id.*

54. *See* Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (noting a subjective test, rather than an objective one); *see also* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1178 & n.88 (1982).

55. *See* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240 (1995) (stating that if the harm may result at some unknown time or date, the imminence requirement will not be met).

56. *See* Dennis v. United States, 341 U.S. 494, 503 (1951) (noting that "Speech can rebut speech, propaganda will answer propaganda"); *see also* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney*, 274 U.S. at 376.

57. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227-33 (1983).

Second, the imminence requirement is a response to suspicion that the government may seek to suppress speech for improper reasons.[58] It is an attempt to ensure that the danger is not presumptive and that the government's interest in preventing the violence is not based on false pretenses.[59]

The modern test for incitement is very protective of political speech.[60] The speaker must incite lawless action, the danger of such action must be imminent, the action must be likely to occur, and the speaker must have intended the action to occur to meet the incitement threshold.[61] Thus, there is both a subjective requirement, the speaker must intend to incite violence, and an objective requirement, the violence must be likely to occur from the point of view of someone other than the speaker.[62] Further illuminating its test, the Court quoted from a previous decision, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[63] In analyzing speech and determining whether it falls under the *Brandenburg* definition of incitement, courts look at two factors: whether the speech prepares and whether it steels its audience to commit imminent lawless action.[64] As the Court noted, "It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country."[65]

D. SUMMARY OF THE MODERN FIRST AMENDMENT INCITEMENT ANALYSIS

Early in the twentieth century, the Court deferred almost completely to government assessments of the dangers inherent in antisocial or politically

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58. *See id.* (citing motivations such as protecting the President from speech that may not otherwise be protected).

59. Avital T. Zer-Ilan, Note, *The First Amendment and Murder Manuals*, 106 YALE L. J. 2697, 2700 (1997).

60. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that if the speaker does not make a call for immediate action, no violation of the First Amendment will be found).

61. Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 369 (1996).

62. *See Brandenburg*, 395 U.S. 444, 447-48 (establishing the requirements for reaching the threshold of speech that incites imminent lawless action).

63. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)).

64. Zer-Ilan, *supra* note 59, at 2699-700.

65. *Brandenburg*, 395 U.S. at 451 (quoting Abrams v. United States, 250 U.S. 616, 628 (1919)).

radical speech.[66] By the 1970s, the Court was rigorously enforcing a constitutional standard that made it virtually impossible for the government to win a case against a speaker making political pronouncements absent some evidence that the speaker had participated directly in the planning or implementation of some specific criminal activity.[67] This progression has coincided with the advent of the Internet and the introduction of hate speech being broadcast over this fairly new medium.

Thirty-three years after *Brandenburg*, the test it established is still being used to analyze First Amendment issues involving the regulation of hate speech.[68] The test has been applied to various forms of speech, including cases dealing with Internet hate speech.[69]

III. THE INTERNET

For purposes of this note, it is necessary to distinguish between traditional media—television, newspapers and radio—and the Internet. The way information is sent and received via traditional methods is very different from the way information is read or transmitted over the Internet. Unlike newsprint, radio, or television, information read on the Internet is generally driven by the user.[70] For the most part, web surfers have control over what they read. Users may search for information by using key words or phrases, or they may enter a specific web address in order to access a particular site.[71] Due to the differences in the way messages are sent and received over the Internet, there is a need for a different standard of First Amendment analysis that is better suited to its uniqueness.[72]

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66. *See generally, e.g.*, Schenck v. United States, 249 U.S. 47 (1919) (upholding federal Espionage Act convictions of antiwar activists under a clear and present danger standard that allowed juries to infer danger from speech itself); Gitlow v. New York, 268 U.S. 652, 671 (1925) (holding that the clear and present danger analysis of *Schenck* did not apply when the legislature itself had specifically identified the dangerous speech).

67. *See, e.g., Brandenburg*, 395 U.S. at 447 (establishing a three-part test for analyzing whether speech advocating violence falls outside First Amendment protection and, therefore, is subject to regulation); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928-29 (1982) (applying the *Brandenburg* test to overturn a civil damages award based on statements made by civil rights protestors); Hess v. Indiana, 414 U.S. 105, 108-09 (1973) (applying the *Brandenburg* test to overturn the conviction of an antiwar protestor for his inflammatory statements about the President).

68. *See, e.g.*, Million Youth March, Inc. v. Safir, 63 F. Supp. 2d 381, 390 (S.D.N.Y. 1999) (using the *Brandenburg* incitement test to assess liability for hate speech).

69. United States v. Baker, 890 F. Supp. 1375, 1382 (E.D. Mich. 1995).

70. *See* Reno v. Am. Civil Liberties Union, 521 U.S. 844, 850 (1997). A web "surfer" is used to describe one who uses the Internet to search different web sites. *Id.* at 852.

71. *Id.*

72. *Id.* at 846-47.

A. *RENO V. AMERICAN CIVIL LIBERTIES UNION*: THE INTERNET IS MAINSTREAM

Despite the vast differences that the Internet has introduced into society, the Supreme Court has held that speech broadcast over it falls within traditional, mainstream First Amendment analysis.[73] In *Reno v. American Civil Liberties Union*,[74] the Supreme Court considered whether the Internet should be regulated in the same manner as traditional media.[75] The Court held that none of the "special justifications" that support increased governmental regulation of broadcast media are present in cyberspace.[76] The *Reno* Court observed that while each type of media may present its own problems, some of those factors are not present in cyberspace.[77] For instance, the Court noted, "Neither before nor after the enactment of the [Communications Decency Act] have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry."[78] The Court further stated that "the Internet is not as 'invasive' as radio or television."[79]

Instead, the Supreme Court compared speech broadcast over the Internet to speech broadcast by historical speakers such as the town crier and the pamphleteer.[80] The Court noted that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox;" and web pages on the Internet allow "the same individual [to] . . . become a pamphleteer."[81]

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73. *Id.* at 868-69. In *Reno*, the plaintiffs brought a suit challenging the constitutionality of some of the provisions of the Communications Decency Act (CDA). *Id.* at 870. The CDA was enacted to protect minors from indecent material on the Internet. *Id.* at 871.

74. 521 U.S. 844 (1997).

75. *Reno*, 521 U.S. at 868-69.

76. *Id.* at 869. The plaintiffs filed a suit challenging the constitutionality of provisions of the CDA seeking to protect minors from harmful material on the Internet. *Id.* at 868. The Supreme Court held that the provisions of the CDA prohibiting transmission of obscene or indecent communications by means of telecommunications devices to persons under age eighteen, or sending patently offensive communications through use of interactive computer services to persons under age eighteen, were content-based blanket restrictions on speech. *Id.* As such, they could not be properly analyzed on a First Amendment challenge as a form of time, place, and manner regulation. *Id.* The Court also stated the challenged provisions were facially overbroad in violation of the First Amendment. *Id.* at 875-76. Finally, the Court stated that the constitutionality of the provision prohibiting transmission of obscene or indecent communications by means of telecommunications devices to persons under age eighteen could be saved from the facial overbreadth challenge by severing the term "or indecent" from the statute pursuant to its severability clause. *Id.* at 883.

77. *Id.* at 868.

78. *Id.* at 868-69.

79. *Id.* at 869.

80. *Id.* at 870.

81. *Id.*

This comparison did not address the differences between the traditional forms of media, or as in the Court's analogy, a pamphleteer, and a web page broadcast over the Internet.[82]

B. THE INTERNET'S DISTINGUISHING FEATURES AND WHY IT LACKS THE ABILITY TO PROVOKE "IMMINENT LAWLESS ACTION"

There are many features that distinguish the Internet from traditional forms of media. First, the Internet provides very few barriers to entry for both speakers and listeners. For example, it is easier for a layperson to broadcast a message over the Internet than it would be for that person to broadcast the same message over the radio or television. Even though readership and viewership for the traditional forms of media may well be higher than that of the Internet, what makes the Internet so different is the ability of a common person to broadcast a message through that medium as opposed to a television broadcast.[83] For instance, according to the United States Census Bureau, more than half of the households in the United States had one or more computers in 2000, and more than eighty percent of those households had at least one member using the Internet.[84] Although more people may have televisions in their homes, not all of those people have the ability to instantaneously broadcast a message over it.

Second, someone with virtually no training or experience with the Internet can post a message on a message board or in a chat room, and someone with only a basic level of programming knowledge can create a web site and broadcast information to millions of readers almost instantaneously.[85] Thousands of manuals are available, which explain in lay terms how to create web sites or message boards, and classes on how to create these sites are now common even in high school curriculum.[86]

Third, personal information, threatening speech, or a "call to action" can be drafted and disseminated within seconds over the Internet.[87] With traditional print media, the time it takes to circulate the intended

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82. *Id.*

83. ROTHMAN, *supra* note 3, at 106-07.

84. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES 1-2 (Aug. 2002), *available at* http://www.census.gov/population/www/socdemo/computer.html. Since 1984, the country has experienced more than a five-fold increase in the proportion of households with computers. *Id.* at 2. In 2000, 44 million United States households had at least one member online. *Id.* The Census Bureau also found that 94 million people used the Internet in 2000, up from 57 million people in 1998. *Id.*

85. *See* Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1668 (1998).

86. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 852-53 (1997).

87. *Id.* at 852.

information is considerably longer.[88] Once a message is posted on the Internet however, the sender must wait for a reader to find the information.[89] As this note will address, one of the problems with regulating hate speech over the Internet is that after senders have broadcast messages over the Internet, they never know for certain who or how many readers actually receive it.[90]

Additionally, traditional means of mass communication are regulated by federal agencies such as the Federal Communications Commission.[91] Currently, there is very little formal government regulation with regard to the Internet.[92] The primary means of regulation comes from Internet Service Providers, or ISPs, which are the hosts of web pages, chat rooms, and various web sites.[93] ISPs may, at their discretion, edit or censor the information being broadcast from their servers.[94]

Finally, the Internet is not hosted, nor is there an editor or broadcaster to filter the transmitted information.[95] Due to the vastness of the Internet and the millions of messages being transmitted at any given time, there simply is not a feasible way to monitor each and every message broadcast over it.[96] Inevitably, there will be people who elect to exploit the limitless opportunities presented by the Internet, and the issues related to the regulation of hate speech and violent messages posted on the Internet have not been sufficiently addressed.[97]

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88. Sullivan, *supra* note 85, at 1667-68.

89. *Reno*, 521 U.S. at 851. Hackers have recently accessed and vandalized sites like MSN and various government homepages such as the Pentagon's web site, where readership can be in the millions. Reuters, *Pentagon Kids Kicked Off Grid* 1 (Nov. 6, 1998), *available at* http://www.wired.com/news/politics/0,1283,16098,00.html. In the month of February 2001 alone, online vandals defaced more than a dozen sites run by major companies, including those owned by Intel, Compaq Computer, Hewlett-Packard, Disney's Go.com, and CompUSA. Robert Lemos, *Online Vandals Smoke New York Times Site*, CNET NEWS, Feb. 16, 2001, *available at* http://news.cnet.com/news/0-1003-201-4849987-0.html?tag=rltdnws. Readers are then exposed to the unsolicited messages as soon as they access the hacked site. *Id.*

90. *Reno*, 521 U.S. at 851.

91. Federal Communications Commission, *available at* http://www.fcc.gov/ (last visited Jan. 27, 2002). The Federal Communications Commission (FCC) is an independent United States government agency, directly responsible to Congress. *Id.* The FCC was established by the Communications Act of 1934 and is charged with regulating interstate and international communications by radio, television, wire, satellite and cable. *Id.* The FCC's jurisdiction covers the fifty states, the District of Columbia, and U.S. territories. *Id.*

92. *Reno*, 521 U.S. at 868-69.

93. Sullivan, *supra* note 85, at 1670.

94. *Reno*, 521 U.S. at 850-51.

95. Sullivan, *supra* note 85, at 1671.

96. *Reno*, 521 U.S. at 853-55.

97. *See, e.g.*, CNET News.com, *supra* note 5.

IV. WHY A REFORMULATED TEST IS NEEDED TO EVALUATE INTERNET SPEECH

Given the unique nature of the Internet and the importance of protecting First Amendment free speech rights in cyberspace, an alternative test is needed to better balance free speech concerns with the prohibition of threats and the protection of potential victims. Because Internet speech is broadcast in a manner that is different than traditional media outlets, an analysis of speech made over it should be formulated to accommodate its uniqueness.[98]

A. WHY *BRANDENBURG* IS AN INAPPROPRIATE TEST TO EVALUATE INTERNET SPEECH

Brandenburg, which gave us the current standard by which to gauge threatening speech, was decided in 1969 with regard to a statement spoken at a Ku Klux Klan rally.[99] This was long before the Internet was a mainstream means of communication.[100] A modern test should reflect the nuances of the Internet and address the fact that speech over the Internet is unlike words spoken at a public rally, broadcast on the evening news, or printed in a newspaper. For example, the audience that the Internet can potentially reach is far wider than the audience one can gather at a public rally, yet on the other hand, a message may go virtually unheard.[101] In order to preserve the fundamental protections of the First Amendment, the test should make a fair inquiry as to the intentions of the speaker as well as the reaction of the intended target of the speech.

The incitement doctrine and an analysis under *Brandenburg* may be better suited for traditional media such as a newspaper, pamphlet, or public address. It is easier to tell how listeners under those conditions are reacting to what the speaker is proposing.[102] The Internet creates a different scenario because reactions to a speaker's proposal are not easily gauged.[103]

An analysis under the true threats doctrine better fits the circumstances created by the Internet and is more suitable than the *Brandenburg* test

98. *Reno*, 521 U.S. at 850.

99. Brandenburg v. Ohio, 395 U.S. 444, 445 (1969).

100. *Reno*, 521 U.S. at 849-50. The Internet was in the initial stages of development at that time. *Id.*

101. *Id.* at 854.

102. Hess v. Indiana, 414 U.S. 105, 108-09 (1973). The defendant in *Hess* shouted, "We'll take the fucking street later," while facing a crowd at an antiwar demonstration. *Id.* at 107. The reaction of Hess's listeners would be easier to gauge than the reaction of people viewing a web site from the privacy of their homes.

103. United States v. Daughenbaugh, 49 F.3d 171, 174 (5th Cir. 1995).

because it is unlikely that speech broadcast within such a vast expanse of information could ever incite imminent lawless action.[104] The *Brandenburg* test is by far the most speech-protective standard employed by the Court to take advocacy of unlawful conduct out of the reach of governmental regulation.[105] Because the *Brandenburg* test favors protecting extremist speech over governmental regulation, perhaps it is "too blunt an instrument" to address the perpetration of violence that is so prevalent on the Internet.[106]

B. THE TRUE THREATS DOCTRINE

Another type of speech that is not protected by the First Amendment is known as "true threats."[107] Various federal and state statutes make threatening statements a basis for civil liability or criminal prosecution.[108] The most general federal statute dealing with threats makes it a crime, punishable by fine or imprisonment, to transmit in commerce "any communication containing . . . any threat to injure the person of another."[109] Other federal statutes are more specific. For example, some prohibit threats of force or violence against the President or Vice President,[110] federal judges and other federal officials,[111] IRS employees,[112] providers of abortion services,[113] and jurors.[114]

1. The Modern True Threats Analysis—Watts v. United States

The modern First Amendment true threats analysis comes from *Watts v. United States*.[115] The defendant in *Watts* was convicted under a federal

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104. *Brandenburg*, 395 U.S. at 447; *see also* Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats From Coercive Political Advocacy*, 74 WASH. L. REV 1209, 1236 (1999).

105. *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975) (noting that *Brandenburg* is "the most speech-protective standard yet evolved by the Supreme Court").

106. David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the* Brandenburg *Test*, 29 GA. L. REV. 1, 5 (1994).

107. *See* Watts v. United States, 394 U.S. 705, 708 (1969) (holding that debate on public issues should be "uninhibited, robust, and wideopen, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials") (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

108. *E.g.*, 18 U.S.C. § 875(c) (2000).

109. *Id.*

110. *Id.* § 871(a).

111. *Id.* § 115(a)(1)(B).

112. 26 U.S.C. § 7212(a) (2000).

113. 18 U.S.C. § 248.

114. *Id.* § 1503.

115. 394 U.S. 705 (1969).

statute that prohibited making threatening statements aimed at the President.[116] The defendant was convicted based on the following statement:

> They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.[117]

The defendant was speaking at a rally being held near the Washington Monument during the Vietnam War.[118] The Supreme Court reversed the court of appeal's decision and held that the defendant's speech did not support his conviction.[119]

The *Watts* Court made a distinction between threats and protected speech, holding that the defendant's statement was mere "political hyperbole," not a viable threat against the President.[120] There seems to be a consensus among the circuits that threats are punishable as true threats only when they are "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."[121] Thus, the courts have generally been very protective of threatening speech and have only allowed such speech to be punished when it has reached a level of extreme dangerousness.[122]

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116. *Watts*, 394 U.S. at 706; 18 U.S.C. § 871.

117. *Watts*, 394 U.S. at 706 (quoting an Army investigator's testimony of the defendant's statements).

118. *Id.*

119. *Id.* at 708.

120. *Id.*

121. United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976); *see also* United States v. Baker, 890 F. Supp. 1375, 1382 (E.D. Mich. 1995) (quoting the *Kelner* definition); United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997). However, the district judge in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists* gave the following instructions to the jury regarding a true threat:

> A statement is a 'true threat' when a reasonable person making the statement would foresee that the statement would be interpreted by those to whom it is communicated as a serious expression of an intent to bodily harm or assault. This is an objective standard, that of a reasonable person. Defendants' subjective intent or motive is not the standard that you must apply in this case.

See Leigh Noffsinger, *Wanted Posters, Bulletproof Vests, and the First Amendment: Distinguishing True Threats from Coercive Political Advocacy*, 74 WASH. L. REV. 1209, 1237 (1999) (quoting Jury Instruction No. 10, Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, Civ. No. 95-1671-JO (D. Or. 1999)).

122. *Kelner*, 534 F.2d at 1027.

The Supreme Court's opinion in *Watts* offers little guidance on how to make such a determination in future cases.[123] It stated only that the constitutional free speech principle requires interpretation of the term "threat" in the anti-threat statute as being limited to threats that are "true," and the defendant's speech was political hyperbole that did not meet this threshold.[124] The Court in *Watts* offered no further criteria by which to determine whether a threat is true, and thus unprotected, nor has it since.[125] Even though specific criteria was not outlined by the Court for determining whether a statement is a "true threat" under the First Amendment, various courts of appeal have formulated a test.[126] The tests, with one exception, are similar.[127]

2. *Variations of the True Threats Test Within the Circuits*

Circuit variations with regard to the true threats test generally turn on a subjective or objective analysis of the speaker's intention and the listener's perception of the threat.[128] The first element is "intentional speech."[129] The speaker must have made the statement intentionally, but specific intent is not required.[130] More precisely, although the speaker must have intended to make the threatening statement, he or she did not actually need to intend to

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123. *See generally* Watts v. United States, 394 U.S. 705 (1969) (noting that the Court did not offer a specific test by which future cases could be decided).

124. *Id.* at 707.

125. *See generally id.* In *R.A.V. v. City of St. Paul*, the Court enumerated "reasons why threats of violence are outside the First Amendment." R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992). These reasons include "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Id.* The Court offered no further elaboration of the test for unprotected threats. *Id.*

126. *Compare, e.g.*, United States v. Malik, 16 F.3d 45, 50 (2d Cir. 1994) (determining that a certain threshold of contextual evidence could support a conclusion that ambiguous language constituted an actual threat), *and Kelner*, 534 F.2d at 1024-25 (holding that determining whether certain speech constituted an actual threat rather than political hyperbole was a question of fact for the jury), *with* Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 372 (9th Cir. 1996) (imposing an objective test on the determination of whether the specific words chosen constituted a threat).

127. *Kelner*, 534 F.2d at 1027. The Second Circuit applies a more stringent test: "So long as the threat on its face and in the circumstances in which it is made is so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution, the statute may properly be applied." *Id.*

128. See *supra* note 126 and accompanying text.

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

130. Watts v. United States, 394 U.S. 705, 707 (1969). The Court also expressed "grave doubts" that apparent intent alone was sufficient to be intentional speech. *Id.*

carry out the threatened action,[131] or even have the capability to carry it out.[132]

Second, the statement must convey an outward intention to inflict violence on another person.[133] The statement can be tested by asking "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[134] For example, most case law suggests that the statement must express the speaker's own intention and not that of a third party.[135]

Third, the statement must be made in such a way that the speaker would reasonably foresee that the target of the words would interpret them as a serious expression of an intention to inflict harm.[136] The third element is necessary in order to distinguish threatening statements that cause substantial harm, statements that a reasonable listener would take seriously and that are likely to reasonably instill fear in the target of the threat, from those that should be understood as "hyperbole."[137] Some courts phrase this element of the test differently, shifting the inquiry to whether a reasonable recipient of the speech would interpret it as a threat, rather than whether a reasonable person (such as the speaker) would foresee that the recipient would interpret the speech as a threat.[138] Despite the difference in focus, each of these formulations states an objective standard, how a reasonable

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131. *Id.*

132. *See Hoffman*, 806 F.2d at 708 (stating that "corroborating evidence that the defendant had the ability to carry out the threat is not a requirement to establish a 'true threat'"); United States v. Orozco-Santillan, 903 F.2d 1262, 1265-66 & n.3 (9th Cir. 1990) (noting that the intent requirement does not include whether the speaker "was able to carry out his threat").

133. *Orozco-Santillan*, 903 F.2d at 1265; *see also* Rice v. Paladin Enters., Inc., 128 F.3d 233, 244 (4th Cir. 1997) (referring to blackmail and other forms of "speech brigaded with action").

134. *Orozco-Santillan*, 903 F.2d at 1265; United States v. Malik, 16 F.3d 45, 51 (2d Cir. 1994) (stating "[a] threat is a statement expressing an intention to inflict bodily harm to someone"); Roy v. United States, 416 F.2d 874, 877 (9th Cir. 1969) (holding that a threat requires "a serious expression of an intention to inflict bodily harm upon or to take the life of [another]").

135. *See* United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (citing United States v. Whitfield, 31 F.3d 747, 749 (8th Cir. 1994)); United States v. Kosma, 951 F.2d 549, 554 (3d Cir. 1991) (distinguishing *Rankin v. McPherson*, 483 U.S. 378 (1987) on the ground that "Kosma's letters implied that Kosma himself would be the person who would kill the President, while McPherson's statement merely expressed a desire that another person kill the President").

136. *See, e.g.*, United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997) (holding that the test for a true threat is "whether [the speaker] should have reasonably foreseen that the statement he uttered would be taken as a threat by those to whom it is made"); *Roy*, 416 F.2d at 877 (stating "a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm").

137. *See* Watts v. United States, 394 U.S. 705, 708 (1969).

138. *See, e.g.*, United States v. Welch, 745 F.2d 614, 618 (10th Cir. 1984). "The question is whether those who hear or read the threat reasonably consider that an actual threat has been made." United States v. Dysart, 705 F.2d 1247, 1256 (10th Cir. 1983).

person would interpret the speech, rather than a subjective one, how a particular person actually interpreted it.[139]

Finally, the context in which the statement was made must be taken into consideration.[140] What one person perceives as a threat, another may perceive as harmless.[141] A determination should also be based on "the identities of the speakers and listeners, the current and historical relationship between the parties, the place in which the communication is made, and the method or mode of communication," as well as the social, political, and cultural contexts.[142] Also relevant is the subjective factor of whether those who hear the speech actually interpret it as a serious threat.[143] Therefore, the subjective reactions of listeners may be a factor in establishing whether the speech was objectively a serious threat.[144]

The two cases that follow provide a framework for applying the true threats doctrine when analyzing threatening speech and its protection under the First Amendment.[145] Although the outcomes are different, an analysis follows, explaining how the true threats test proposed in this note would allow for a more appropriate result.

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139. *See* Recent Case, *Criminal Law - First Amendment—First Circuit Defines Threat in The Context of Federal Threat Statutes*, United States v. Fulmer, 108 F.3d 1486 (1st Cir. 1997), 111 HARV. L. REV. 1110, 1112-13 (1998) (noting that when the test is objective, there is less analysis to be done as compared to the subjective test, in which listeners' feelings must be discovered).

140. *Watts*, 394 U.S. at 708 (considering the political context in holding that an offensive statement regarding political opposition to the President was not a true threat).

141. *Id.*

142. John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 659-60 (1994).

143. *See* United States v. J.H.H., 22 F.3d 821, 827 (8th Cir. 1994) (citing *Watts*, 394 U.S. at 708, and noting that "[e]vidence showing the reaction of the victim of a threat is admissible as proof that a threat was made"); United States v. Daughenbaugh, 49 F.3d 171, 174 (5th Cir. 1995) (stating that the actions taken by the judges were compelling).

144. *See, e.g.*, United States v. Welch, 745 F.2d 614, 618 (10th Cir. 1984).

145. *See* Planned Parenthood of the Columbia/Willamette, Inc., v. Am. Coalition of Life Activists (Planned Parenthood I), 23 F. Supp. 2d 1182, 1191 (D. Or. 1998) (deciding a case involving hate speech broadcast over a pro-life web site), *injunction granted at* Planned Parenthood of the Columbia/Willamette, Inc., v. Am. Coalition of Life Activists (Planned Parenthood II), 41 F. Supp. 2d 1130 (D. Or. 1999), *vacated by* Planned Parenthood of the Columbia/Willamette, Inc., v. Am. Coalition of Life Activists (Planned Parenthood III), 244 F.3d 1007 (9th Cir. 2001), *aff'd in part and vacated in part by* Planned Parenthood of the Colombia/Willamette, Inc. v. Am. Coalition of Life Activists (Planned Parenthood IV), 290 F.3d 1058 (9th Cir. 2002); United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997) (deciding a case where threatening e-mails were exchanged between two private individuals).

V. FREE SPEECH AND THE INTERNET—TWO CASES THAT ILLUSTRATE HOW VIOLENT SPEECH BROADCAST OVER THE INTERNET CAN BE ANALYZED UNDER THE TRUE THREATS DOCTRINE

The Supreme Court's current standard is that speech is protected unless it is directed toward a specific group of people and likely to produce "imminent lawless action."[146] However, following the *Brandenburg* test to analyze speech made over the Internet fails to address the Internet's unique aspects.[147] Two recent cases, *United States v. Alkhabaz*[148] and *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*[149] demonstrate the ease by which the Internet is being used as a medium for the transmission of threats.[150] *Alkhabaz* involved the transmission of threats via e-mail messages,[151] and *Planned Parenthood* involved an anti-abortion web site that contained pro-life messages.[152] In both cases, variations of the true threats standard were applied, and although the courts reached different conclusions, the cases illustrate how a true threats approach can be applied to situations that present First Amendment Internet concerns.[153]

In *Planned Parenthood*, the Ninth Circuit and the Oregon district court used a true threats analysis to evaluate speech broadcast over the Internet.[154] However, the court limited its view to whether the material contained on the Nuremberg Files web site could be construed as a "true threat" by a reasonable person.[155]

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146. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (distinguishing imminent lawless action from mere abstract teaching by noting that it "is not the same as preparing a group for violent action and steeling it to such action").

147. *See generally id.* (noting that the case was decided with regard to a public speech, parts of which were later broadcast on television and making no mention of the Internet).

148. 104 F.3d 1492 (6th Cir. 1997).

149. 290 F.3d 1058 (9th Cir. 2002).

150. *E.g., Planned Parenthood I*, 23 F. Supp. 2d at 1187.

151. United States v. Baker, 890 F. Supp. 1375, 1378-79 (E.D. Mich. 1995).

152. *Planned Parenthood I*, 23 F. Supp. 2d at 1187.

153. *Compare Alkhabaz*, 104 F.3d at 1496 (deciding that because the third party and subject of the violent e-mails was not the recipient of them, she could not have feared that the threats were true and imminent), *with Planned Parenthood I*, 23 F. Supp. 2d at 1194 (deciding that while the intended targets of the web site could have held an objective fear for their safety, the material did not constitute express threats against them).

154. *See Planned Parenthood I*, 23 F. Supp. 2d at 1194 (holding that the "true threat" standard governed the plaintiffs' claims regarding the defendant's speech).

155. *Id.*

A. *PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC. V. AMERICAN COALITION OF LIFE ACTIVISTS*

The leading and most discussed case to date regarding issues of free speech and the Internet is *Planned Parenthood*.[156] The suit, which involved the Nuremberg Files web site, was filed in the United States District Court in Portland, Oregon.[157] The complaint alleged that an anti-abortion group, through wanted-style posters and the Nuremberg Files web site,[158] was targeting abortion providers in a life-threatening manner.[159] The jury had to decide whether the defendants had illegally used the threat of force against abortion providers.[160] The case came amidst rising concerns generated by attacks on abortion clinics and doctors who performed abortions, including the murder of Dr. Barnett Slepian in New York on October 23, 1998.[161] Slepian was killed by a sniper attack as he was having a conversation with his wife and children in his New York home.[162]

On February 25, 1999, a federal judge in Portland, Oregon, banned the anti-abortion activists from publishing the wanted posters and personal information on the Internet.[163] In his order, United States District Judge Robert E. Jones wrote, "I totally reject the defendants' attempts to justify their actions as an expression of opinion or as a legitimate and lawful exercise of free speech."[164] Judge Jones called the web site "a blatant and illegal communication of true threats to kill."[165]

The web site provided a list of abortion providers, which incited violence against doctors and violated a federal law passed to protect abortion providers.[166] The initial case marked the first time the Freedom of

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156. *Id.* at 1182.

157. *Id.*

158. *Id.* at 1185-86. The Nuremberg Files web site, which listed the names of abortion doctors, was created by Neal Horsley, a computer consultant from Georgia. Planned Parenthood II, 41 F. Supp. 2d 1130, 1155 (D. Or. 1999). Horsley stated that he was listing the doctors' names only in the hope that they would be prosecuted if abortion was ever outlawed. *See* Frederick Clarkson, *Journalists or Terrorists?* (May 31, 2001), *available at* http://www.execpc.com/~awallace/force.htm.

159. *Planned Parenthood I*, 23 F. Supp. 2d at 1183.

160. *Id.*

161. Lisa Bennett-Haigney, *Doctor Murdered as Anti-Abortion Violence and Terrorism Continue* (1999), *available at* http://www.now.org/nnt/winter-99/aborvio.html. Dr. Slepian, an Obstetrics and Gynecology physician who provided abortions, was killed when an anti-abortion protestor shot him from the woods behind his house. *Id.*

162. *Id.*

163. *Planned Parenthood II*, 41 F. Supp. 2d at 1155-56.

164. *Id.* at 1154.

165. *Id.*

166. Rene Sanchez, *Antiabortion Web Site Handed a Win*, WASH. POST, Mar. 29, 2001, at A1.

Access to Clinic Entrances Act (FACE),[167] a 1994 federal law created to protect abortion providers, was invoked without evidence of direct confrontations or threats.[168] FACE lists as a prohibited activity: whoever "by force or threat of force . . . intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with" anyone seeking or providing an abortion.[169]

The Nuremberg Files web site contained the names of clinic owners and workers, judges, and politicians who had supported the right to an abortion.[170] The site sought any information regarding "abortionist[s], their car[s], their house[s], friends."[171] From 1993 to 1998, fringe members of the pro-life movement had murdered or attempted to murder dozens of abortion workers who appeared in the wanted posters, which were created by the same individuals responsible for the Nuremberg Files web site.[172]

When this case first came to trial, several doctors whose names were on the web site testified that they had resorted to wearing bulletproof vests and elaborate disguises to protect themselves from attack.[173] The doctors further testified to living in constant fear for their lives and the safety of their families.[174] The ruling in favor of the clinic workers was upheld after the pro-life activists appealed the initial decision, and a permanent injunction was issued to prevent the hit-list effect of the site.[175]

In a unanimous decision on appeal, a three-judge panel of the United States Court of Appeals for the Ninth Circuit held that the site could not be banned or sued for damages.[176] The Ninth Circuit ruled that the First Amendment protected the content contained on the Nuremberg Files web site because even though it was contentious and could be intimidating, it presented no explicit or imminent threat of violence against the doctors.[177]

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167. 18 U.S.C. § 248 (2000).

168. *See generally* Planned Parenthood I, 23 F. Supp. 2d 1182 (D. Or. 1998) (considering FACE when evaluating statements posted on a web site).

169. 18 U.S.C. § 248(a)(1).

170. *Visualize Abortionists on Trial, The Nuremberg Files*, *available at* http://www.christiangallery.com/atrocity (last visited Feb. 1, 2002) [hereinafter *Abortionists on Trial*].

171. *Id.*

172. *Planned Parenthood I*, 23 F. Supp. 2d at 1185-86.

173. *Id.*

174. *Id.* at 1186. Evidence showed that the Federal Bureau of Investigation (FBI) informed some of the plaintiffs that they were being named and labeled as baby butchers on the Nuremberg Files web site. *Id.* They were offered twenty-four-hour protection and advised to obtain and wear bulletproof vests. *Id.*

175. Planned Parenthood II, 41 F. Supp. 2d 1130, 1155-56 (D. Or. 1999).

176. Planned Parenthood III, 244 F.3d 1007, 1019-20 (9th Cir. 2001).

177. *Id.* at 1019-20 (holding that the language and depictions contained on the web site were protected by the First Amendment).

The Ninth Circuit decision overturned the $107 million settlement that abortion providers had won from a jury in Portland, Oregon, after they sued the web site's creators.[178]

The circuit court's decision repeatedly cited *NAACP v. Claiborne Hardware Co.*,[179] a 1982 Supreme Court case that involved a group of white-owned businesses in Mississippi being boycotted by civil rights groups, which accused them of racist practices.[180] In *Claiborne*, civil rights activists took note of African-Americans who shopped in the stores and then later publicized their names.[181] Some of the people on the list were threatened or harmed.[182] A boycott leader also vowed that if any of them returned to the stores, they would have their necks broken.[183] The Supreme Court ruled that the threat was protected under the First Amendment, even though it contributed to an atmosphere of intimidation, because it was a form of political speech pronounced at a public rally and no direct acts of violence had been targeted at any individual.[184] "The two cases [*Claiborne* and *Planned Parenthood*] have one key thing in common," the *Planned Parenthood* court concluded, "political activists used words in an effort to bend opponents to their will."[185]

1. *The Importance of Examining the Context in Which the Threat Was Made*

In *Planned Parenthood*, an ordinary person might not have found the material contained on the web site to be threatening. However, in the context of the overwhelming amount of clinic violence that was taking place around the United States and the number of bombings and attempted murders of abortion doctors, the threats made on the web site could have been particularly threatening and should have been analyzed with a keen eye on the circumstances under which they were made.[186]

The use of the true threats test proposed in this note would prohibit the type of speech contained on the Nuremberg Files web site because the doctors gave lengthy testimony regarding their extreme fear.[187] Based on

178. Sanchez, *supra* note 166, at A1.
179. 458 U.S. 886 (1982).
180. *Planned Parenthood III*, 244 F.3d at 1019-20; *Claiborne*, 458 U.S. at 886-87.
181. *Claiborne*, 458 U.S. at 887.
182. *Id.* at 893.
183. *Id.* at 902.
184. *Id.* at 929.
185. *Planned Parenthood III*, 244 F.3d at 1014.
186. *Id.*
187. Planned Parenthood I, 23 F. Supp. 2d 1182, 1187-88 (D. Or. 1998).

the testimony by the doctors and the actions they took to avoid being targeted by a few members of the pro-life movement, their testimony could have supported a finding that a reasonable listener would have experienced the same fear.[188]

It has been established that the medical professionals listed on the web site felt threatened and that they also felt harm was imminent.[189] There was evidence to support these fears, such as the testimony that several of the doctors started wearing bulletproof vests after being made aware that their names appeared on the site.[190] Some of the medical professionals who testified in *Planned Parenthood* also described how they donned elaborate disguises and refused to travel in the same vehicle as other family members.[191] Under the standard proposed in this note, it would be easier for a jury to conclude that, although the web site content did not provoke imminent lawlessness, it did create significant fear in the minds of the doctors it targeted.

The proposed true threats standard, which evaluates the context in which the speech was made, would likely have resulted in a ruling for the plaintiffs in *Planned Parenthood.*[192] Under the objective prong of the proposed test, a reasonable person hearing, or in this case reading, the defendants' expression would likely perceive it as threatening to the individuals listed on both the posters and the web site, especially in light of the relevant factual context.[193] The plaintiffs had introduced into evidence various occasions where doctors had been listed on similar posters and soon after had been shot and either killed or wounded.[194] Additionally, the language on the web site itself was threatening as it likened the plaintiffs to war criminals and stated that readers "might want to share your point of view with this doctor," thus implying that the reader use violence against the listed doctors.[195]

Under the subjective prong of the proposed test, a jury would likely conclude that the defendants intended their posters and the web site to threaten the plaintiffs, even if they did not intend their expression to result

188. *Id.* at 1190.

189. *Id.* at 1186-87.

190. *Id.* at 1186.

191. Planned Parenthood II, 41 F. Supp. 2d 1130, 1154 (D. Or. 1999).

192. *See id.* (noting that the plaintiff doctors testified as to the level of fear that was placed on them by the pro-life activists via their posters and web site content, and the fact that the plaintiffs took precautions to deter what they perceived as true threats to their safety).

193. Planned Parenthood I, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998).

194. *Id.* at 1187; *see also Abortionists on Trial, supra* note 170.

195. *Planned Parenthood I*, 23 F. Supp. 2d at 1188.

in injury to the plaintiffs.[196] That the defendants intended at the very least to frighten the plaintiffs out of practice could be implied from the relevant context.[197]

Not only were the defendant organizations known for their advocacy of violence to achieve their ends, but the individual defendants had actively advocated the use of violence to put an end to abortion.[198] Additionally, the defendants knew from past experience that using expressions such as the posters and the web site listing doctors' addresses and phone numbers had, in some cases, resulted in the murders of several abortion doctors.[199]

Broadcasting such information over the Internet leads to fear in the minds of the doctors and therefore satisfies the true threats test.[200] This is why, under a true threats approach, the defendants in *Planned Parenthood* should have been accountable for their actions.[201] In fact, such a decision was reached in May 2002 when *Planned Parenthood* was reheard *en banc* by the Ninth Circuit.[202]

2. *Planned Parenthood Revisited En Banc*

Upon rehearing the case *en banc*, the Ninth Circuit found that the material contained in the Deadly Dozen[203] wanted-style posters and the

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196. *Id.* District Judge Jones noted:

> I will not summarize the facts giving rise to the 'context of violence' here, but note only that there is substantial evidence of record from which a rational trier of fact could conclude that the defendants in this case were aware of and promoted the atmosphere of violence surrounding the anti-abortion movement.

Id.

197. *Id.*

198. *Id.*

199. *Id. at* 1191.

200. Sanchez, *supra* note 166, at A1.

201. *Id.* Although the Nuremberg Files web site did not directly make a call for violence of explicitly threatened bodily harm, it did provide potentially life-threatening information regarding the physical whereabouts of legitimate medical service providers. *See Abortionists on Trial, supra* note 170. Since 1993, five murders and twelve attempted murders have occurred at reproductive health clinics. *See* Anne Bower, *Clinic Violence: The Python of Choice* (Mar. 1996), *available at* http://www.ifas.org/fw/9603/violence.html. There have been over 20 murders and attempted murders, 100 acid attacks, 166 arson incidents, and 41 bombings in the last twenty-five years. *See* National Abortion Federation, *Incidents of Violence and Disruption Against Abortion Providers, available at* http://www.prochoice.org/ (last visited Dec. 1, 2002).

202. *See* Planned Parenthood IV, 290 F.3d 1058, 1077-88 (9th Cir. 2002) (determining that the court should review the whole context when determining whether a statement is a true threat and banning the use of specific information from being broadcast over the Nuremberg Files web site).

203. The Deadly Dozen poster contained several depictions of abortion doctors formatted in such a way that they looked like old-style wanted posters. *Id.* at 1062. Several of these posters had been distributed over the Internet and at various rallies. *Id.* at 1064-65. Eventually, some of the doctors depicted in these posters were murdered, leading the doctors being depicted to believe that they were in imminent danger of being killed. *Id.* at 1063-64. The dissent argued that the

listing of specific personal information about the plaintiffs on the Nuremberg Files web site did, indeed, constitute a "true threat."[204] This ruling reevaluated the issuance of the permanent injunction in *Planned Parenthood II*.[205] In *Planned Parenthood II*, District Judge Robert E. Jones ordered that the defendants not threaten[206] the plaintiffs, publish, reproduce or distribute the Deadly Dozen poster, or provide material via the Nuremberg Files web site,[207] with the intent to threaten any of the plaintiffs, their employees, family members, patients or their attorneys.[208] Upon rehearing the case, the Ninth Circuit affirmed the injunction granted in *Planned Parenthood II* in all respects, but remanded the case to reevaluate the punitive damages award.[209]

It is important to note that *Planned Parenthood* was brought under FACE, which applies to abortion clinics and is aimed at protecting abortion providers while ensuring safe access to reproductive health services.[210] FACE, by its own terms, "requires that 'threat of force' be defined and applied consistent with the First Amendment."[211] However, since "threat of force" is not defined in the Act, the court was faced with the task of determining the meaning of those words in the context of FACE.[212] In an attempt to construe a meaning that comported with the First Amendment, the court used a long-standing definition of threats, honed from several free

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majority did not establish a pattern showing that "people who prepare wanted-type posters then engage in physical violence." *Id.* at 1091 (Kozinski, J., dissenting). The dissent, therefore, disagreed that the posters constituted a true threat. *Id.* Additionally, a separate dissent criticized the majority opinion, stating that it did not comport with the holding of *Claiborne Hardware* because the wanted-style posters were not direct threats at individuals. *Id.* at 1088 (Reinhardt, J., dissenting) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 at 932-34 (1982)).

204. *Id.*

205. Planned Parenthood II, 41 F. Supp.2d 1130, 1155-56 (D. Or. 1999).

206. Judge Robert E. Jones attempted to outline exactly what he meant by "threaten" in a footnote in his opinion. He wrote:

> For purposes of this Order and Preliminary Injunction, I consider a person to make a "true threat" when the person makes a statement that, in content, a reasonable listener would interpret as communicating a serious expression of an intent to inflict or cause serious harm on or to the listener (objective); and the speaker intended that the statement be taken as a threat that would serve to place the listener in fear for his or her personal safety, regardless of whether the speaker actually intended to carry out the threat (subjective).

Id. at 1155 n.1.

207. The order specifically included any other "mirror" web site that might be used to house the Nuremberg Files information under another web address. *Id.* at 1156 & n.2.

208. *Id.* at 1155-56 (1999).

209. Planned Parenthood IV, 290 F.3d 1058, 1088 (9th Cir. 2002).

210. *Id.* at 1062.

211. *Id.* at 1070.

212. *Id.*

speech cases.[213] That definition of threats asks "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[214]

As such, the court held that the Deadly Dozen poster and part of the Nuremberg files web site, specifically, the list of names and addresses of certain doctors, constituted true threats.[215] This decision was reached despite the fact that the posters, on their face, did not contain any "explicitly threatening language."[216] The court found support for its ruling because of the "reputation" the hit list had of foreshadowing the murders of abortion doctors.[217] The court seemingly found merit in the argument that the doctors whose names appeared on the wanted posters felt that their personal safety was in imminent jeopardy.[218]

Finally, the Ninth Circuit concluded that there was no error in the district court's decision to adopt the "long-standing law on 'true threats' to define a 'threat' for the purposes of FACE."[219] Relying on this long list of prior authority, the court concluded that because of the context surrounding this case, the messages contained in the wanted posters and the personal information about specific doctors appearing on the Nuremberg Files web site went "well beyond" the political message they were purported to be.[220]

The court did make the distinction that being on the "hit list," which named specific physicians, could be considered a threat, but that the Nuremberg Files web site, in the absence of the list, could not be considered a true threat and was therefore mere political speech protected by the First Amendment.[221] It is entirely conceivable that the result in *Planned Parenthood* would have been different were it not brought under FACE.[222]

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213. *Id.* at 1063.
214. *Id.* at 1088.
215. *Id.*
216. *Id.* at 1071.
217. *Id.* at 1063-64.
218. *Id.* at 1079.
219. *Id.* at 1063.
220. *Id.* at 1079.
221. *Id.* at 1088. The court pointed out that in three incidents prior to this ruling, a wanted poster identifying a specific abortion provider was circulated, either on the web site or at a rally, and the doctor depicted in the poster was then murdered. *Id.*
222. *See id.* at 1063 (stating that the "true threats" analysis was proper under FACE, but not mentioning whether it would be proper under other circumstances).

B. *UNITED STATES V. ALKHABAZ*—THE "JAKE BAKER" CASE

In another case dealing with threats made over the Internet, *United States v. Alkhabaz*, the Sixth Circuit Court of Appeals affirmed the district court's decision not to indict Jake Baker under 18 U.S.C. § 875(c) for transmitting threats to injure or kidnap another through e-mail messages transmitted via the Internet.[223] Baker had posted a fictional story on a message board that described the kidnapping, torture, and murder of a woman who bore the same name as one of his classmates.[224] This story led to an investigation, in which private e-mail messages between Baker and Arthur Gonda were discovered.[225] In their e-mail messages, Baker and Gonda discussed their shared interest in sexual abuse and torture of women and young girls.[226] The Government argued that these messages represented an evolution from shared fantasies into a firm plan to kidnap, rape, and murder a female person and, as such, were threats transmitted in interstate commerce and prohibited under 18 U.S.C. § 875(c).[227] The case against Baker was ultimately dismissed, but only because the district court applied a speech-protective version of the true threat doctrine that retained the "imminence" and "likelihood" components of the *Brandenburg* test.[228]

The Sixth Circuit held that the e-mail messages did not constitute true threats, and thus, were protected speech.[229] However, in reaching this holding, the Sixth Circuit created a novel two-prong test for determining when speech is a threat.[230] Under this new test, speech is an unprotected

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223. United States v. Alkhabaz, 104 F.3d 1492, 1493 (6th Cir. 1997). Title 18 of the United States Code § 875(c) states: "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) (2000).

224. *Alkhabaz*, 104 F.3d at 1493.

225. *Id.*

226. *Id.* at 1497-1501.

227. United States v. Baker, 890 F. Supp. 1375, 1386 (E.D. Mich. 1995).

228. *Id.* at 1383. In dismissing the indictment, the district court used different reasoning than the appellate court later used. *Id.* First, the district court held that the *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) test applied in the Sixth Circuit. *Id.* at 1385; *see also Kelner*, 534 F.2d at 1027. The court then noted that the e-mails were private, and there was nothing in them to suggest that they would be distributed any further; thus, the court looked to how a reasonable person would expect Gonda to interpret the e-mail. *Baker*, 890 F. Supp. at 1386. In determining this, the court first noted that Gonda could have been anyone, so nothing could be assumed about his identity. *Id.* The court then reasoned that in light of Gonda's responses, he was likely not intimidated by the e-mail from Baker. *Id.* at 1385. Finally, the court noted that there was no specifically identifiable victim, and thus, no unequivocal, unconditional, and specific expression of intent to harm someone. *Id.* at 1390. Looking at all of this, the court concluded that there was not enough evidence to prosecute under 18 U.S.C. § 875(c). *Id.* at 1390-91.

229. *Alkhabaz*, 104 F.3d at 1496.

230. *Id.* at 1495 (establishing two factors that need to be present in order for speech to be analyzed as a true threat).

threat if a reasonable person: "(1) would take the statement as a serious expression of an intention to inflict bodily harm . . . and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation."[231] The court emphasized that the second prong of this test does not create a subjective standard, but instead must be "determined objectively, from the perspective of the receiver."[232]

In creating this test, the court described threats as tools that people use to achieve some goal through intimidation, whether that goal is extortionate, coercive, political, or something seemingly innocuous that is done as a prank.[233] The court stated that the core purpose of a threat is the intent to achieve a goal through intimidation, and it reasoned that because of this, a communication objectively indicating an intent to harm cannot be a threat unless it is also conveyed for the purpose of furthering a goal through intimidation.[234] Further, the court noted that Congress's intent was to forbid only those communications in fact constituting a threat.[235] Thus, the court noted that to best achieve Congress's intent in passing 18 U.S.C. § 875(c), it was necessary to add a second prong to the threats test, requiring that the expression be perceived as communicated to achieve some goal through intimidation, as this was part of the meaning of a threat.[236]

Circuit Judge Krupansky dissented from the majority's opinion.[237] Judge Krupansky stated that, in his opinion, the majority altered the plain meaning of 18 U.S.C. § 875(c) and ignored prevailing precedents by "judicially legislating an exogenous element" into the statute.[238] Judge Krupansky suggested that a more appropriate test would be whether, in the context of the statement, a reasonable recipient would believe that the speaker was serious about carrying out his alleged threat, regardless of the speaker's actual motive.[239] Judge Krupansky stressed that this test was in line with Sixth Circuit precedent, while the majority's novel test was not.[240]

If the Sixth Circuit was trying to create a more speech-protective test, then the second prong, that the speech be reasonably perceived as communicated in order to achieve a goal through intimidation, seems an

231. *Id.*
232. *Id.* at 1496.
233. *Id.* at 1495.
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* at 1496 (Krupansky, J., dissenting).
238. *Id.* at 1496-97.
239. *Id.* at 1503.
240. *Id.* at 1506.

awkward way of accomplishing this task.[241] With this requirement, the Sixth Circuit was essentially looking at the speaker's intent in making the alleged threat, which is a subjective element.[242] However, the Sixth Circuit was trying to keep the test objective, and thus, it asked whether a recipient would think that the threatened action reflected the speaker's intention.[243]

Alkhabaz presented a scenario somewhat less compelling than *Planned Parenthood*, as private e-mails between two people are not likely to reach the rest of the public, and are therefore, likely not intended by their authors to threaten a third person.[244] Furthermore, the fact that both the district court and the Sixth Circuit Court of Appeals dismissed the indictments against Baker suggested that the courts were not ready to address free speech and First Amendment issues in cyberspace.[245] Nevertheless, an appropriate test is needed that will allow the courts to carve out an exception in those cases in which there are actual threats being made.[246]

The important distinction between *Alkhabaz* and *Planned Parenthood* is that in *Alkhabaz*, the e-mails were exchanged between private individuals,[247] whereas in *Planned Parenthood*, the threats were made via a web site with a significant readership.[248] Had the *Alkhabaz* court employed the version of the true threats doctrine used by the court in *Planned Parenthood*, a contrary result might have been reached.[249]

C. HOW A DIFFERENT RESULT MIGHT HAVE BEEN REACHED IN *ALKHABAZ*

The *Alkhabaz* court found that the e-mails exchanged between James Baker and Arthur Gonda did not constitute a true threat because they were privately exchanged between two individuals.[250] Despite the fact that the e-mails referred to raping and murdering a woman on the campus where

241. *Id.* at 1496.

242. *Id.* at 1494-95.

243. *Id.* at 1495-96.

244. United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995).

245. *Id.* at 1390; United States v. Alkhabaz, 104 F.3d 1492, 1505-06 (6th Cir. 1997).

246. *See generally* United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976) (illustrating how a true threats approach can successfully be applied where the defendant transmitted in interstate commerce a threat to injure a foreign political leader).

247. *Baker*, 890 F. Supp. at 1379 (deciding a case which involved two men corresponding by e-mail).

248. Planned Parenthood I, 23 F. Supp. 2d 1182, 1187 (D. Or. 1998) (noting that the Nuremberg Files web site was available for viewing by the general public and not simply comments exchanged between two individuals).

249. *See Alkhabaz*, 104 F.3d at 1496 (noting that a mens rea element must be determined objectively).

250. *Id.*

Baker attended college, the court concluded that the messages did not rise to the level of a true threat because it was unlikely that the information exchanged would ever reach a third party.[251]

Even though the court used a true threats test, the version that was used retained the "imminence" and "likelihood" components of *Brandenburg*.[252] Under the *Brandenburg* standard, the speaker's words must incite imminent lawless action; however, the link between the speaker's words and the listener's actions have the potential to become very attenuated when dealing with speech over the Internet.[253] A test that retains the *Brandenburg* components makes it more difficult for a jury to convict because the connection between words broadcast over the Internet and the reader's reaction is so difficult to gauge.[254]

In Judge Krupansky's dissenting opinion, he suggested a more appropriate test for determining whether speech should be considered a true threat, and thus, outside the protection of the First Amendment.[255] In addition to looking at the context in which the statement was made, his test would require determining whether a reasonable recipient would believe that the speaker was serious about carrying out his alleged threat, regardless of the speaker's actual motive.[256]

Testimony was offered in *United States v. Baker*[257] regarding the woman whose name was mentioned in the e-mails.[258] When the e-mails were brought to her attention, she had a traumatic response that resulted in recommended psychological counseling.[259] Had the court used a true threats analysis that included how an objective listener would have perceived the threat, as Judge Krupansky suggested, the jury would have had an easier time convicting Baker.[260] Under Judge Krupansky's test, the testimony would have assisted the jury in determining that Baker's threats indeed caused a great deal of psychological harm to the target of his speech and would, therefore, not have been protected by the First Amendment.[261]

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251. *Id.* at 1494-95.

252. *Baker*, 890 F. Supp. at 1382.

253. Brandenburg v. Ohio, 395 U.S. 444, 444-47 (1969).

254. United States v. Daughenbaugh, 49 F.3d 171, 174 (5th Cir. 1995).

255. *See* United States v. Alkhabaz, 104 F.3d 1492, 1496-1507 (6th Cir. 1997) (Krupansky J., dissenting).

256. *Id.* at 1503.

257. 890 F. Supp. 1375 (E.D. Mich. 1995).

258. *Baker*, 890 F. Supp. at 1506-07.

259. *Id.* at 1507.

260. *Id.*

261. *Id.*

The two components suggested by Judge Krupansky are essential to a true threats test when scrutinizing hate speech broadcast over the Internet.[262] Therefore, a suitable test should take into account the context in which the threats were made and should reflect how the intended target responded to the threatening language.[263]

VI. CONCLUSION

The Internet is seemingly the most powerful and far-reaching media tool put in place since television was introduced in the 1930s.[264] The task of building a foundation of case law to establish what society will allow and what it will find to be an unacceptable breach of the First Amendment right to free speech is essential.

Free speech issues should not be treated the same with regard to the Internet as they are with other print or broadcast media. The differences between the two distinct media categories are too vast to treat them identically, and the standard that has been in place with regard to traditional media under *Brandenburg* has been in place for over thirty years.[265] Although *Brandenburg* may be suitable for the traditional media outlets, which were well-established when it was decided, Internet speech and many unforeseen changes have made such a standard outdated.

Many web sites have higher readerships than the New York Times.[266] Not only is readership high in many cases, but the information is available for viewing and reviewing at the reader's leisure. That is not always the case with newspaper articles, television programs, or public speeches. An Internet threat can be read worldwide, and in some circumstances, it can be reread or reprinted more easily than a newspaper article. For these reasons, the true threats doctrine should be used to protect the safety of people who become targets on the Internet.

To allow violent threats to go unregulated over such a vast means of communication would compromise the integrity of the First Amendment.

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262. *Id.*

263. *Id.* at 1503.

264. Reno v. United States, 521 U.S. 844, 850 (1997).

265. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969) (evaluating a First Amendment case involving a public statement).

266. See Jeff Bercovici, Ongoing Numbers War for NY News and Post (Oct. 31, 2001), *available at* http://www.medialifemagazine.com/news2001/oct01/oct29/3_wed/news4wednesday.html (noting that the daily circulation for the New York Times and the Wall Street Journal was 1,109,371 and 1,780,605 respectively, as of the time of printing); see also 20 With Plenty: August's Top Sites in Daily Hits, According to Jupiter Media Metrix (Oct. 8, 2001), *available at* http://www.usnews.com/usnews/nycu/tech/articles/011008/top20.htm (reporting that sites like Yahoo and MSN receive around 14,699,000 and 14,295,000 hits per day, respectively).

The courts need to address this issue and decide what parameters to place on Internet violence and hate speech. By taking a proactive approach and putting a true threats standard in place, both speakers and listeners will know how their actions will be evaluated.

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