THE INTERNET AS A GAME CHANGER: REEVALUATING THE TRUE THREATS DOCTRINE

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I. INTRODUCTION

The topic our panel was asked to address for this Symposium was criminal law, free speech, and the Internet. This short Essay discusses one issue raised by this topic: How should courts distinguish between true threats and constitutionally protected speech in cases involving Internet speech? This topic is both timely and important because the "current jurisprudence" on this issue is "hopelessly confused, and courts are reaching radically different results in relevantly similar cases. Unless and until the [Supreme] Court changes its approach to help clarify matters, one can only expect the great disparity in reasoning and result in this area to increase."[1]

Before setting forth a tentative thesis regarding how courts should distinguish true threats from protected speech, it is important to be transparent about the assumptions that form the basis of my suggestion. These premises, which concern constitutional law generally, and the Internet and free speech

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1. Mark Strasser, *Advocacy, True Threats, and the First Amendment*, 38 HASTINGS CONST. L. Q. 339, 339-40 (2011).

specifically, are contestable but essential to my proposal. In order of generality, the three fundamental assumptions of my argument are (1) the Supreme Court too often employs strong judicial review to overturn acts of the elected branches; (2) outside of core political speech cases, the Supreme Court overvalues the importance of free speech and undervalues the harm caused by that speech; and (3) the Internet is a true game changer when it comes to balancing the interests in free speech with the potential harms caused by that speech.

The first premise is based on my left-of-center politics and strongly held belief that, over time, the Court acts far more for the right than for the left and almost never acts progressively.[2] The second premise derives in part from attending a number of conferences hosted by my co-panelist, Russ Weaver, and listening to the views of academics from other countries where free speech is seriously valued but not to the degree here. These countries treat issues involving hate speech, incitement, defamation, and campaign speech quite differently than we do and, in my view, far more sensibly.[3] My third premise, that the Internet is a game changer when it comes to criminal law and free speech, derives from my belief that there is simply no pre-Internet analogy that allows speech to be disseminated so quickly, so cheaply, and to so many for such a long period of time.[4] To the extent that some forms of speech, like true threats, can cause harm, the Internet makes that harm far more pronounced and serious and that difference is potentially, if not already, one of kind, not degree.[5] Although the Internet undoubtedly allows speech to flourish like it never has before, which is a good thing, the potential for that speech to cause harm has never been greater.[6]

With those three (controversial) premises in mind, my argument about free speech, the criminal law, and the Internet is that the line between protected advocacy and free speech on the one hand, and true threats or incitement on the other, should be shifted in a significant way towards the punishment of personalized threats and away from protecting speech.[7] The Supreme Court

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2. *See infra* Part III and text accompanying notes 94-97.

3. *See, e.g.*, Susan H. Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 OHIO N.U. L. REV. 755, 771-79 (2008) (presenting a suggestion for revision of the American free speech model to include the English contempt-of-court law); Lyombe Eko, *New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet*, 28 LOY. L.A. INT'L & COMP. L. REV. 69, 79-83, 107-10 (2006) (describing the clash between the French and American speech regulations); Giorgio Resta, *Trying Cases in the Media: A Comparative Overview*, 71 LAW & CONTEMP. PROBS. 31, 40-54 (2008) (comparing the U.S. free press and expression system with Continental Europe's court-related speech restraints); Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 521-33 (2009) (discussing hate speech regulation in democratic nations such as Canada, England, and Scandinavia).

4. *See infra* Part III.

5. *See infra* Part III.

6. *See infra* Part III.

7. *See infra* Part IV.

should recognize that the current test for incitement—that to be proscribed, speech has to be intended to and actually lead to imminent lawless action—should not be applied to threatening speech posted on the Internet where the very idea of imminence has no real relationship to the possibility of speech causing actual harm.[8] Moreover, because lower courts are struggling to make sense of free speech doctrine in the context of the Internet and given the Court's limited statements about true threats, it is time for the Court to issue much needed guidance on the difficult issue of what legal standards should apply to Internet threat cases.

Part II discusses three representative cases from lower courts struggling with the interplay between Internet threats and free speech. Part III summarizes the Court's decisions in the area and explains why they do not offer much help sorting out these issues. Part IV offers some tentative thoughts on how to balance the need to protect robust free speech on the Internet with the need to protect people who are truly feeling threatened by that speech.

II. LOWER COURT STRUGGLES

A number of lower courts have had a difficult time applying the Court's free speech cases to situations involving serious Internet threats. Three such cases from different parts of the country will highlight the difficulties and the important interests at stake.

A. The Nuremberg Files Case

Perhaps the most important lower court case to deal with the problem of distinguishing between protected speech and unprotected threats is *Planned Parenthood v. American Coalition of Life Activists*, otherwise known as the *Nuremberg Files Case*.[9] Four doctors and two health clinics filed suit claiming that the American Coalition of Life Activists (ACLA) had violated their rights under the Freedom of Access to Clinic Entrances Act (FACE), which gives aggrieved persons a right of action against anyone who by "threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . providing reproductive health services."[10] The plaintiffs alleged that ACLA was threatening them by circulating posters identifying the doctors with titles like "GUILTY" or "THE DEADLY DOZEN" and by running a website called the "Nuremberg Files," which contained a list of doctors "whom the ACLA anticipated one day might be put on trial for crimes against humanity."[11] The website also contained pictures of bloody fetuses, slaughtered babies, and

8. *See infra* text accompanying notes 57-61.

9. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003).

10. *Id.* at 1062; 18 U.S.C. § 248(a)(1), (c)(1)(A) (2006).

11. *Am. Coal. of Life Activists*, 290 F.3d at 1062, 1064.

holocaust imagery and identified the names, home addresses, and phone numbers of doctors who performed abortions, as well as a statement that people collecting information about the doctors' "crimes against humanity" could receive a $5,000 reward.[12] The posters identifying the doctors were circulated in the wake of a similar series of posters that had named several doctors who performed abortions and were then murdered, though not by any of the ACLA defendants.[13]

The trial court held that ACLA's speech was not protected by the First Amendment, upheld a large jury verdict against the group, and enjoined the group from circulating the posters and maintaining the website.[14] A panel of the Ninth Circuit reversed, holding that ACLA's speech did not constitute a "true threat" and was thus protected by the First Amendment.[15] The Ninth Circuit, sitting en banc, reversed the panel in a controversial 6–5 decision.[16]

The ACLA defendants argued that they were engaged in protected "political speech that constituted neither an incitement to imminent lawless action nor a true threat."[17] ACLA also argued that the posters and website merely identified the doctors performing the abortions and did not suggest that any harm should come to the doctors.[18] Moreover, ACLA argued that its own pure political speech could not be "converted into non-protected speech by a context of violence that includes the independent action of others."[19]

The Ninth Circuit employed the following test to determine whether speech is constitutionally protected political speech or an unprotected threat: a true threat contains "an expression of an intention to inflict evil, injury, or damage on another," and "where a reasonable person would foresee that the listener will believe he will be subjected to physical violence upon his person."[20] The person making the threat does not have to have the means to carry it out as long as he knowingly communicates the threat.[21]

Applying this test, the majority of the Ninth Circuit held that, given the murder of several doctors who had been identified by similar posters in the past—albeit by different defendants—a jury could have found that the context of the posters as well as the website constituted true threats in violation of FACE, and thus not protected by the First Amendment.[22] Here is a summary of the holding:

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12. *Id.* at 1064-65.
13. *Id.* at 1062.
14. *Id.* at 1066.
15. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 244 F.3d 1007, 1019-20 (9th Cir. 2001), *rev'd en banc*, 290 F.3d 1058 (9th Cir. 2002).
16. *Am. Coal. of Life Activists*, 290 F.3d at 1063.
17. *Id.* at 1070.
18. *Id.* at 1070-71.
19. *Id.* at 1071.
20. *Id.* at 1075.
21. *Id.*
22. *Id.* at 1085-86.

> We have reviewed the record and are satisfied that use of the [posters] . . . and the individual plaintiffs' listing in the Nuremberg Files constitute a true threat. In three prior incidents, a "wanted"-type poster identifying a specific doctor who provided abortion services was circulated, and the doctor named on the poster was killed. ACLA and physicians knew of this, and both understood the significance of the particular posters specifically identifying each of them. ACLA realized that "wanted" or "guilty" posters had a threatening meaning that physicians would take seriously. In conjunction with the "guilty" posters, being listed on a Nuremberg Files scorecard for abortion providers impliedly threatened physicians with being next on a hit list.[23]

The dissenters, five judges including the usually liberal Judge Reinhardt and the usually conservative Judge Kozinski, believed that the majority misapplied the true threats doctrine and punished ACLA for engaging in constitutionally protected political speech.[24] The thrust of the dissents was that ACLA did not directly threaten physical harm to anyone, that the posters explicitly disavowed violence, and that trying to intimidate people to change their behavior through aggressive but not directly threatening political speech is fully protected by the First Amendment.[25]

B. United States v. Carmichael

In *United States v. Carmichael*, the government wanted to close a website run by a defendant who was being prosecuted for selling eleven duffle bags of marijuana.[26] The website contained the names and photos of DEA agents and several informants involved in the defendant's case beneath the word "Wanted" in large red letters, as well as a request for information about these people.[27] The site contained the following disclosure: "This website . . . is definitely not an attempt to intimidate or harass any informants or agents, but is simply an attempt to seek information. . . . Carmichael maintains his innocence, and wants the public to know all the facts as well as the participants in this case."[28]

The government moved for a protective order asking the court to close down the website on the basis that the defendant was trying to intimidate possible witnesses in the case.[29] Several DEA agents testified that their informants felt scared by the website and were reluctant to testify for fear of their safety.[30] The DEA agents were also concerned that, if their pictures were

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23. *Id.* at 1088.

24. *See id.* at 1088-89 (Reinhardt, J., dissenting); *id.* at 1089 (Kozinski, J., dissenting); *id.* at 1101 (Berzon, J., dissenting).

25. *See supra* note 24 and accompanying text.

26. United States v. Carmichael, 326 F. Supp. 2d 1267, 1270-71 (M.D. Ala. 2004).

27. *Id.* at 1272.

28. *Id.*

29. *Id.* at 1273.

30. *Id.* at 1274-75.

posted on the site, the photos could hamper their ability to do their job and increase the possibility that they would be harmed.[31]

The district court identified the issue as whether Carmichael's website constituted political speech protected by the First Amendment or a true threat.[32] Relying on a series of Supreme Court cases that did not provide a lot of helpful guidance, the court held that the website was protected speech because there was no explicit threat on the site, and taking context into account, none of the witnesses or informants in the case should reasonably have felt physically threatened by the "general atmosphere of intimidation" created by the site.[33] Thus, the court denied the government's motion to close down the site, and the order was apparently never appealed.[34]

C. United States v. White

A third relevant lower court case is *United States v. White*.[35] In this case, the defendant had a website devoted to, among other things, white supremacy and criticizing the conviction of a different white supremacist, Matthew Hale, for threatening a federal judge.[36] The defendant's website said, among other things, that "everyone associated with the Matt Hale trial has deserved assassination for a long time."[37] Eventually, the defendant posted personal information about the foreperson of the Hale trial including his name, address, office number, and cell phone number.[38] The defendant was charged with the federal crime of soliciting violence against a juror, but the district court, applying a host of different legal standards, including the tests for incitement and true threats, dismissed the indictment on the ground that the First Amendment protected White's speech.[39]

The court of appeals reversed, holding that it was a jury question whether White had the requisite intent needed to support the charge.[40] The panel said that if the defendant's intent was to solicit someone to harm the juror, his speech would not be protected by the First Amendment.[41] But if his intent was simply to make political statements about that juror, the speech would receive

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31. *Id.* at 1273-75.
32. *Id.* at 1267.
33. *See id.* at 1287-90.
34. *See id.* at 1301.
35. United States v. White, 610 F.3d 956 (7th Cir. 2010) (per curiam).
36. *See id.* at 957.
37. *Id.*
38. *Id.* at 957-58.
39. *See* United States v. White, 638 F. Supp. 2d 935, 942-58 (N.D. Ill. 2009), *rev'd per curiam*, 610 F.3d 956 (7th Cir. 2010).
40. *See White*, 610 F.3d at 962.
41. *Id.* at 961.

full First Amendment protection.[42] According to the Seventh Circuit, that question would have to be decided by a jury.[43]

These three cases represent some of the issues that lower courts are struggling with when confronting the First Amendment status of allegedly threatening speech on the Internet. As these cases demonstrate, the line between protected political speech on one hand, and impermissible true threats on the other, is difficult to ascertain and is dividing the lower courts. Part of the problem is that the Supreme Court has given little guidance to resolve these cases. The lower courts are generally applying three Supreme Court decisions to Internet threat cases, but none of them offer much help.

III. THE SUPREME COURT CASES

A. Watts v. United States

The first case that judges and scholars normally point to when discussing Internet threats is *Watts v. United States*.[44] In *Watts*, a Vietnam War protester said the following during a demonstration on the grounds of the Washington Monument:

> 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.[45]

Based on this statement, the defendant was convicted of "knowingly and willfully threatening the President," thereby violating federal law.[46] The Supreme Court overturned the conviction in a short per curiam opinion.[47] After summarizing the language of the statute, the Court said that the defendant could be found guilty only if he uttered a true threat and then said the following:

> We do not believe that the kind of political hyperbole indulged in by petitioner fits within that statutory term. For we must interpret the language Congress chose "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." The language of the political arena, like the language used in labor disputes . . . is often vituperative, abusive, and inexact. We agree with petitioner that his

42. *See id.*
43. *Id.* at 962.
44. Watts v. United States, 394 U.S. 705 (1969) (per curiam).
45. *Id.* at 706.
46. *Id.*
47. *See id.* at 705, 708.

> only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.[48]

Despite overturning the defendant's conviction, *Watts* tells us very little about how courts should decide Internet threat cases.[49] The case involved a threat against the President, the most protected man in the United States, and was uttered during a heated political protest—not placed permanently online.[50] Other than the Court saying for the first time that there is a difference between a true threat and constitutionally protected speech, the case simply does not add much substance to free speech doctrine.[51]

B. Brandenburg v. Ohio

The second case that is often relied upon by lower courts and scholars when dealing with Internet threats is *Brandenburg v. Ohio*.[52] This landmark decision, decided just two months after *Watts*, reversed the conviction of a Ku Klux Klan leader for making hateful comments about blacks and Jews.[53] The leader said, 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."[54] He also said, "I believe the nigger should be returned to Africa, the Jew returned to Israel."[55]

The Klan leader was convicted under the Ohio Criminal Syndicalism statute that, among other things, made it a crime to "advocate or teach the duty, necessity, or propriety of violence as a means of accomplishing industrial or political reform."[56] The Supreme Court reversed the conviction and set forth what is still the test to determine whether a person can be arrested for political advocacy that causes or may cause illegal activity.[57] In order to be punishable as a crime, such advocacy must be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[58] The Ohio law

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48. *Id.* at 708 (citations omitted) (first quotation from New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).
49. *See id.* at 707-08.
50. *See id.* at 706-07.
51. *See id.* at 707.
52. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
53. *See id.* at 446.
54. *Id.*
55. *Id.* at 447.
56. *Id.* at 448 (internal quotation marks omitted).
57. *See id.* at 447.
58. *Id.*

did not satisfy this standard; therefore, the Court had to reverse the defendant's conviction.[59]

Courts face two major difficulties with applying the *Brandenburg* test to Internet threat cases. First, the test requires that the harm be imminent.[60] This makes sense in the context of fiery speech uttered during political rallies, but it makes much less sense when applied to speech posted on the Internet where the threat can last forever and be seen by millions of people around the world. For example, there is a significant difference between a person who at a pro-life rally, yells that a particular doctor should be "stopped" if a year from now he is still performing abortions, and a person posting on the Internet the doctor's home address and suggesting the same sentiment. The imminence requirement makes sense for the former but hardly lessens the danger of the latter. The fact of permanence, as well as the great reach of the threat, makes Internet speech more dangerous than rallying cries at political protests, and the *Brandenburg* test is just not flexible enough to deal with that problem.

The second problem with applying *Brandenburg* to Internet threat cases is that many such threats do not deal with core political speech or political advocacy.[61] Threats against specific jurors who reach unpopular decisions, threats against undercover agents and informants in specific cases, or cyber bullying in high schools, for example, often have little to do with core political speech.[62] As most free speech cases in the end involve a balancing between the benefits and harms of speech, *Brandenburg*'s protective standard for core political speech simply should not apply, without more, to personally directed speech with little or no political content.

C. NAACP v. Claiborne Hardware

The third and most important case lower courts have applied, or tried to apply, to true threats cases is *NAACP v. Claiborne*.[63] In this case, the Court overturned a verdict against the NAACP and one of its members for a boycott organized by the NAACP against white merchants in the late 1960s and early 1970s in Mississippi.[64] The merchants claimed that the boycotts were illegal, restrained trade, and were implemented with threats of violence and force.[65] The relevance of the case for Internet-threat purposes is that the Court overturned a jury verdict for the plaintiffs even though one of the leaders of the

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59. *See id.* at 448-49.

60. *See id.* at 447.

61. *See id.* at 447-48.

62. *See* discussion regarding specific jurors, undercover agents, and informants, *supra* Part II.B-C. *See generally* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 577 (4th Cir. 2011), *petition for cert. filed*, No. 11–461 (Oct. 13, 2011) (upholding school administrators' punishment of a high school student for derogatory statements made online).

63. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 894 (1982).

64. *Id.* at 889-90, 933-34.

65. *Id.* at 890-93.

NAACP, Charles Evers, made what appeared to be threatening comments during several political rallies.[66] Evers stated 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."[67] 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."[68] Although some acts of violence occurred during the boycott, the Court still held that the speech by the NAACP leader could not give rise to liability because, though "emotionally charged," the "rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg*."[69]

Some lower courts have used *Claiborne* to give significant First Amendment protection to Internet threats that sound less threatening than the words uttered by Evers during the boycott.[70] For example, the five dissenting judges in *Nuremberg Files* relied heavily on *Claiborne* to support their position that the anti-abortion posters and website at issue should have been deemed speech protected by the First Amendment.[71] Those judges believed that *Claiborne* stood for the propositions that "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment. . . . [W]here liability is premised on 'politically motivated' activities, we must 'examine critically the basis on which liability was imposed.'"[72]

After reviewing the threatening statements made by Evers in *Claiborne*, as quoted above, the dissenters in *Nuremberg Files* argued that the Supreme Court found that, even though the statements "might have been understood as inviting an unlawful form of discipline," they were still constitutionally protected because the statements were not "fighting words," unlawful "incitement," or "true threats."[73] These dissenting judges argued that if threatening to "break your damn neck" was protected by the First Amendment, then the speech at issue in *Nuremberg Files*, which did not explicitly threaten physical harm to anyone, should also have been protected by the First Amendment.[74] Similarly, the *Carmichael* judge who denied the government's motion to shut down the website identifying DEA agents and informants also relied on *Claiborne* and observed that "there was more evidence that Evers's speeches were threats than that Carmichael's site is a threat. . . . If Evers's speeches [] containing explicit

66. *See id.* at 898-902.
67. *Id.* at 902.
68. *Id.*
69. *Id.* at 927-28.
70. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1089-90, 1095-96 (9th Cir. 2002) (en banc) (Kozinski, J., dissenting); *infra* text accompanying notes 71-84.
71. *See Am. Coal. of Life Activists*, 290 F.3d at 1090.
72. *Id.* at 1092 (quoting *Claiborne*, 458 U.S. at 915, 927).
73. *Id.* at 1094.
74. *Id.* at 1095-96.

threats of physical harm . . . were protected by the First Amendment, then Carmichael's website should similarly be protected by the First Amendment."[75]

Not surprisingly, some judges, citing *Claiborne*, are sympathetic to a broad reading of the First Amendment, given that the Court deemed the explicit threats of violence in *Claiborne* constitutionally protected.[76] The problem, however, is that these judges are misreading the case. Evers's speeches that contained the threats at issue were directed not at the eventual plaintiffs in the case, the white merchants, but at potential shoppers—*none of whom ever filed suit*.[77] The Supreme Court never had to wrestle in *Claiborne* with a plaintiff who argued she was frightened by the defendant threatening to "break [her] damn neck."[78] Had that threat been directed to a specific person who then sought judicial relief, the Court would likely have not found it protected by the First Amendment.[79]

In *Nuremberg Files*, the doctors testified that they felt personally and physically threatened by the defendants' posters and website.[80] That issue was simply never present in *Claiborne*. In *Claiborne*, the Court primarily considered whether the boycott as a whole was protected and, given the state of racial relations in Mississippi in the late 1960s, it is not surprising that the Court unanimously found that it was.[81] After all, this boycott was trying to change the racist policies of white merchants during the Civil Rights Movement.[82] Evers's threatening comments were relevant only to the extent that the boycott's legality was called into question.[83] This issue is quite different than what constitutional protections should be given to threatening language on the Internet (1) in the context of a claim by the person threatened by the speech or (2) in the context of a claim by the government that jurors, witnesses, or undercover agents are being threatened by the speech.[84] Neither *Claiborne* nor *Brandenburg* nor any other Supreme Court case sets forth helpful legal standards to deal with that difficult question.

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75. United States v. Carmichael, 326 F. Supp. 2d 1267, 1288 (M.D. Ala. 2004).

76. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927-30 (1982).

77. *See id.* at 902.

78. *Id.*

79. *See id.* at 928-29.

80. Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1066 (9th Cir. 2002) (en banc).

81. *See Claiborne*, 458 U.S. at 907.

82. *See id.* at 899 n.26, 907.

83. *See id.* at 928-29.

84. *Compare* United States v. White, 638 F. Supp. 2d 935 (N.D. Ill. 2009), *rev'd per curiam*, 610 F.3d 956 (7th Cir. 2010) (dismissing charge of soliciting violence against a juror), *with* United States v. Carmichael, 326 F. Supp. 2d 1267 (M.D. Ala. 2004) (denying government's motion for a protective order to close down a website containing identifying information of government agents and informants).

IV. A FEW TENTATIVE THOUGHTS

How should judges distinguish true threats from protected speech? Lower courts have applied a series of tests, but the most common test 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."[85] Other courts apply the purely objective test: whether a reasonable person would perceive the speech as a threat.[86] The precise wording of the legal test, however, is less important than how the courts balance the values of free speech and the potential harm caused by that speech.[87] Most people would agree that a true threat is not protected speech, but that definition must be narrow enough not to chill protected political speech. The trick is to draw that line in a way that protects possible victims but also gives breathing room for legitimate First Amendment activities.

When conducting this difficult balancing, I would suggest that courts not be swayed by Supreme Court decisions involving political advocacy, such as *Brandenburg*, into protecting statements constituting true threats simply because the threats are uttered in the context of political or social commentary. Much of the speech at issue in *Nuremberg Files*, for example, was clearly protected by the First Amendment inasmuch as it pertained to the issue of abortion.[88] But, ACLA could have made all of its points and expressed its anti-abortion views in an infinite number of ways without identifying the names and addresses of the doctors performing abortions and suggesting that the doctors were committing crimes "against humanity" and should be punished for those crimes.[89] Although the First Amendment quite obviously protects speech that suggests abortion is a sin and should be illegal, it does not follow that people holding those views are allowed to put others at risk by engaging in threatening and personally directed speech.[90] In determining the line between protected speech and true threats, courts should be sensitive to the pervasiveness of the Internet and how easy it is to reach so many people. The *Nuremberg Files* majority correctly held that questions of whether ACLA could have foreseen that the doctors would reasonably construe ACLA's speech as threatening and whether it was reasonably foreseeable that the doctors would actually be in danger because of the speech, in light of prior murders, were questions of fact for the jury and not issues of law for the judge.[91]

Similarly, although the First Amendment should shield from liability speech criticizing how the government prosecutes white supremacists, treats

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85. United States v. Fulmer, 108 F.3d 1486, 1491 (1st Cir. 1997). For a good canvassing of the various tests applied by the lower courts, see Strasser, *supra* note 1, at 368-76.

86. *See* Strasser, *supra* note 1, at 368-76.

87. *See id.* at 375-76, 384-86.

88. *See* discussion *supra* Part II.A.

89. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1062 (9th Cir. 2002) (en banc).

90. *See id.* 1087-88.

91. *See id.* at 1069-71.

minorities, or hurts white Americans, the First Amendment should not give someone license to identify a juror by name and address and then suggest that everyone associated with that juror's case deserves to be "assassinated," as was the situation in *White*.[92] Such comments may or may not be true threats (that would be a jury question), and First Amendment concerns add little to the analysis. In other words, what constitutes a true threat should not, in most instances, be a question of constitutional law, but rather a finding of fact for a jury, as the Seventh Circuit suggested in *White*.[93] That proposal is not to suggest, of course, that if a reasonable jury could not find something a true threat then a judge could not resolve the question.

Traditionally, our Supreme Court has overprotected speech to avoid the slippery slope of censorship.[94] The Court's decisions on hate speech, defamation, commercial speech, and campaign-finance reform protect speech to a far greater extent than any other country in the world.[95] Only in America is vicious hate speech constitutionally immunized; are public figures virtually unable to recover for untrue defamatory statements; is commercial speech for all intents and purposes given full constitutional protection; and is corporate spending in elections deemed equal to political speech by individuals.[96] The Supreme Court should recognize that we are an outlier in all of these areas among Western democracies. Moreover, it would be a serious mistake to extend this overprotection of speech to threats of violence on the Internet. A reasonable starting place would be to distinguish between threats to a large and ill-defined group—such as abortion doctors in general or unnamed members of a particular ethnic or racial group, which should be given full First Amendment protection—and personally directed invectives toward an individual displayed for everyone to see on the Internet for an unlimited period of time. Such attacks can lead reasonable people to fear for their safety and entice less balanced people than the speaker to commit serious crimes. Robust political debate can take place in this country without protecting implied or direct threats toward particular people.

Of course, every time a line is drawn in First Amendment cases, there will be fact patterns and hypotheticals that represent close calls.[97] The difference between a personally directed threat to named individuals, which should not be immunized by the First Amendment, and protected political advocacy, which should be, may be difficult to distinguish in some cases, especially with public

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92. *See* discussion *supra* Part II.C.

93. *See* United States v. White, 610 F.3d 956, 962 (7th Cir. 2010) (per curiam).

94. *See, e.g.*, Watts v. United States, 394 U.S. 705, 706-08 (1969) (per curiam).

95. *See* Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 402 (2008) ("Across the broad range of substantive free speech issues, the United States takes an exceptional position in favor of unregulated and unregulable speech.").

96. *See id.* at 402-04.

97. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1062-65 (9th Cir. 2002) (en banc) (holding that specific facts could have been found by a jury to present a true threat); *see also White*, 610 F.3d at 957-58 (holding the facts created a question to be answered by the jury).

figures and governmental officials. Nevertheless, the key issue in such cases should be whether it is reasonable for the person threatened to feel threatened. The First Amendment and the prior doctrines the Court has articulated to give meaning to free speech should play little role in that analysis.

V. CONCLUSION

The lower courts are in disarray over how to deal with the line between true threats and protected political speech.[98] Many of these cases are arising in the context of speech on the Internet.[99] The Supreme Court, however, has yet to weigh in on this issue in a meaningful manner. The Court should do so in the near future and make clear that personally directed attacks on individuals that could reasonably be interpreted as a real threat to that person are not protected by the First Amendment and, in most cases, whether or not the speech at issue is a true threat is a question for the jury.

98. *See* discussion *supra* Part II.

99. *See, e.g.*, *White*, 610 F.3d at 957-58.