

THREATS AND MEANINGS: HOW THE FACTS GOVERN FIRST AMENDMENT DOCTRINE

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INTRODUCTION

Two recent decisions, one by the Supreme Court¹ and one by the Ninth Circuit,² have occasioned an ink spill of Exxon Valdez proportions and no little contention. The question, broadly stated, is when the First Amendment should

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1. *Virginia v. Black*, 538 U.S. 343 (2003). For a thorough treatment of *Virginia v. Black*, see Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197. For sharp criticism of the *Black* opinion, see Steven G. Gey, *A Few Questions About Cross Burning, Intimidation, and Free Speech*, 80 NOTRE DAME L. REV. 1287 (2005).

2. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003). I discuss the *Planned Parenthood* case in detail in a later Part.

protect speech alleged to constitute a threat by the speaker to kill or seriously injure someone. Given the level of discord, a notable feature of the debate is the acceptance, by judges and commentators alike, of the general proposition that a threat is not protected by the First Amendment, as the Supreme Court told us as early as 1969. In *Watts v. United States*,³ where the Court held that no “true threat” had been issued by the speaker, it also took the occasion to announce the “threats exception.”⁴

Because the Supreme Court offered little direction for more than two decades, the state supreme courts and federal circuit courts were left to their own devices in fashioning mediating principles to define the contours of the category. On their own, these courts have achieved a considerable consensus around a general formula, even though claims about threats are made in widely diverse factual settings. As this Article shows, the prevailing formula is a set of abstractions offering minimal predictability of results from one case to the next. Remarkably, however, judges typically recite one version of the formula or another as if it were determining the outcome. The result is a collection of opinions that are long on assertion and short on evaluation of anything that matters. In the discussion that follows, we shall see the doctrinal weakness of such an approach. The threats exception, as a First Amendment category, has largely been shaped to fit the very facts it is supposed to govern.

Academic commentary on the threats exception has been dominated by an effort to provide bright-line rules of decision that will severely limit the discretion of jurors or trial judges. Such an objective is most clearly evident in writings criticizing the Ninth Circuit’s *Planned Parenthood* decision. Responding to these critics, this Article shows that the threats exception’s irregular applications, and its adaptability to new forms, are unavoidable. The central inquiry in each case goes to the assignment of meaning—that is, considered in its context, does this statement express a threat, or not? Given the wide-ranging variation of the facts in these cases, precedent typically turns out to be an uncertain guide for deciding the case at hand—a classic indication that a First Amendment problem is present.

In a sizeable number of cases, judges have differed in the meanings they assign to speakers’ words and behavior. In major part, their division appears to reflect divergent attitudes toward the relative importance of two objectives:

3. 394 U.S. 705, 708 (1969).

4. In *Watts*, an eighteen-year-old speaker, protesting the Vietnam War, had said that if the Army should hand him a gun, “the first man I want to get in my sights is L.B.J.” *Id.* at 706. He laughed, and so did his audience. Under the circumstances, the Supreme Court interpreted the words as a joke—not a “true threat” to President Lyndon Johnson, but rather political hyperbole. *Id.* at 708. In the course of its per curiam opinion, the Court said in dictum that the federal statute punishing threats against the President was valid. *Id.* at 707. Out of that thin air, the threats exception crystallized.

The term “threats exception” is Eugene Volokh’s useful coinage. *See, e.g.*, EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES, AND POLICY ARGUMENTS* 171 (2d ed. 2005).

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constructing abstract First Amendment doctrine for the future and doing justice in the case at hand. To a lesser extent, similar disagreements are found among the commentators who discuss the threats exception. This admirable body of writing is dominated by efforts to purify abstract doctrine and to criticize courts for failing to conform to the purified models. But it is hard to force a sharply defined doctrinal grid on a zone of human behavior that is, almost by definition, disorderly. Recent proposals for hard-edged rules are not likely to be adopted by the courts. Nor would they be likely to confine the discretion of jurors and trial judges or to produce precedents that are readily translated from one case to another.

Mondrian produced some excellent art, but it wasn't representational. In this Article I seek illumination of the threats exception by descending from the generalized doctrinal formula to a number of diverse real-life experiences in which speakers' expressions have been alleged to bear threatening meanings and judges have had divergent reactions to the speakers' claims of First Amendment protection. These cases offer a series of lessons about the relation of the doctrine to the circumstances that require its application. A long concluding section illustrates the lessons through a close examination of the facts behind the *Planned Parenthood* decision.

The interaction of fact-finding and law declaration is, of course, a basic concern of any legal system. In considering the idea of "threat" as a doctrinal category and as a question of fact, we shall have repeated occasion to observe the accuracy of Clifford Geertz's remark:

The rendering of fact so that lawyers can plead it, judges can hear it, and juries can settle it is just that, a rendering: as any other trade, science, cult, or art, law, which is a bit of all of these, propounds the world in which its descriptions make sense.⁵

I. TAKING FEAR SERIOUSLY

For a more than a decade, the list of reasons underlying the threats exception usually has been recited from the Supreme Court's opinion in *R.A.V. v. St. Paul*.⁶ That opinion enumerated three justifications for punishing threats: protecting individuals against the fear of violence; protecting against the disruption that a threat of violence may cause; and preempting the possible violence that may be committed by a speaker who threatens.⁷ Jennifer

5. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 173 (1983).

6. 505 U.S. 377 (1992). *R.A.V.* was another opinion in which the Court mentioned the threats exception without applying it.

7. *Id.* at 388. This third concern may be substantial, but it has little to do with the harm suffered by the target of a threat. For a capsule exposition of the doctrinal import of this distinction, see Schauer, *supra* note 1, at 215-16. The probability that a threat will actually mature into physical violence is only marginally related to the harm of the threat. Here I am

Rothman, in her thoughtful critique of doctrinal developments under the threats exception, suggested a fourth reason: protecting those who are the targets of threats against “being coerced into acting against their will.”⁸

As a prologue to the discussion of doctrine and factual settings, I want to highlight the importance of the first reason, which in my view embraces the fourth.⁹ Commentary on the threats exception has been strangely dismissive of the harms caused to the target of a death threat,¹⁰ and the discussion that follows is designed to bring those harms to center stage as a weighty aspect of the target’s liberty—and thus a concern of constitutional dimension.

In *Virginia v. Black*, the Supreme Court, for the first time ever, interpreted the threats exception to permit the punishment of expression—the burning of a cross with the intent to frighten particular individuals.¹¹ Writing for the Court, Justice Sandra Day O’Connor quoted the famous opinion in *Chaplinsky v. New Hampshire*,¹² which read out of the First Amendment another category of speech: face-to-face insults called “fighting words.” Such words, said the

in complete agreement with the argument of G. Robert Blakey and Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 1061-62. In short, a threat is quite different from an incitement to crime. See *infra* note 265; see also *infra* text accompanying notes 33, 277.

8. Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL’Y 283, 290-91 (2001).

9. I agree that the interest in autonomy can have independent significance. For example, consider a conditional threat against a black citizen: “If you vote in tomorrow’s election, I’ll kill you.” I thank Robert Goldstein for focusing my attention on some of the particulars of autonomy in this context.

10. See Schauer, *supra* note 1, at 212 (referring to “that array of unpleasant feelings that we tend to call ‘fear’”). Criticizing the district court’s decision in *Planned Parenthood*, Steven Gey says that the plaintiff doctors “were understandably distressed” and implies that they might find the defendants’ posters “disturbing.” See Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 563 (2000). But, says Professor Gey, all of that distress is irrelevant, for the question is whether the posters were unprotected speech. *Id.* G. Robert Blakey and Brian Murray comment that “the [*Planned Parenthood*] plaintiffs testified that they felt ‘threatened’” but knew the defendants had not explicitly offered to inflict physical harm. Blakey & Murray, *supra* note 7, at 847. In a 302-page article, they do not otherwise raise the subject of fear or refer to the harms caused by fear of a death threat. Jennifer Rothman is not similarly dismissive, but her entire discussion of the “emotional and physical effects” of fear is limited to three sentences. See Rothman, *supra* note 8, at 291.

11. The Court upheld the validity of a state law prohibiting cross-burning with the intent to intimidate. In one of the two cases at hand, a majority of the Justices held that a public cross-burning was constitutionally protected when it expressed not a particularized threat but a more general statement of the unity or ideology of the Ku Klux Klan. *Virginia v. Black*, 538 U.S. 343, 365-66 (2003) (plurality opinion); *id.* at 385-86 (Souter, J., concurring in part and dissenting in part). In the companion case, the Court remanded to allow the state courts to punish two men who burned a cross with the intent of intimidating a neighbor. *Id.* at 367-68. On remand, the Supreme Court of Virginia affirmed and reinstated the men’s convictions. See *Elliott v. Commonwealth*, 593 S.E.2d 263 (Va. 2004).

12. 315 U.S. 568 (1942).

Court, “by their very utterance inflict injury.”¹³ This description was ill-suited to Walter Chaplinsky’s case, but it is well chosen to describe a death threat that looks real to the person who is threatened—and most cases implicating the threats exception have involved alleged life-threatening statements about identified individuals, called “targets” in this Article.¹⁴

From the earliest days of the common law, assault—intentionally putting someone in fear of physical harm—was a crime and also a tort, a trespass against the King’s peace.¹⁵ In part, the early legal remedies were designed to keep the target of an assault from taking the law into his own hands. But the power of the state to protect people against being put in fear can stand on its own, independent of the purpose to avoid private vengeance. When President Franklin Roosevelt coined the expression “freedom from fear” during World War II,¹⁶ his immediate referent surely was one well-publicized aspect of Nazi terror—the nighttime knock at the door by the secret police. But the phrase also resonates with the larger need of all humans for a sense of physical security, perhaps the most basic freedom protected by law. Deliberately putting people in fear for their lives is a grave wrong inflicting a grave harm, and it deserves a strong reaction by the state. No surprise, then, that the threats exception “has traditionally coexisted comfortably with even a strong First Amendment.”¹⁷

Fear is one of the most basic emotions, very old in the history of human evolution. It is easy to see why. The ability to avoid death, or serious physical impairment, is crucial to any organism’s survival and reproduction. We should not be surprised to learn that much of the human system of fear arousal, underlying vigilance and sustained engagement in strategies to avoid harm, lies in the brain stem—part of humans’ inheritance from their reptilian past.¹⁸

13. *Id.* at 572. Justice Murphy referred in the same exclusionary vein to other categories of speech that are recognized today as within the First Amendment’s protection. *Id.* A prominent example was libel, which, since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), has received vigorous protection in cases involving “public” speech.

14. No doubt the threats exception also extends to some threats short of death, such as a threat of serious physical injury to the target or to members of the target’s family.

Another kind of fear has appeared in recent articles: the sort of apprehension that may lead to public policies regulating perceived hazards to health or safety. *See, e.g.*, Rachel F. Moran, *Fear Unbound: A Reply to Professor Sunstein*, 42 WASHBURN L.J. 1 (2002); Cass R. Sunstein, *The Laws of Fear*, 115 HARV. L. REV. 1119 (2002); *see also* Rachel F. Moran, *Fear: A Story in Three Parts*, 69 MO. L. REV. 1013 (2004). In this Article, leaving aside questions about public perceptions of risks from AIDS or pollution or heroin, I focus on threats of physical harm deliberately directed to individuals.

15. *I. de S. & Wife v. W. de S.*, Year Book, Liber Assisarum, folio 99, placitum 60 (1348 or 1349) (Thorpe, C.J.). When I was a first-year law student, this was the very first case studied in Professor Warren A. Seavey’s course on torts; it had been introduced in such courses for many years. *See* 1 JAMES BARR AMES & JEREMIAH SMITH, A SELECTION OF CASES ON THE LAW OF TORTS 1 (1910).

16. Franklin Delano Roosevelt, Annual Address to Congress: The Four Freedoms (Jan. 6, 1941).

17. Schauer, *supra* note 1, at 211.

18. *See* JOSEPH LEDOUX, SYNAPTIC SELF: HOW OUR BRAINS BECOME WHO WE ARE

Humans have a well-developed ability to recognize threats. This perception, like any other, is “an act of categorization,”¹⁹ a decision that the situation poses a threat.²⁰ The perception is also a prediction,²¹ based on “learned expectancies” that have a neurological basis.²² Fear triggers a reaction with impressive efficiency. In the face of a perceived threat, the neurological phenomena of defense conditioning occur in an instant, and they make an enduring impression—perhaps lasting for a lifetime. Fear is especially likely to continue when the threat in question is a death threat. “[W]here consequences are grave, expectancy concerning what may be encountered does not change easily”²³ As Joseph LeDoux says, “a predator will always be a predator.”²⁴ Further, the “contextualization of fear—that is, the regulation of fear on the basis of the situation we are in”—has its own basis in the physiology of the brain.²⁵

Death threats are particularly harmful, for they trigger short-term fear and long-term anxiety. For some purposes, one can distinguish between fear and anxiety: “Classically, . . . fear is viewed as a reaction to a specific and immediately present stimulus, whereas anxiety is a concern about what *might* happen.”²⁶ Yet, in any law-oriented analysis of the harms caused by a death threat, the distinction is of little use. One form of anxiety much discussed in recent years is post-traumatic stress disorder, in which stimuli reminding one of an earlier life-threatening event trigger what neurologists call fear responses.²⁷ Because these responses have a long shelf life, the threat can continue to preoccupy the person who is targeted long after the initial life-threatening shock. “Emotions, in short, amplify memories.”²⁸ The brain’s coordination of emotion can convert cognition, one’s conscious experience, into emotional experience—thus imprinting working memory with the relevant emotional feeling, such as fear. One result is an effect on long-term memories.²⁹

To put this point in legally cognizable terms, while some forms of threats may have diminishing harmful effects over time, a life-threatening experience

196 (2003).

19. Jerome S. Bruner, *On Perceptual Readiness*, 64 PSYCH. REV. 123, 123 (1957).

20. *Id.* at 132.

21. *Id.* at 126.

22. *Id.* at 134.

23. *Id.* at 141.

24. LEDOUX, *supra* note 18, at 124.

25. *Id.* at 215-16. This contextualization is “a psychological construction, a kind of memory created on the spot” *Id.* at 216. Of course, it is the conscious experience of fear that most immediately concerns the law of threats. I am not—repeat, not—suggesting that a person’s conscious experience of fear is identical to a biological phenomenon. For a discussion of the differences, see JEROME KAGAN, *THREE SEDUCTIVE IDEAS* 18-35 (1998).

26. LEDOUX, *supra* note 18, at 289 (emphasis in original).

27. *Id.* at 294-95.

28. *Id.* at 222.

29. *Id.* at 225-29.

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is unlikely to follow that pattern. The stress response to a perceived physical threat is “ubiquitous amongst mammals.”³⁰ In LeDoux’s words, when stress is severe and continuous, “[y]our cardiovascular system can be compromised, your muscles can weaken, and you can develop ulcers and become more susceptible to certain kinds of infections.”³¹

Such possible physical reactions, pernicious as they may be, are only one manifestation of a more basic harm wrought by fear: living with the thought that each day may be the last. Such a thought would be seriously troubling even to an inveterate loner, but for many of us, the contemplation of death surely would focus on the severance of our connections with those who are closest to us. A death threat may be most painful of all, not because one is afraid to die, but because his death would visit on his spouse and children the permanent deprivation of his love and support, over the rest of what would otherwise be his natural lifetime. The “disruption”³² produced by a death threat is not merely the taking of protective measures, but also the need to offer protection and comfort to spouses and children who will themselves be terrified.

The shock of receiving the death threat also does not recede with time, so long as the threat seems credible. In the First Amendment context of punishing advocacy of unlawful conduct, requiring a showing of immediate incitement to unlawfulness makes good sense because it allows room for “more speech” to remedy bad speech.³³ But, in the context of a death threat, a *locus poenitentiae* merely extends—for a term with no end in sight³⁴—the anticipation of the

30. JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 132-33 (1996) [hereinafter LEDOUX, *EMOTIONAL BRAIN*].

31. *Id.* at 278 (citing Robert M. Sapolsky, *The Physiology and Pathophysiology of Unhappiness*, in *WELL-BEING: THE FOUNDATION OF HEDONIC PSYCHOLOGY* 453, 455-57 (Daniel Kahneman et al. eds., 1999)). LeDoux goes on: “But none of this should happen if the hippocampus is working properly to shut down the stress reaction. As we discussed [previously], during prolonged and severe stress, the ability of the hippocampus to do its stress-control job falters.” *Id.* at 278. For further particulars on the reaction of the body to chronic stress, see ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 120-21 (1994); JEFFREY ALAN GRAY, *THE PSYCHOLOGY OF FEAR AND STRESS* 64-66 (2d ed. 1987); LEDOUX, *EMOTIONAL BRAIN*, *supra* note 30, at 239-46.

32. “Disruption” was said by the Supreme Court in *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992), to be a separate item on the list of harms from threats. The Court had in mind institutional disruptions, such as the mobilization of the U.S. Secret Service in response to a threat against the President. It is important to remember that a death threat targeted at a private individual radically disrupts his or her life and the lives of his or her family as well.

33. *See* *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The Supreme Court adopted this immediacy requirement for incitement in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Writing in the specific context of the district court’s initial decision in the *Planned Parenthood* case, Steven Gey has argued that the threats exception should be limited by the *Brandenburg* principle, applied only when there is a threat of immediate harm. *See* Gey, *supra* note 10, at 546-53, 591-92. *But see infra* text accompanying note 277 (indicating my disagreement). In general, Professor Gey strongly criticizes the Ninth Circuit’s *Planned Parenthood* decision. *See* Gey, *supra* note 1, at 1138-45.

34. The uncertainty—the lack of control over the delivery of the anticipated harm or

severance of one's treasured human connections. For the spirit of the targeted individual, or a member of the target's family, this fear is the wound that does not heal.³⁵

Samuel Johnson's oft-quoted comment that the prospect of hanging wonderfully concentrates the mind³⁶ can be given a neurological spin that he surely did not contemplate: "[E]motion comes to monopolize consciousness, at least in the domain of fear, when the amygdala³⁷ comes to dominate working memory."³⁸ So, a death threat produces not just fear, but also the reduction of such capacities as cognition and motivation. Fear also tends to displace other emotions. In sum, when fear is severe enough, it takes away your normal life and seriously diminishes your sense of self³⁹—your interpretation of your situation "with respect to others and toward the world," an interpretation "composed of expectations, feelings of esteem and power, and so on."⁴⁰

even the predictability of its arrival—is itself a stressor. *See* Sapolsky, *supra* note 31, at 458-59. As Justice Thurgood Marshall once wrote in quite a different context, "the value of a sword of Damocles is that it hangs—not that it drops." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

35. For a graceful translation of this proposition into the doctrinal terms of the threats exception, see Schauer, *supra* note 1, at 214.

36. "Depend upon it, Sir, when any man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully." 2 JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON* 393 (Heritage 1963).

37. This is the part of the brain most involved in organizing the organism's defense against perceived threats of harm. *See* LEDOUX, *supra* note 18, at 61-64.

38. *Id.* at 226.

39. A death threat is, by general agreement, a traumatic event. *See* AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 424 (4th ed. 1994). "Perhaps the biggest misunderstanding about trauma is the emphasis on the direct damage or injury caused by traumatic events. The more important impact on life is caused by trauma's ability to disconnect a person from his or her resourceful states of being." ROBERT SCHWARZ, *TOOLS FOR TRANSFORMING TRAUMA* 21 (2000). I am indebted to Taimie Bryant for introducing me to these sources.

Legal sanctions against such torts as libel and invasion of privacy are also concerned with protecting plaintiffs' autonomy, dignity, and selfhood. *See, e.g.*, Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 707-19 (1986); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 962-68 (1989). Dissenting in the *Planned Parenthood* case, Judge Marsha Berzon cites *New York Times Co. v. Sullivan* and suggests an analogy between the harms of defamation and those of a death threat. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1103-04 (9th Cir. 2002) (en banc) (Berzon, J., dissenting) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 279 (1964)). There is much to admire in her dissent, but this analogy seems overstated. Some defamation can be seriously harmful. Yet, the harms *typically* resulting from a credible death threat are more grave—vastly more grave—than the harms *typically* caused by libel of a public figure. Incidentally, the Supreme Court did not think that the *Times*'s alleged libel harmed Sullivan at all. *See New York Times*, 376 U.S. at 288-92. Sullivan's lawsuit, among its other uses, was a bid for the status of local hero.

40. JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* 130 (1986); *see also* GEORGE H. MEAD, *MIND, SELF, AND SOCIETY* (1934).

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In the language of today's constitutional law, prevention of so serious a deformation of one's sense of self must be an interest compelling enough to justify the state's punishing of death threats. To express this concern for protecting the core of an individual's sense of self is to remind ourselves that the threats exception has its own liberating purpose: to free the putative targets of threats to go about their own lives.⁴¹ Thus we can see that the "fourth" reason for the threats exception—protecting people against coercion that forces them to act against their will⁴²—is interlaced with the basic concern for protecting people from fear.⁴³ In one useful perspective, a death threat is a power grab. As the law of blackmail recognizes,⁴⁴ the speaker who issues a threat asserts power over the target, and the threat, if taken seriously, diminishes the power of the target:

[The target of a threat] must include, among the costs, the cost of a loss of control to himself. . . .

[Furthermore,] a successful threat not only accomplishes the threatener's specific objective, but also demonstrates vividly his mastery. In a word, using threats can be quite satisfying. If nothing else, a threat, ultimately successful or not, usually generates an immediate response from which the threatener derives a sense of initiative and influence.⁴⁵

In sum, a serious threat of death or great physical harm, by "reinforc[ing] a superior-subordinate relationship," undercuts the target's sense of self and provides the threatener with "a sense of his own power."⁴⁶

Constitutional law is not indifferent to questions of power and freedom.⁴⁷ By definition, the threats exception to the First Amendment is deployed only when government, by law, has taken an active role in adjusting the power relations among private persons, as they may have been affected by threats.⁴⁸

41. The self is not a thing; it is an interpretive "configuring of personal events into a historical unity which includes not only what one has been but also anticipations of what one will be." DONALD E. POLKINGHORNE, *NARRATIVE KNOWING AND THE HUMAN SCIENCES* 150 (1988). What could be more disruptive of the self than a death threat?

42. *See supra* text accompanying note 8.

43. Robert Post suggests that this "fourth" harm from a threat might also be folded into the second: "The disruption of [threatened] violence is the enthrallment of the will." E-mail from Robert C. Post, Professor, Yale Law School, to Kenneth L. Karst, Professor, UCLA School of Law (Jan. 2, 2005) (on file with author).

44. *See, e.g.*, C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 60-65 (1989).

45. THOMAS W. MILBURN & KENNETH H. WATMAN, *ON THE NATURE OF THREAT: A SOCIAL PSYCHOLOGICAL ANALYSIS* 39 (1981).

46. *Id.* at 100.

47. I concede that, when power relations are defined as "private," our constitutional law often shows a distressing degree of indifference. That, however, is another question for another day. *See generally* Kenneth L. Karst, *Sources of Status-Harm and Group Disadvantage in Private Behavior*, in *ISSUES IN LEGAL SCHOLARSHIP: THE ORIGINS AND FATE OF ANTISUBORDINATION THEORY* (Robert C. Post ed., 2002), available at <http://bepress.com/ils/iss2/art4/> (last visited Feb. 25, 2006).

48. The state is very much involved when a statute penalizes threats; the First

What needs emphasis here is that a court's decision to deploy the exception is not merely a limit on a liberty, but a crucial defense of the target's liberty.

II. THE CATEGORY AS AN UNCERTAIN TEMPLATE

In the common law tradition, as Holmes described it a century ago, the law's judge-made categories normally come into being gradually as lawyers and judges come to see patterns in decisions that previously were made with only limited recognition of their relation to one another:

It seems to me well to remember that men begin with no theory at all, and with no such generalization as contract. They begin with particular cases, and even when they have generalized they are often a long way from the final generalizations of a later time.⁴⁹

Translating this account in time and doctrinal place, one might insert the word "threat" in place of "contract," but, as we have seen, to do so would utterly mischaracterize what has happened. The Supreme Court in 1969 simply invented the category "threats" and left the term indeterminate. So, one part of Holmes's account does describe the development of the threats exception: his comment about beginning "with no theory at all." For several decades the lower courts sought, on their own, to define the category's reach. During this time, the Supreme Court referred on occasion to the threats exception,⁵⁰ but it was not until 2003, and *Virginia v. Black*, that the Court directly applied the exception to reject a First Amendment claim.⁵¹

The category of speech known as "threats" is founded on common sense.⁵² Everyone has some intuitive sense of what a threat is, and it should come as no surprise that the lower courts have worked out an abstract definition that has a

Amendment enters the picture when the speaker faces punishment (or civil sanctions) under such a statute. Then the law's definition of a threat comes into issue, in two ways. First, does the utterance count as a threat, as defined by the statute? Second, does the utterance constitute a threat within the scope of the threats exception?

49. Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, Address Before the New York State Bar Association (1899), in *COLLECTED LEGAL PAPERS* 210, 218 (1920).

50. The first principal restatement of the threats exception came in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). For a discussion of *R.A.V.*, see *supra* text accompanying note 7. For casual reaffirmations of the exception, see *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 373 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994). The subject of threats appeared fleetingly in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), where the Court's holding did not decide whether the case was an appropriate occasion for applying the threats exception, but rested on different grounds: (1) the absence of any incitement to unlawful action that would satisfy the test in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and (2) the lack of evidence that the damages awarded by the state court reflected business losses resulting from alleged threats. For further discussion of *Claiborne*, see *infra* text accompanying notes 357-66.

51. See *supra* text accompanying note 11.

52. See Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 *VAND. L. REV.* 265, 288 (1981) (discussing "commonsense differences" among categories of utterances).

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fair measure of coherence. In the discussion that follows, I first set out the prevailing doctrines governing the threats exception and then sketch the facts of a number of real cases. Forming the current legal principles into a composite “jury instruction,” I invite the reader to be a juror, deciding in each case whether the defendant’s statements amount to a threat.

A. A Capsule Restatement of the Law of Threats and the First Amendment (So Far)

Doctrine first. Some aspects of the First Amendment law governing threats are, in the abstract, tolerably well established. For now, I simply list them.

The threats exception exists. Government can punish an expression of the speaker’s⁵³ intention to inflict physical harm on another identified person—the “target”—or on someone close to the target, for such a threat lies outside the protection of the First Amendment. The exception no doubt applies to some threats of serious nonphysical harms (“I’m going to burn down your house!”), but not to threats of public criticism or refusal to trade.⁵⁴

Some statements, literally expressing an intention to inflict serious harm, are unmistakably jokes, or otherwise not meant to be taken seriously, and do not fall within the threats exception.

In some cases where courts have held that a speaker has forfeited First Amendment protection by reason of the threats exception, a statute has prescribed punishment or civil liability only for speakers who act with the actual (“subjective”) intention⁵⁵ to cause the target to believe that he or she is in danger of harm to be inflicted by the speaker⁵⁶—as opposed to a benign intention to warn (“Watch out for that car!”). Irrespective of such a statute, as a

53. I use “speaker” to include persons who convey their messages by other means: writings, menacing gestures, cross-burnings targeted at individuals, and the like.

54. Laws punishing blackmail, however, are undoubtedly valid, although theorists justify them on many diverse bases. See KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 93-94 (1989); see also BAKER, *supra* note 44, at 60-65. Blackmail appears to be a speech category that has been embraced intuitively—perhaps because the profit motive is so ugly—with the search for justifications coming along later.

55. The statutes vary in their descriptions of the speaker’s required state of mind, employing intention, purpose, willfulness, or knowledge.

Blakey and Murray tell us that threat statutes are silent on the question of intent to threaten. See Blakey & Murray, *supra* note 7, at 1070. I defer to their well-known expertise in criminal law, but (a) the statute punishing telephone threats (“willfully”) and (b) Freedom of Access to Clinic Entrances (FACE), the law providing civil remedies for threats of force against clinic users (“intentionally”), include language that looks like such a requirement. See 18 U.S.C. §§ 248(a)(1)-(3), 844(e) (2006).

56. Where the threat suggests that harm may come from persons other than the speaker, the threats exception applies, at minimum, when those persons are co-conspirators or close associates of the speaker. The case law has not yet established such a showing as a necessary condition for invoking the threats exception, but seems likely to do so eventually. See *infra* text accompanying notes 252, 293.

matter of constitutional law, the threats exception to the First Amendment now appears to apply only to a speaker who has intended to threaten.⁵⁷

In addition to the requirement of an intention to intimidate, the threats exception requires that the statement be objectively threatening. It would be an intolerable intrusion on free speech to apply the threats exception to a message just because someone feels threatened by it. The First Amendment requires jurors and judges to make some evaluation of reasonable expectations. The formulas vary. One formula asks whether a reasonable speaker would expect the target to take the statement as a threat of serious harm. An alternative formula asks whether a reasonable target would interpret the statement as such a threat. In theory, either of these formulations is an “objective” standard. In other words, neither definition requires a showing of the speaker’s actual expectation, nor does it require a showing that the message actually put the target in fear.⁵⁸ Yet courts often do take account of the actual expectations of the speaker, or the target, or both. For instance, the target’s actual fear may be seen to illustrate that the message would reasonably be understood to be a threat. In the same vein, a speaker’s intent to threaten may also help to prove that the statement should be regarded as threatening.

Finally, speech that otherwise falls within the threats exception gains no First Amendment protection from a showing that the speaker does not intend to carry out the threat, or lacks the capability of doing so. Nor does application of the threats exception require a showing that harm to the target is, or appears to be, imminent.

Later, I shall suggest that the courts clarify the general principles I have just “restated,” adding a few more requirements for applying the threats exception—recognizing all the while the limitations on doctrine’s effectiveness in controlling decisions.

B. *Imagine You Are a Juror—Six Times*

In each of the following six cases, please imagine that you are a juror, asked to decide whether a speaker’s statement is or is not a threat. Assume, too, that the judge has given your jury this instruction:

A threat is a statement which a reasonable speaker should foresee would be interpreted, by those to whom the speaker communicates the message, to be a

57. The latter point is drawn from the Supreme Court’s definition of “threat” in *Virginia v. Black*, 538 U.S. 343, 359-60, 362-63 (2003). However, the Court did not specify whether it was speaking of intent in the sense of purpose or in the sense of knowledge or foreseeability that the communication would be taken as a threat.

Frederick Schauer expresses doubt that a specific intent to intimidate should be seen as a First Amendment requirement, but understands that *Virginia v. Black* assumes that it is. See Schauer, *supra* note 1, at 218-24.

58. A statute providing a civil remedy for intimidation would be unlikely to produce plaintiffs unless someone claimed to be intimidated.

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serious expression of intent to inflict bodily harm. The speaker need not intend to carry out the threat, but must intend to threaten some person indicated by the message.⁵⁹

Please re-read the instruction *after* you have read the summary of evidence in each of the following real cases. Then consider what the speaker's statement means: Is it a threat, or not?

1. *All for Love*⁶⁰

After making a single appearance before U.S. Magistrate Judge Celeste Bremer, Odell Whitfield wrote more than sixty letters to her over a seven-year period. In these letters Whitfield made clear that he desired a sexual relationship with the judge. Some of the letters included poems containing explicit sexual references, and one of the letters included two photocopied pages from a romance novel that described a forcible sexual encounter. Whitfield had phoned Judge Bremer's home, and on one occasion he traveled to Des Moines in an attempt to meet with her. The judge knew that Whitfield had previously committed a felony and at least once had carried a gun. He was charged under Iowa law with ten counts of harassment, but the county attorney and Whitfield agreed that if Whitfield did not write or contact Judge Bremer for a year, the state charges would be dismissed. Whitfield complied, and the charges were dismissed. Seven months later, Whitfield mailed a packet of letters to Judge Bremer. In one of them he said his love for Judge Bremer was "driving [him] insane" and that it was difficult to love someone "you can't see or touch or hug and kiss when you want to."⁶¹ He also wrote, "You are my most desired goal, and I will Stop [sic] at nothing to reach you."⁶² On the basis of these last letters, Whitfield was prosecuted for the federal crime of mailing a threat to a federal judge. Judge Bremer testified that she considered the letters to threaten a sexual assault.

Please review the model injury instruction. Did Whitfield's last set of letters constitute a threat?

2. *Trash the President*⁶³

Zebuel Hanna prepared, photocopied, and distributed four documents

59. This instruction is a composite of statements from the Ninth Circuit's *Planned Parenthood* decision and the Supreme Court's opinion in *Virginia v. Black*. It is a fair representative of instructions that have earned the approval of appellate courts.

60. The following facts were adapted from *United States v. Whitfield*, 31 F.3d 747, 748-49 (8th Cir. 1994).

61. *Id.* at 748.

62. *Id.*

63. The following facts were adapted from *United States v. Hanna*, 293 F.3d 1080, 1081-83 (9th Cir. 2002).

containing various combinations of handwritten words, drawings, photographs, and passages from the Bible. Hanna mailed or hand-delivered the letters to neighbors, businesses, and state and local government offices throughout the United States. Although the documents referred to President Bill Clinton, Hanna did not send any of them to the President, the President's aides, or any federal agency. The documents were:

- A paper containing the words "KILL THE BEAST"⁶⁴ in handwritten capitals at the top of the page, along with some handwritten comments and two stick-figure drawings representing the President and Hillary Rodham Clinton. Above the President figure was the number 666 (associated by some people with the Devil) and the name "willie jeffer jackal."⁶⁵
- A paper containing a dozen handwritten comments, several cut-out passages from the Bible, and a photograph of President Clinton at Justice Ruth Bader Ginsburg's swearing-in. Below the photograph was a handwritten comment: "17 little Angels Murdered by Beast Blythe and his 666 Molesters."⁶⁶ At the bottom of the page, the paper read: "William Jefferson Blythe 3rd, Mr. buzzard's feast, WANTED For MURDER, DEAD OR ALIVE."⁶⁷
- A paper containing the words "WANTED FOR MURDER"⁶⁸ in large bold capitals, taking up about a third of the page. An arrow connected the words "Beast Blythe" to the President's picture. Below the picture was printed: "WILLIAM JEFFERSON BLYTHE 3rd, alias Willie the Clinton, alias Rev. HIV 3rd AND His 666 MOLESTERS, DEAD OR ALIVE."⁶⁹
- A paper containing these words in handwriting along the top: "All filth herein will be hanged by the feet and their throat slit."⁷⁰ Below was a list of thirty names, including "sweet willie Blythe,"⁷¹ and other handwritten comments. The words were written on the face of a formal court document, entitled "Petition for Court Ordered Involuntary Admission" (evidently filed previously to commit Hanna for psychiatric evaluation).

Hanna was prosecuted for the federal crime of making threats against the President.

Please review the model injury instruction. Did Hanna's documents

64. *Id.* at 1082.

65. *Id.* at 1083.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

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constitute a threat?

3. *Echoes of Columbine*⁷²

The shooting massacre at Columbine High School in Jefferson County, Colorado happened in April 1999. In March 2001, at Mount Baker Middle School in King County, Washington, eighth-grade student K.J. was sitting next to Martin Kilborn in their advanced reading class; it was the last day of the class. The two started talking about books they had been reading. Kilborn had with him a book showing military men and guns on the cover. He turned to K.J., and, half smiling, said to her, “I’m going to bring a gun to school tomorrow and shoot everyone and start with you.”⁷³ Then he began giggling, and said, “[M]aybe not you first.” K.J. was surprised; she said, “[Y]eah, *right*,” and turned away.⁷⁴ She told a friend about Kilborn’s statement, but did not tell the teacher. She thought Kilborn might be joking—they had been joking together in their previous class—but she was not sure. She went home, and the more she thought about the incident, the more she became afraid Kilborn was serious. She did not know Kilborn to be a scary person; he had never done anything like this before. K.J. told her parents about the incident, and her mother phoned 911.

Kilborn was arrested and charged under state law with “felony harassment,” in that he knowingly threatened to cause bodily injury to K.J. In court, K.J. testified that she did not feel scared when Kilborn spoke—just surprised. They had known each other two years and had never had a fight or disagreement. Kilborn always treated her nicely. He would make jokes on occasion, and the other students, including K.J., laughed at them. She said, “[H]e was acting kind of like he was joking, but I didn’t know if he was joking or not.”⁷⁵ She added that, because a school rule prohibited bringing a gun to school—or even talking about bringing a gun to school—she thought “he must have been serious.”⁷⁶ Kilborn testified that he was only joking.

Please review the model injury instruction. Did Kilborn’s statement constitute a threat?

72. The following facts are adapted from *State v. Kilburn*, 84 P.3d 1215, 1217-18, 1224 (Wash. 2004). The opinions in this case consistently spell the defendant’s name as Kilborn. In the caption of the case, however, his name is written as Kilburn.

73. *Id.* at 1217.

74. *Id.*

75. *Id.* at 1224.

76. *Id.*

4. *The Purloined Letter*⁷⁷

J.M. (male) and K.G. (female) were students at Northwood Junior High School in Arkansas. They had been “going together” (seeing each other mostly at school and church) in their seventh-grade year, repeatedly “breaking up” and getting back together. At the end of that year, though, K.G. definitively told J.M. that she was breaking up with him because she was interested in another boy. Angry and frustrated, J.M. drafted “two violent, misogynistic, and obscenity laden rants”⁷⁸ that expressed his desire to molest, rape, and murder K.G. J.M. previously had adopted the persona of a “tough guy,” once implausibly telling K.G. that he was a member of the Bloods gang. He testified that, in response to the breakup with K.G., he was trying to write a rap lyric similar to those of Eminem and other tough-guy rap celebrities, but he found that his words would not fit any particular beat. Ultimately, he rewrote his words as letters, signing them both. He left the letters in his room at home, where he had written them.

About a month before the eighth-grade year was to begin, a friend, D.M., accidentally discovered one of the letters in J.M.’s room. Before D.M. could read the letter, J.M. snatched it from his hand. D.M. asked to see the letter, and J.M. showed it to him, but when D.M. asked for a copy, J.M. refused. D.M. apparently told K.G. about the letter, and she discussed it with J.M. in several telephone conversations. During these talks, J.M. did not threaten K.G. Eventually, J.M. admitted to her that he had written the letter and that it contained statements about killing her. In one of the conversations, K.G. asked J.M. if she could read the “songs” he had written, and J.M. refused. K.G. then enlisted D.M. to get the letter for her. D.M. spent a night at J.M.’s house, stole the letter without J.M.’s knowledge, and gave it to K.G. In gym class, K.G. read the letter in the presence of other students, one of whom told the campus security officer that K.G. had been threatened. The officer went to the gym, where he found K.G. crying. He investigated a bit further and reported the incident to the school administrators.

The local prosecutors declined to treat the case as a criminal matter. However, Northwood’s principal recommended that J.M. be suspended for the rest of the school year. On the appeal of J.M.’s parents, the school district’s director of student services recommended a one-semester suspension, during which J.M. could attend the district’s alternate school. When his parents appealed to the school board, members of the board upbraided them at the hearing for allowing J.M. to listen to rap recordings. The board “expelled” J.M. from both schools for the remainder of his entire eighth-grade year. J.M., through his mother, then sued in federal district court, claiming that the board

77. The following facts are adapted from *Doe v. Pulaski County Special School District*, 306 F.3d 616, 619-20 (8th Cir. 2002).

78. *Id.* at 619.

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had violated his First Amendment rights and that he was entitled to reinstatement at Northwood. Meanwhile, K.G. continued to participate in youth group activities with J.M. after she had read his letter. When he apologized for his conduct, the two hugged, and he hugged her mother.

Please review the model injury instruction. Did J.M.'s letter constitute a threat?

5. *Reach out and Touch Someone*⁷⁹

James Viefhaus and his fiancée formed a two-member organization in Tulsa, called the National Socialist Alliance of Oklahoma, to promote white racial superiority and to advocate the destruction of, among others, “blacks, Jews, homosexuals, and federal law enforcement officials.”⁸⁰ They maintained a telephone hotline under the listing “Aryan Intelligence Network.” One who phoned the hotline would hear an answering machine message in which Viefhaus explained the Alliance’s views. On December 8, 1996, one such message stated, in part:

It is time for all white people to realize that the current system of government is beyond repair. Our revolution is not about fixing this system, but to absolutely destroy it, by any means necessary. Only then can we build an Aryan society for our children and grandchildren. . . . As in the case of the bombing of the Murrah Federal Building [in Oklahoma City, April 1995], the revolutionary understands and accepts no matter how painful that innocent people must be considered expendable if necessary, in order to successfully complete any action This is a war . . . racial . . . holy war. As an added ultimatum to those of you who are still unwilling to pick up a sword, a letter from a high ranking revolutionary commander has been written and received demanding that action be taken against the government by all white warriors by December 15th and if this action is not taken, bombs will be activated in 15 pre-selected major U.S. cities. That means December 15, 1996 In [other] words, this war is going to start with or without you.⁸¹

A journalist, who had been covering white supremacy groups and the militia movement, phoned the hotline, heard this message, and called the FBI. On December 13, 1996, FBI agents searched Viefhaus’s house. They seized literature espousing hate and violence, Nazi propaganda, a cache of weapons, books on bomb making, chemicals and other materials that could be made into pipe bombs, and a list of facilities in the Tulsa area occupied by Jewish, Muslim, and Native American groups, as well as federal agencies. Viefhaus was indicted on several counts, including the use of a telephone to transmit a bomb threat. He moved to dismiss that count on the ground that the phone message did not represent a “true threat” and was protected speech.

79. The following facts are adapted from *United States v. Viefhaus*, 168 F.3d 392, 394-95 (10th Cir. 1999).

80. *Id.* at 394.

81. *Id.*

Please review the model injury instruction. Did Viefhaus's hotline message constitute a threat?

6. *The Silver Bullets*⁸²

Kevan Fulmer complained to the Office of the United States Trustee that his brother and his former father-in-law had failed to disclose assets in bankruptcy and had committed pension fraud and income tax fraud. The complaint was referred to Richard Egan, an FBI agent. When Egan met with Fulmer, Fulmer repeated his charges in general terms, calling his brother and the former father-in-law "vicious" people who had "used the courts to keep him away from his family."⁸³ Fulmer kept steering discussion to his strained relationship with his family. Egan described Fulmer's manner as "polite," "articulate," and "tense."⁸⁴ For three months, Fulmer contacted Egan every seven to ten days, delivered documents to Egan's office, and stopped by to ask about the investigation. Fulmer sent letters and faxes to Egan and left messages on Egan's telephone answering machine. All the while, Fulmer continued to talk about his poor relationship with his family. Egan interviewed the two men whom Fulmer had implicated and reviewed documents relating to the bankruptcy. He then consulted with an Assistant U.S. Attorney. The U.S. Attorney's office told Egan that there was insufficient evidence to justify prosecution, and Egan called Fulmer to pass on news of the decision. Fulmer protested, said "goodbye," and hung up the phone. Three months later, Fulmer left the following voicemail message at Egan's office:

Hi, Dick, Kevan Fulmer. Hope things are well, hope you had an enjoyable Easter and all the other holidays since I've spoken with you last. I want you to look something up. It's known as misprision. Just think of it in terms of misprision of a felony. Hope all is well. The silver bullets are coming. I'll talk to you. Enjoy the intriguing unraveling of what I said to you. Talk to you, Dick. It's been a pleasure. Take care.⁸⁵

Egan later testified that he was "shocked" by the message, which he found "chilling" and "scary," coming just a week after the bombing of the Murrah Federal Building in Oklahoma City.⁸⁶ He had never heard the term "silver bullets" before, and he believed it indicated a threat. His supervisor testified that Egan appeared "clearly upset, concerned, [and] agitated."⁸⁷ Egan immediately reported the matter to the U.S. Attorney's office, and three days later, Fulmer was indicted for threatening a federal agent. At his trial, Fulmer

82. The following facts are adapted from *United States v. Fulmer*, 108 F.3d 1486, 1489-90 (1st Cir. 1997).

83. *Id.* at 1489.

84. *Id.*

85. *Id.* at 1490.

86. *Id.*

87. *Id.*

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presented two witnesses. First, a lawyer and former federal investigator testified that he had heard Fulmer use the term “silver bullets” to describe “a clear-cut simple violation of law.”⁸⁸ He said Fulmer had used the term to describe specific evidence, including an \$8200 check from a bankruptcy estate that never reached its intended recipient. Second, a man who had known Fulmer for more than twenty years testified that he had heard Fulmer use the term “silver bullets” to mean “information that he was going to provide to banks proving the illegality” of some of his brother’s transactions.⁸⁹

Please review the model injury instruction. Did Fulmer’s phone message constitute a threat?

C. *Circumstances Alter Cases—and Categories*

You will have noticed that the sample jury instruction, although typical, is not exactly self-applying. I have offered the six sample cases to highlight some of the difficulty in deciding whether a statement deserves to be called a threat, and thus deprived of First Amendment protection. The difficulty plagues both jurors and judges, because the existence, or not, of a threat is at once a question about what happened and a question of constitutional fact. In both of those inquiries, there is first the matter of deciding what words the speaker used⁹⁰ and then an evaluative determination of whether the words, taken in context,⁹¹ carry the meaning of a threat of serious harm. After the jury has made those two determinations, the judges become involved. The trial judge, and appellate judges on review, are supposed to give great deference to the jury’s answer to the first question. They must scrutinize the record closely, making independent decisions on the second question, asking whether the evidence is sufficient to demonstrate that a statement should be assigned a meaning that has crossed the constitutional line dividing protected speech from unprotected speech.⁹²

Let us look at the cases again, one by one, taking particular note of their thorny aspects and considering the lessons they teach about threats as a category of First Amendment doctrine. Some of these lessons emerge from the courts’ decisions; others emerge from the facts. Let us remember, too, that a lesson can be useful even when it raises a question.

The first case, “All for Love,” illustrates the centrality of intention in the evaluation of an alleged threat. A threat is, by definition, a statement that

88. *Id.*

89. *Id.*

90. Or, in some cases, nonverbal communication—for example, burning a cross in someone’s yard.

91. The context can be immediate—for example, the inflection, or tone of voice conveying a spoken statement. Or, it can reach into the past—for example, Whitfield’s previous letters to Judge Bremer.

92. *See infra* text accompanying note 152.

expresses the speaker's intention to harm the target.⁹³ Beyond this issue of the assignment of a threatening meaning to a statement, there is the issue of the speaker's intent to threaten. The two questions are analytically separate, even though they seem likely to blur together in the minds of the jurors and judges who must decide whether a statement falls within the threats exception. The *Whitfield* case invites us to consider both of these aspects of intentionality. First, what meanings should be assigned to Whitfield's final letters to Judge Bremer—the messages for which he was prosecuted? This question has at least three applications: the selection of meanings that were understood by Whitfield, by Judge Bremer, and by the adjudicators (jury and judges).

Consider first the meanings of those statements in the view of Whitfield. Nothing in the letters' texts explicitly stated an intent to inflict any kind of harm on Judge Bremer. Probably he had not stopped to think that his touching or hugging or kissing her against her will would be seen as such a harm. When he sent his final letters, he might not have recalled that, some years back, he had sent her the novelist's description of a forced sexual encounter. On the other hand, in Judge Bremer's view, the meanings were ominous. "I will Stop at nothing" must have been especially unsettling in the context of Whitfield's long course of obsessive behavior. One can easily imagine that, if Whitfield were to "reach" Judge Bremer, approaching her physically, he might not stop with a handshake. Unless protected by a bodyguard, the judge might well suffer physical contact that she considered revolting, or worse. And—who knows? Whitfield's demonstrated obsession might turn angry or violent in the face of the judge's negative reactions.

The court in *Whitfield* said the case should go to the jury if "a reasonable recipient, familiar with the context" of the letters would view them as a threat.⁹⁴ But even if the trial judge were to follow my sample instruction, telling the jury to consider the expectations of a "reasonable speaker" about the likely understanding of a recipient, it is hard to imagine how any juror could avoid some identification with the person who was the target of an alleged threat. When you decided, in your capacity as juror-for-the-moment, did you put yourself in Judge Bremer's place, thinking about her fears and asking whether they were justified? Do you not agree with me that Judge Bremer would not be overreacting if, on reading the last batch of letters, she immediately suffered the physical harms and psychological shock associated with the fear that Whitfield might attack her—maybe even kill her? Furthermore, Whitfield was still at large. So, Judge Bremer could look forward to prolonged anxiety that would seriously disrupt her life and sense of self. This case confirms how threats are an intuitive category for exclusion from the First Amendment's protection; everyone can readily understand how threats produce

93. The speaker need not intend to carry out this expressed intention.

94. *United States v. Whitfield*, 31 F.3d 747, 749 (8th Cir. 1994).

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not only immediate fear, but also long-term “learned expectancies”⁹⁵ of serious harm. We have all experienced some sort of fear, and we identify readily with the emotion. Thus, one danger at the initial fact-finding stage is that a pattern of emotional identifications with the targets of speech, combined with the unavoidable imprecision of the category “threat,” may risk the oversuppression of speech.⁹⁶

In the *Whitfield* case, the jury’s conclusion not surprisingly paralleled that of Judge Bremer; they found Whitfield guilty, and the federal district judge sentenced him to twenty-seven months of imprisonment and three years of supervised release. On appeal, the Eighth Circuit said, “We will reverse only if no reasonable jury could have concluded beyond a reasonable doubt that the defendant is guilty of the charged offense.”⁹⁷ The court went on to say that, under the “totality of the circumstances” extending back more than seven years, Judge Bremer could reasonably interpret the final set of letters as a threat of sexual assault, and the jury could, within the bounds of reason, give the letters the same interpretation. The judgment was affirmed in an opinion just over two pages in length.

The relevant meanings of Whitfield’s letters, then, were to be assigned not only by reading their text, but also by reference to their context. Meaning generally flows from acculturation—indeed, one definition of culture is the assignment of meaning to behavior, including words.⁹⁸ Part of the relevant cultural context is generalized: patterns of male-female relations, or the vocabulary available for a love letter. But, *Lesson 1a*, exemplified by *Whitfield*, is that the most important feature of the context of an alleged threat is specific to the acculturating experiences of the speaker and the target. The intentions expressed in Whitfield’s final set of letters—the meanings to be assigned to them for purposes of this case—are properly understood in light of the persistent and unwanted communications he sent to Judge Bremer in the years before the state made him stop. Judge Bremer’s fears were not idle imaginings; they had ample basis. Whitfield might not have intended for her to feel threatened. But surely a reasonable speaker in his position should have known that his letters, following his seven-year history of compulsive harassment, would likely be understood as a threat of sexual assault.

Now we face a question for the judges who review the jury’s verdict: Should this state of mind—a presumed knowledge that the target of the

95. See *supra* text accompanying note 22.

96. On intuitive categories, see *supra* note 52 and accompanying text. For a discussion of the risks of oversuppression when First Amendment categories are indeterminate, see Schauer, *supra* note 52, at 290.

97. *Whitfield*, 31 F.3d at 749. This degree of deference seems excessive in a First Amendment case; the trial judge and the appellate judges should review the evidence independently to establish that the speaker’s statement was an unprotected threat.

98. See generally JEROME BRUNER, *ACTS OF MEANING* (1990); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* (1973).

message would likely be intimidated—satisfy the constitutional definition of a proscribable threat? The Supreme Court’s definition of “threat” in *Virginia v. Black* demands a showing of intent to threaten,⁹⁹ a term that might refer to the speaker’s *purpose* to cause the target to fear a physical assault by the speaker. Alternatively, the intent-to-threaten requirement might refer to the speaker’s *knowledge*—an intent to communicate a message he or she knows or has good reason to know will be understood to indicate the speaker’s intent to assault the target.¹⁰⁰ The *Whitfield* case was decided nine years before *Black*, and the Eighth Circuit’s standard—“whether a reasonable person would feel threatened”—did not require the jury to determine whether Whitfield had intended to intimidate Judge Bremer.¹⁰¹ If similar facts were to arise today, with a jury instructed under today’s prevailing “reasonable speaker” standard, would the Supreme Court reverse the conviction, or clarify that “intent to intimidate” includes not only Whitfield’s actual purpose, but also his presumed knowledge that the statement would be understood as intimidating?¹⁰² *Lesson 1b* of *Whitfield* is that the lower courts could use some further guidance from the Supreme Court on this question.

If and when the Court gives an answer in a case such as *Whitfield*,¹⁰³ some Justices might seek to articulate doctrine designed to restrict the reach of the threats exception in future cases. Other Justices, answering the same question, might be more focused on reaching a just result in the case at hand—in my view, nudging the Court toward upholding the conviction.¹⁰⁴ The legal standards governing the threats exception are, inevitably, open to interpretations influenced by jurors’ and judges’ generalized sense of justice in the circumstances before them. Their conclusions about the speaker’s intention to intimidate, and about the meaning they assign to a communication, are supposed to take the communication’s context into account—an abstract proposition that has found no dissent, either from judges or from

99. 538 U.S. 343, 360 (2003) (directing that a threat has “the intent of placing the victim in fear of bodily harm or death”).

100. The facts of *Black*—a cross-burning in a neighbor’s yard—suggested purposive intimidation and thus did not require the Court to consider a distinction between the two kinds of intention.

101. 31 F.3d at 749.

102. My preference is for including not just purpose but also the latter form of intent, founded on the speaker’s knowledge that the message will be seen as a threat. Jennifer Rothman would require a showing that the speaker “purposely, knowingly, or recklessly” made an intimidating statement. *See* Rothman, *supra* note 8, at 333-34. As Eugene Volokh has shown in another context, “knowledge” and “intent” requirements tend to blur together in practical application, and to be hard to distinguish in theoretical justification. *See* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1182-92 (2005).

103. Imagining this case is pure fantasy. If anything is clear from the materials discussed in this Article, it is the persistent and sharp variation of factual settings from one case to the next.

104. My guess is that the Court would uphold the conviction, but—like the imagined case—this is conjecture.

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commentators. *Whitfield* illustrates the strong influence of so rich and complex a context on judicial decision. This influence seems inevitable, and yet it invites criticism because it gives jurors and judges discretion to read speech out of the First Amendment.¹⁰⁵

A prominent theme of First Amendment doctrine emphasizes the effort to rein in the discretion of officials when regulating speech through rules and broad categorizations.¹⁰⁶ The threats exception, however, offers no escape from the central question of “fact”: the meaning that is properly assigned to a speaker’s communication. The assignment of meaning is typically bound up with its cultural context, which frequently extends far beyond the speaker’s literal words. At a trial, when counsel offer evidence about the speaker’s words and their context, they do so with an eye on the legal standard that defines a threat. Here, as everywhere in the legal system, “[t]he legal representation of fact is normative from the start.”¹⁰⁷ From the start, yes. But at the conclusion—if *Whitfield* be taken as an example—the norms are themselves fact-bound. To be more explicit: the general legal standard defining “threat”—which, in theory, is supposed to dictate the decision—is effectively created, case by case, in its application to specific situations.

With the open texture of the threats exception in mind, let us turn to the second case, “Trash the President.” What did Hanna’s four documents mean to him or to a reasonable reader? Did they express an intention to harm President Clinton? Indications might be found in (1) his specific reference to killing the President; (2) his references to the President as a murderer, arguably implying that he deserves the death penalty; (3) his seemingly strong desire that the President be killed; (4) his Satanic references, combined with an apparent religious foundation for his beliefs and desires; and (5) his listing of the President’s name among those who, in some unspecified way, would have “their throat slit.”¹⁰⁸ Secret Service agents and local police officers testified that they believed Hanna’s documents were death threats against President Clinton. The jury found Hanna guilty of making threats against the President, and the trial court entered a conviction. On appeal, the Ninth Circuit stated by way of dictum that the evidence warranted submission of the case to the jury: “[A] jury could conclude that a reasonable person in Hanna’s position would foresee that such statements would be perceived as threats by the recipients of the statements.”¹⁰⁹ However, because the law enforcement officials had been allowed to state their opinions that Hanna’s documents constituted threats, the

105. See, e.g., Blakey & Murray, *supra* note 7, at 875-90, 1064-65; Gey, *supra* note 1, at 1343-45.

106. For just one example, schemes for licensing speech must be confined to fairly precise standards that do not allow officials to impose their own preferences on the decision to grant or deny a license. See, e.g., Lovell v. Griffin, 303 U.S. 444 (1938).

107. GEERTZ, *supra* note 5, at 174.

108. United States v. Hanna, 293 F.3d 1080, 1083 (9th Cir. 2002).

109. *Id.* at 1088.

court reversed the conviction and remanded for a new trial. The key question—whether someone in Hanna’s situation would realize that his communications would be perceived by recipients as a threat—was one to be determined “from the perspective of an average, reasonable person”; the introduction of “expert” testimony on that question was a serious error, prejudicing the jury’s deliberations.¹¹⁰ Still, in concluding that the evidence sufficed to submit the question to the jury, the court drew its own conclusion about the meaning of Hanna’s documents—that is, a reasonable jury could consider them a threat on the President’s life.¹¹¹

The lack of an explicit death threat, then, was not enough to displace the court’s finding of a threatening meaning in Hanna’s documents. Nor was that assignment of meaning displaced by the failure of those documents to state specifically that Hanna himself would do the killing. Nor did Hanna’s failure to communicate his documents to the President, or anyone close to the President, make a difference to this court. By way of further dictum, the court said that, in the case of a threat against the President, a specific intent to threaten need not be shown; the threats exception justifies criminal prosecution when a reasonable speaker should have foreseen that a recipient would understand the message as a threat.¹¹² The decision antedates *Virginia v. Black*,¹¹³ but, even after that decision, threats against the President may be considered a special category. It did not seem to matter to the court whether President Clinton had or had not heard about these writings or suffered the initial and ongoing harms common in cases of fear.¹¹⁴ *Lesson 2a* of *Hanna*, then, is that the factual element of the President as putative target seems to produce a mild judicial inclination to broaden the reach of the threats exception. If Hanna’s communications had been focused on some other person, of course, he might not have been prosecuted. In such a case, if the jury were to convict him of a threat under today’s law, the trial judge, and the appellate court, would need to consider the sufficiency of evidence of an intent to threaten—that is, the sufficiency of the connection between the speaker and the resulting harm.

All the foregoing, however, lies in the realm of dictum. What the court decided was that Hanna’s conviction had been tainted by the testimony of the law enforcement officers that they believed Hanna’s messages were threats

110. *Id.* at 1087.

111. The court of appeals also noted that a reviewing court must make its own determination of constitutional fact in a case like Hanna’s—that is, the question whether the evidence met the constitutional definition of “threat.” *Id.* at 1088. However, given the error in admitting expert testimony on the key question, the court would not address that issue.

112. *Id.* at 1084.

113. On the *Black* opinion’s emphasis on intention to threaten, see *supra* note 57 and accompanying text.

114. Many courts have referred to the “disruption” element (mobilization of the Secret Service, etc.) when explaining the harms caused by threats against the President. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992); *Rogers v. United States*, 422 U.S. 35, 46-47 (1975) (Marshall, J., concurring); *United States v. Kosma*, 951 F.2d 549, 556 (3d Cir. 1991).

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against the President. The court's decision was undoubtedly correct. *Lesson 2b* is that, in cases where the threats exception is invoked, the messages alleged to be threats typically do not have some fixed meaning that a purported "expert" on threats could identify. Rather, what is sought are "vernacular characterizations" of the messages;¹¹⁵ the relevant meaning is to be assigned by "average, reasonable" persons—that is, by the jurors. Although some of the Secret Service agents might have had previous experience with wacky people who might like to be seen as would-be assassins, Hanna had developed his meanings from his own life experience. President Clinton, the putative target, had not expressed his understanding of the words and may not have heard of Hanna or his messages. So, on a retrial, the jurors—without hearing the opinions of "experts"—would have to make their assignment of meaning mainly by reference to Hanna's literal words: What would a reasonable speaker expect a recipient to understand? After receiving proper instructions on the requirements of an intent to threaten and some substantial likelihood that the messages would reach the President, a jury might reasonably find that Hanna had communicated a threat.

In the third case, "Echoes of Columbine," Kilborn was convicted of felony harassment by a juvenile court judge sitting without a jury. The decision was based on Kilborn's statement to K.J. in the classroom. Before the trial, the deputy prosecutor had offered a "deferred disposition," but Kilborn's lawyer rejected the offer. After the trial and the judge's decision, the deputy prosecutor renewed the offer.¹¹⁶ The judge said that a deferral of the hearing could not be authorized after adjudication. She went on: "[Kilborn] has now got a felony: there is nothing I can do about it. This should have been resolved in some other way prior to trial, and it's just—it's a tragedy that it wasn't."¹¹⁷

The judge did not impose on Kilborn any sanction of confinement, supervision, or community service. All she imposed on him was a \$100 "victim penalty assessment,"¹¹⁸ not an ordinary sentence for a felony conviction. Taking the case up on discretionary review, the Supreme Court of Washington reversed, concluding that the evidence was insufficient to establish a threatening meaning for Kilborn's statement. The majority insisted that it was *not* making a finding that Kilborn had been joking. Rather, said the majority, it had applied the "objective standard" of whether a reasonable person in Kilborn's position would see that his statements, threatening in form, would be taken seriously.¹¹⁹ The decision was 4-3, with the dissenters arguing for deference to the findings of the trial judge.

Did Kilborn really threaten to shoot K.J.? What meaning should be

115. GEERTZ, *supra* note 5, at 215.

116. *State v. Kilburn*, 84 P.3d 1215, 1218 (Wash. 2004).

117. *Id.*

118. *Id.*

119. *Id.* at 1221.

attributed by the decisionmakers to his statements? It is easy to see why K.J.'s mother dialed 911. Similarly, K.J. does not seem unreasonable for becoming more frightened hour by hour after the incident. The Columbine shootings had caused many teenagers—and surely the great majority of parents of teenagers—to be nervous. Kilborn might have been joking, but the setting was a poor choice for such gallows humor. He might well be expected to realize that K.J. could take him seriously and suffer serious emotional harms from her fear—although eighth-grade boys as a group are not noted for their sensitivity. This was a case in which the speaker's literal linguistic meaning, and even the meaning of his statement in context, might well have been seen as fitting the doctrinal formula for the threats exception—as the juvenile court judge found and the dissenting justices argued.

Then what explains the two decisions of the Washington Supreme Court majority—first, to take the case up for discretionary review and, second, to reverse the conviction? My hunch is that the trial judge herself invited this sequence of events. If Kilborn were serious—or even if he were joking, but had good reason to know K.J. would think he was serious—and so had committed a felony, why did she not impose real punishment? Why did she call her own decision a “tragedy”? Don't you imagine that the justices in the majority were asking themselves these questions? Even for one who doesn't have to serve time in prison, it is no small thing to have a felony on your resume. The severity of that label, as the trial judge said, would be a tragedy—but only if there were some strong reason for her to believe that the whole prosecution was a mistake. *Lesson 3* is that the doctrinal formula for the threats exception can be contorted because of a view of the facts—and of the justice of the case, considered as a whole—by those judges who have the last word. Here, the final result of the contortion seems tolerable, first, because it is speech-protective and, second, because there is strong reason to doubt that Kilborn intended to frighten K.J. and subject her to consequent harms.

The fourth case, “The Purloined Letter,” involved children of similar age. This was no felony prosecution; rather, the question was whether an eighth-grade boy could be suspended from school for a year. Following a bench trial,¹²⁰ the federal district judge concluded that J.M.¹²¹ had not issued a “true threat” and ordered the school board to reinstate him. On review, the Eighth Circuit, sitting en banc, reversed by a 6-4 vote.¹²² The majority, employing a “reasonable recipient” standard to define constitutionally unprotected threats, concluded that J.M. had, indeed, threatened K.G. in the letter that was stolen from J.M.'s bedroom. Accordingly, the school board's action in suspending him from school for the rest of the year was constitutional. The dissenting judges said J.M. had not intended to communicate the letter to K.G., the

120. This was a suit for an injunction, so there was no jury.

121. J.M. is called Josh in the court's opinions, and John Doe in the case's title.

122. *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616 (8th Cir. 2002).

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putative target, and argued that the meaning of the letter was altered by this context. Two features of the context seemed especially relevant to them. The first was a social milieu in which teenagers, especially boys, are egged on to express themselves aggressively by the constant streams of violence in rap lyrics, television, and video games. These varieties of media violence are not designed to be taken literally, and J.M. had kept his repulsive creation to himself. Second, K.G. had failed to alert a parent, a teacher, or any other adult about the letter before she read it to her friends; in the dissenters' view, this was not the behavior of one who had reason to think her life was in danger.¹²³

Comparing the two cases involving eighth graders, J.M.'s letter was more obnoxious, and more hurtful, than Kilborn's classroom reference to shooting up the school. K.G.'s later association with J.M., including hugging him, strongly suggests that she had not suffered either the initial harms of fear or the prolonged anxiety that usually follows a death threat. When the security officer found her crying, there is a considerable likelihood that the primary cause of her emotion was her awareness that J.M. was hostile to her—and, possibly, even a feeling that she had brought the hostility on herself. But in what sense was J.M.'s letter—communicated only in the privacy of his own bedroom, and then only to one other boy who talked him into showing it—a threat to K.G.? Perhaps, when J.M. wrote the lyric that would not scan, he secretly hoped K.G. would hear about it and come to appreciate the depth of his puppy-passion for her. But the connection between J.M.'s actions and the doctrine governing the threats exception is, at best, tenuous. *Lesson 4a*, illustrated by the facts of *Doe* but put to one side by the Eighth Circuit, is that there is no intent to threaten, and thus no occasion to apply the threats exception, in the absence of a showing that the speaker intended the message to reach the target.¹²⁴

The theme of school board discretion animated both the majority and dissenting opinion. The dissenters thought the school board “failed to exercise sound, reasonable, and legal decision-making in its review of J.M.'s conduct,”¹²⁵ because the board members jumped to the conclusion that he had issued a “terroristic threat,” without even considering whether he had written the letter in order to threaten anyone. In short, the dissenters were anxious to keep First Amendment doctrine pure, especially as a control over headstrong administrative overreaction. The majority agreed that the school board's action “was unnecessarily harsh,” but they wanted to keep the federal courts out of the business of micro-managing schools.¹²⁶ This was not a criminal prosecution. By the time of the Eighth Circuit's decision, J.M.'s suspension year had ended;

123. *Id.* at 631-32 (Heaney, J., dissenting).

124. Here I would define intent to include knowledge of a strong likelihood that the communication would reach the target. And here, too, a threat against the President may be a special case. *See supra* text preceding and accompanying note 158.

125. *Doe*, 306 F.3d at 633-34.

126. *Id.* at 627.

indeed, one issue the majority discussed was mootness.¹²⁷ Although J.M. does not seem to have communicated a threat in the constitutional sense, he did set in motion a ruckus in the school community when he let D.M. see his ugly literary effort. Even the penalty of suspension seems too severe for this conduct—which fails to meet the requirements of the threats exception and, after all, happened outside the school—but the suspension was nothing close to a felony conviction, and the majority could not bring itself to intrude on the school board’s autonomy. *Lesson 4b* goes beyond *Lesson 3*; it is that a generalized sense of the justice of the case can be so dominant that the doctrine governing the threats exception turns out to have little real influence on a decision. Yet, in *Doe*, the majority and dissent both argued at length from the premises of that doctrine.¹²⁸ In the argument and decision of future federal cases on the threats exception, no doubt we can expect assertions about First Amendment doctrine from attorneys and judges to be buttressed by selective quotations from the court’s opinion. We can hope that the Supreme Court’s intervening opinion in *Virginia v. Black*,¹²⁹ with its emphasis on a showing of intent to threaten, will warn later courts to avoid the Eighth Circuit’s error.

The fifth case, “Reach out and Touch Someone,” engenders little pity for the protagonist. The outgoing message on the Alliance’s answering machine was as pretentious as it was odious. After a jury found Viefhaus to be guilty, the federal district court convicted him of conspiracy to use a telephone to transmit a bomb threat and of the actual use of the phone for that purpose. On review, the Tenth Circuit disposed of his appeal in a little more than four pages. Having employed the phone machine to thump his chest, so to speak, Viefhaus meekly argued that the hotline message was merely “vulgar political speech.”¹³⁰ The court of appeals disagreed, calling his message a threat to bomb someone. It did so in reliance on his “ultimatum” assertion that “15 pre-selected major U.S. cities” would be bombed unless various unspecified actions were taken.¹³¹ The case law on the threats exception, summarized in our hypothesized jury instruction,¹³² refers to a threat to “some person indicated by the message”—the “target.” *Lesson 5a* is easy—so easy that, at last, we have a rule: when the message indicates no target in particular, there is no legitimate occasion for invoking the threats exception to the First Amendment.

In *Viefhaus*, no one was subjected to the initial harms accompanying fear of a death threat or to any subsequent anxieties. Viefhaus’s vague and general statement, standing alone, probably would not have been prosecuted as a

127. *Id.* at 620-21. The court properly held that the case was not moot.

128. Still, the passion of the dissent centers on the school board’s vindictive and “draconian” punishment. *Id.* at 635 (Heaney, J., dissenting). To verify this characterization of the dissent, see *id.* at 633-36.

129. See *supra* note 57 and accompanying text.

130. *United States v. Viefhaus*, 168 F.3d 392, 395 (10th Cir. 1999).

131. *Id.* at 394.

132. See *supra* text accompanying note 59.

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threat.¹³³ What energized this case—from the decision to prosecute to the appellate court’s affirmance of the conviction—was that the agents who searched Viefhaus’s home turned up weapons, bomb materials, and books on bomb making, along with Nazi propaganda and an apparent list of potential targets for bombing. True enough: this is one scary fellow, and putting him away is not an unappealing idea. But the charge before the Tenth Circuit on this appeal was not a conspiracy to detonate a bomb or even illegal possession of weapons;¹³⁴ it was the making of a telephone threat. The court of appeals closed its opinion with a reference to the materials found in the house, saying that they were relevant as part of the circumstances in which the phone message was communicated. The seized materials, said the court, showed that Viefhaus was “planning for a racial holy war.”¹³⁵ Not only did they help “establish that Viefhaus believed a ‘racial conflagration’ was on the horizon”; they also helped to prove “the sincerity of Viefhaus’ beliefs, as well as *the likely effect Viefhaus’ message would have on an objective listener . . .*”¹³⁶

Now, wait a minute. Before the FBI search, it was impossible for any listener (other than Viefhaus’s girlfriend) to listen to the phone message and interpret its content *in relation to the bomb materials the FBI later found*. But this experience of “informed” listening became real for the FBI agents—and then for the prosecutors, jurors, and trial judge. I can think of no evidence more likely to influence a juror’s determination of the meaning of Viefhaus’s phone message than the fruits of the agents’ search. The Tenth Circuit, applying an “abuse of discretion” test to the trial judge’s admission of evidence produced by the search, summarized its conclusion by saying that “[a]lthough admission of this evidence was harmful to Viefhaus, its probative value outweighed any prejudicial effect.”¹³⁷ Probative value? Bombs in the house help to prove that the speaker should know a reasonable listener would hear and interpret the hotline message as a threat? The doctrine of the threats exception was stretched in this case to the breaking point. This case reminds us of *Lesson 4*: the general factual setting, and the overall sense of justice in the case, undoubtedly influence jurors and judges alike. *Lesson 5b* adds an additional factor, one of no little concern: if the speaker is a bad actor of the highest degree, the decisionmakers’ judgment calls will incline against him. The most serious defect in *Viefhaus* was the court’s failure to see that the absence of a specified target removes any need for jurors or judges to make a judgment call.

We close with the final case, “The Silver Bullets.” Fulmer was convicted in

133. If the phone message were to be prosecuted as incitement, it would fail the “imminent” and “likely” harm test of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

134. He had been charged with the latter offense in another count, which was not at issue in this appeal.

135. *Viefhaus*, 168 F.3d at 398.

136. *Id.* (emphasis added).

137. *Id.* Besides, said the court, admitting the evidence would, at the most, be harmless error. *Id.*

federal district court, and sentenced to five months of imprisonment followed by two years of supervised release. On appeal, the First Circuit treated the question whether Fulmer had threatened Egan as a question of fact for a properly instructed jury.¹³⁸ The trial judge had rightly instructed the jury that a threat is a message that a reasonable speaker should foresee will be understood as a threat of bodily harm. The court of appeals followed the general pattern in saying that Egan's testimony about being fearful was relevant to what a reasonable speaker should have foreseen. Egan did suffer the emotional—even physical—harms that a death threat initially engenders, and—because of emotion's effect on long-term memory—he also suffered continuing anxiety. The court went on to say that a rational jury could find that Fulmer should reasonably have foreseen that Egan would interpret his “silver bullets” reference to carry the meaning of a threat, and could infer Fulmer's intent to threaten Egan from the surrounding circumstances.¹³⁹ This determination appears to be an instance of the tendency of a decisionmaker to adopt the perspective of the target in assigning meaning.

The First Circuit reversed Fulmer's conviction on quite a different ground: the district judge had improperly allowed the prosecution to introduce into evidence some real silver-colored bullets that Agent Egan—not the speaker, but the supposed target—had kept in a desk drawer in his office.¹⁴⁰ There was no suggestion that Fulmer even knew those bullets existed; their presentation in court could do nothing but prejudice the jury's determination of what Fulmer meant by his reference to “silver bullets.” Accordingly, the First Circuit remanded the case for a new trial. *Lesson 6a*, recalling *Lesson 2b*, reminds judges that their constitutional duty concerning the evidence is not merely one of independent examination after the jury reaches its verdict; the duty begins when the evidence is offered. *Lesson 6b*, highlighted by *Fulmer*, is a lesson for defense lawyers: if your client's statement includes an odd metaphor that has an arguably threatening sound, examine closely the source for the term—and then make sure that your client explains the source to the court and the jury.

The most serious problem with this case arose from the failure of defense counsel to develop the subject of the meaning that Fulmer had attached to the term “silver bullets.” Here we deal not with some “true” meaning of his message, but with his intent to threaten. One would hope that the new jury in *Fulmer* might have become acquainted with some fragments of media history. Readers who were radio listeners in the 1930s and 1940s will recognize “silver bullets” as a trademark of “The Lone Ranger,” a weekly half-hour drama of great popularity.¹⁴¹ The Lone Ranger was a masked man who rode the range of

138. *United States v. Fulmer*, 108 F.3d 1486, 1492 (1st Cir. 1997).

139. The “rational jury” standard is plainly insufficient, given the need for the judges to review the record independently to establish that the statement was threatening and that the speaker intended to threaten.

140. *Fulmer*, 108 F.3d at 1498-99.

141. I confirmed this assignment of meaning for my generation in a low-priced

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the Mutual Broadcasting System,¹⁴² doing private justice when official law enforcement was less than effective. The Lone Ranger put silver bullets in his gun to remind himself that life was precious and that shooting someone must be the very last resort. In fact, he did not kill. I still hear his voice: “You’re not hurt; I just shot the gun out of your hand.” He might leave a silver bullet at a scene, so that folks would know he had been there to set things right. Occasionally, too, he gave a silver bullet to a sheriff, who might otherwise assume that a man wearing a mask must be an outlaw. Moviegoers of the same era will also remember that a silver bullet was the essential means of killing a werewolf, thus restoring order to a threatened community.¹⁴³ Across a large swath of American popular culture, then, the metaphor “silver bullets” came to stand for justice. It would not be strange if Fulmer had heard the expression used—perhaps by his parents—in such a context and had used it in his phone message not to threaten Egan but to describe the evidence that he believed would prove his brother’s misconduct in the bankruptcy proceeding. Agent Egan, too, was of a recent generation—and so, apparently, were the jurors and every one of the judges who heard Fulmer’s case. Who *was* that masked man?

III. THREATS, FACTS, AND LAW

In his illuminating comparison of the relationship between fact and law in several legal systems, Clifford Geertz rightly says that any system of adjudication must engage in “the skeletonization of fact, the reduction of it to the genre capacities of the law”¹⁴⁴ For our present purposes, the relevant genre is “threats.” Geertz might have been (but, of course, was not) describing our six sample cases when he went on to say, “whatever it is that the law is after it is not the whole story.”¹⁴⁵ These cases, taken one by one and collectively, have given us a useful reminder that the only way you can produce a skeleton is to take the life out of the organism.

empirical test, asking my wife, “When you hear the words ‘silver bullets,’ what comes to mind?” She instantly replied, “The Lone Ranger.” I concede that a sociologist might not be content with a survey based on a sample of two, not selected at random.

142. The radio show began as a local show in Detroit in 1933. I learned this datum from my friend, the late Ted Robertson, who was the first to suggest Rossini’s overture to *William Tell* as the program’s theme music—although others later claimed credit. The Mutual Broadcasting System lasted from 1934 to 1999; from the beginning, “The Lone Ranger” was a major reason for the network’s success. In the years following World War II, the Lone Ranger, like Milton Berle and Jack Benny, made a successful transition from radio to television, reaching our children’s generation. But it was a new actor, with a new voice, and the pictures never matched a child’s imagination.

143. For an elaborate exposition of the 1941 movie, *The Wolf Man*, in relation to the Fulmer case, see Blakey & Murray, *supra* note 7, at 941 n.337. This movie is still shown from time to time—Halloween is one occasion—on late-night television. Today I give it two stars (“flawed; has moments”); when I was twelve, it seemed better.

144. GEERTZ, *supra* note 5, at 172.

145. *Id.* at 173 (footnote omitted).

A. The Jury's Role: Preliminary Thoughts

When the trial judge puts to the jury the question whether a speaker's communication was a threat, the judge may say, casually, that the question is one of fact. True enough: juries do determine "what happened" in the strict sense of historical facts—for example, the words that the speaker uttered. But the jurors' most important task in a "threats" case is different. The jury is directed to evaluate the meaning of a speaker's statement in its context—which may be illuminated by extensive testimony. When all the evidence is in, they are to say whether the speaker's statement did or did not constitute a threat, as defined by the judge's instruction.¹⁴⁶ In coming to that conclusion, the jury decides on the application of the legal standard. One way to describe this crucial evaluative function is to say that the jurors make the initial decision on a question of constitutional fact. Holmes discussed an analogous practice: allocation to the jury of the question of negligence. Because his comments seem so apt for translation to our present topic, I quote him here, substituting "a threat" or "threats" for "negligent" or "negligence":

[A]t this day it has come to be a widespread doctrine that [a threat] not only is a question for the jury but is a question of fact. . . .

I venture to think . . . that every time that a judge declines to rule whether certain conduct is [a threat] or not he avows his inability to state the law, and that the meaning of leaving nice questions to the jury is that while if a question of law is pretty clear we can decide it . . . if it is difficult it can be decided better by twelve men at random from the street. . . .

When we rule on evidence of [a threat] we are ruling on a standard of conduct, a standard which we hold the parties bound to know beforehand, and which in theory is always the same upon the same facts and not a matter dependent upon the whim of the particular jury or the eloquence of the particular advocate. . . .

There are many cases where no one could lay down a standard of conduct intelligently without hearing evidence upon that, as well as concerning what the conduct was. And although it does not follow that such evidence is for the jury, . . . still they are a convenient tribunal, and if the evidence to establish a rule of law is to be left to them, it seems natural to leave the conclusion from the evidence to them as well. . . . [O]ne reason why I believe in our practice of leaving questions of [threats] to [jurors] is what is precisely one of their gravest defects from the point of view of their theoretical function: that they will introduce into their verdict a certain amount—a very large amount, so far as I have observed—of popular prejudice, and thus keep the administration of law in accord with the wishes and feelings of the community.¹⁴⁷

146. Thus, the ordinary, "locutionary" meaning of the words may be supplemented by evidence to show what Kent Greenawalt calls a "situation-altering" meaning. GREENAWALT, *supra* note 54, at 57-63; *see also* J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 6 (2d ed. 1975) (explaining "performative utterance"). For a highly theoretical analysis of threats, *see* GREENAWALT, *supra* note 54, at 90-109.

147. Holmes, *supra* note 49, at 233-38.

Perhaps we can do no better, in adjudicating First Amendment cases involving alleged threats, than to turn over the initial decision to those “average” persons who will do justice to the parties by making their own “vernacular characterizations”¹⁴⁸ of meanings properly assigned to the allegedly threatening communications. And yet, where constitutional law is to be made in its very application—as with the threats exception—it makes excellent sense to insist that jury determinations be second-guessed (and even third-guessed, *de novo*, on appeal) by judges who are positioned to make sure that First Amendment freedoms are also taken seriously. When a court is making law, the parties to the case are not the only stakeholders.

In discussing the jury’s role in applying the threats exception, I have quoted Holmes’s approving remark that that jurors bring “popular prejudice” to bear on their rulings. My deployment of this statement in connection with a First Amendment claim may raise hackles among civil libertarians. But Holmes uses the word “prejudice” in a way characteristic of late-nineteenth-century talk about lay jurors. He has in mind not racism or political hostility or some other invidious discrimination, but a popular sense of justice, bubbling upward from the particulars of a case to the doctrine. Holmes seems to have believed that, eventually, the aggregate of such jury decisions would lead judges to establish rules of law to govern the determination of negligence in common situations. That result, we now know, did not happen. Nor should it have happened: imagine freezing the rules governing railroad safety on the basis of, say, twenty consistent verdicts around the turn of the twentieth century. Still, there is something appealing in the idea that juries, in performing the evaluative component of their determinations of “what is so”—was this speaker’s statement a threat?—will have a salutary influence on the development of larger legal-ethical principles about “what is right”—what, in law, constitutes a threat?¹⁴⁹ One of the motivating sentiments behind the enshrining of trial by jury in the Sixth Amendment was democracy itself: the sense that a local jury was a protection against distrusted official authority and that jury service extended participation in government to a broad segment of the public.¹⁵⁰ As Alexander Meiklejohn might add at this point, these views seem especially appropriate when the question at hand touches the freedom of speech.¹⁵¹ Indeed, in the setting of the threats exception, a part of Holmes’s expectation has been fulfilled: in great measure, the facts shape the courts’ perceptions of

148. See *supra* text accompanying note 115; see also GEERTZ, *supra* note 5, at 215.

149. GEERTZ, *supra* note 5, at 174.

150. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995); see also JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 1-2, 22-36 (1994); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183-89 (1991).

151. On connecting free speech to citizen participation, see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). On jury service as part of “the idea of democratic government,” see *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991).

the law in particular cases. The other part of his expectation—the enshrinement of results in detailed rules of law—has not happened here any more than it did with the law of negligence. A good thing, too.

When the First Amendment is arguably in play, the jury does not have the last word. In the modern era, the First Amendment is seen as a protection *against* popular sentiments that may systematically disadvantage minority viewpoints. After the verdict comes review by judges to determine, as a matter of law, whether the evidence justifies a finding that the speech at issue was not constitutionally protected¹⁵²—that is, in our doctrinal setting, whether the speech was a threat. The judges are to decide this question independently. Yet, the trial judge, who has heard the testimony along with the jury, will often agree with the jury's conclusion about a speaker's meaning—that it is or is not a threat.¹⁵³ After all, it is undisputed in the law of the threats exception that the context of a statement is a crucial determinant of its relevant meanings to speaker and target. In a seriously disputed case, we can expect the trial to be dominated by a thorough airing of the contextual setting. Following such a trial, we should expect that appellate judges, even as they fulfill their duty to make independent evaluations of the constitutional facts, may incline toward thinking that the jury and the trial judge have reached the right conclusion.

Trial and appellate judges, when they expound on the facts in their opinions, are not merely adjudicating the case; they are also interpreting the law that is supposed to govern the threats exception in cases yet to come. Thus, in the classic mode of the common law, the facts of individual cases give life to the doctrinal abstractions, playing a role in shaping this constitutional category that dwarfs the role of the abstractions themselves.¹⁵⁴ As Holmes felt about the law of negligence, so I feel about the law of threats. The role of jurors, bringing commonsense judgments to this branch of the lawmaking process, is not to be lamented, but applauded¹⁵⁵—remembering, all the while, the judges' duty to

152. This proposition has roots as early as *Fiske v. Kansas*, 274 U.S. 380 (1927). Its modern source is *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984). For a good summary of the justifications for independent review, see Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2435-37 (1998).

153. A recent study of criminal cases found that the judge and the jury agreed on the question of guilt or innocence in seventy-five percent of the cases—a figure in close agreement with another study half a century earlier. See Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's The American Jury* (Cornell Law Sch. Res. Paper No. 04-025, 2004), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=593941.

154. I say “shaping” here because “defining” might suggest sharp definitions—a portrayal that would misrepresent this body of law.

155. Highlighting the role of fact-finding in lawmaking is, among legal commentators, an old spectator sport, dating (at least) back to the Legal Realists of the early twentieth century. In creating the law of the First Amendment, juries often play a considerable role, even in fields dominated by content regulation. The law of obscenity is a prime example; Chief Justice Burger (unfortunately) called obscenity a question of “fact” and applauded the

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make their own independent examinations of the record—with the First Amendment centrally in mind.

B. Estimating Expectations of the Speaker and the Target

In deciding whether to characterize a statement as a threat, jurors and judges typically will find no help from an authority (such as a dictionary) that establishes some essential (“true”) meaning.¹⁵⁶ Rather, the statement must be interpreted by reference to its context—the decisionmakers must choose among various meanings within the range of reasonable possibility. The doctrinal formulas for the threats exception define the range of possible meanings by reference to reasonable expectations: Should the speaker reasonably have expected the target(s) of the statement reasonably to understand the statement as a threat? As Jennifer Rothman has noted, the apparent compounding here—reasonable expectations concerning reasonable expectations—is less of a problem than it might seem.¹⁵⁷ Even so, complexity can attend the determination of the allegedly threatening meaning of a speaker’s statement. Perhaps a few glances back at our six cases can provide further illustration.

Words alone. Sometimes, a speaker’s literal words are the only clear information the jurors and judges have. The meanings assigned to Hanna’s disjointed, semi-coherent attacks on President Clinton were not illuminated by external contextual indicia. A possible complication for the analysis of words is that, even where the literal words can be understood to threaten and the speaker

local jury’s ability to apply “contemporary community standards” concerning a publication’s appeal to prurient interest and its offensiveness. *Miller v. California*, 413 U.S. 15, 24 (1973).

It is fair to say that courts pay considerable deference to these evaluative determinations by juries. I recognize that laws regulating obscenity—and indecency, too—can be set apart from other content regulations, because the suppressed materials are seen by many observers as lying at some distance from the core values of the First Amendment. The facts of a “fighting words” case rarely achieve consideration by the Supreme Court, which has been inclined to rule that the statute at issue is facially unconstitutional for overbreadth. *See, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972). I have referred to the unsuitability, in threats cases, of the standard for incitement. *See supra* text accompanying note 33; *see also infra* text accompanying note 277. Like incitement, the field of libel takes us close to the central values of free speech, and it was in such a case that the Court has required close judicial scrutiny of jury determinations that would leave defamatory publications unprotected. *See Bose Corp.*, 466 U.S. 485. That standard undoubtedly applies to the regulation of threats, but our sample cases make clear that judicial applications of the standard have not produced doctrinal refinements matching those developed in the law of libel.

156. Here, as elsewhere, I use the term “statement” to include not merely words but other expressive behavior. For an interesting exploration of approaches to the possible meanings of symbols, see Timothy Zick, *Cross-Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261 (2004). I do want to dissociate myself from some of this article’s optimistic suggestions, for example (i) that “courts need a method for approaching meaning systematically,” *id.* at 2325; or (ii) that judges, from a wide range of sources, can fashion “an objective context of meaning . . . from various subjective meaning-contexts,” *id.* at 2329.

157. *See* Rothman, *supra* note 8, at 302-05, 314-21, 334-35.

seems serious, he may be using words—such as “silver bullets”—in a benign sense unknown to the putative target. If Fulmer had convinced the jury that he spoke of “silver bullets” with an innocent usage in mind, then—although a “reasonable speaker” standard, in theory, might leave his statement constitutionally unprotected—presumably he would be let off the hook by the “intent to intimidate” requirement of the statute punishing threats to a federal agent.¹⁵⁸ Jurors may or may not be better than judges at discerning motive and intent; what we do know is that a group of citizens, on the average, will do better than an individual in avoiding an idiosyncratic interpretation of such meanings.¹⁵⁹ In making their commonsense group evaluations of the expression of intentions and of the intention to threaten, jurors build on a skill that humans learn in infancy.¹⁶⁰

Context and acculturated meanings. Very often the words are only part of the story. A dispute about an allegedly threatening meaning of a speaker’s words will center on the inferences a trier of fact can properly draw from the context in which the words were communicated. In *Doe*, the letter stolen from J.M. explicitly spoke of doing great harm to K.G.; the problem posed by the case was that J.M. did not show his letter to her. Did he communicate a threat? Not in my view, but the school board thought he did, and a majority of the court of appeals agreed.¹⁶¹ The *Doe* case illustrates that the dispute often goes to the proper boundaries of the relevant context. As we have seen, there are times when the speaker and the putative target have shared a considerable history, well before the allegedly threatening statement is uttered. Odell Whitfield’s many efforts to reach Judge Bremer must be seen as relevant to the proper assignment of meanings to his last spate of letters. At the very least, that

158. After *Virginia v. Black*, a similar showing is a constitutional requirement for applying the threats exception. See *supra* note 11 and accompanying text.

159. Psychologist Phoebe Ellsworth puts it this way: “If it does nothing else, group deliberation . . . forces people to realize that there are different ways of interpreting the same facts. . . . A judge does not have this vivid reminder that alternative construals are possible.” Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 L. & CONTEMP. PROBS. 205, 206 (1989). After surveying a large number of empirical studies of jury behavior in civil cases, a prominent legal scholar and psychologist offers a more hedged view:

On the issue of negligence, there is no evidence to support the claim that juries decide cases less competently than judges and some reason to suspect that the combined judgments of jurors, enhanced through the deliberation process, may be as good or better than those that would be rendered by a randomly selected judge.

Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 898 (1998). In applying the threats exception, of course, judges have their own special duty to review jury verdicts in order to assure compliance with the First Amendment’s demands.

160. “Even infants of a few months see the behavior of those around them as *intended*.” ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 38 (2000) (emphasis in original). On intention as a “primitive” category of intuitive perception, see BRUNER, *supra* note 40, at 16-19.

161. In neither this case nor *Kilborn*’s were the facts tried to a jury. Too bad; a little more common sense at the trial level might have been useful.

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history establishes a shared acculturation about the relationship that Whitfield wanted to foster. And the pre-message interactions of classmates K.J. and Martin Kilborn in the “Echoes of Columbine” example, including their recent history of classroom joking, suggest enough of a shared culture to influence the decision of whether Kilborn should have known that K.J. would take seriously his words about shooting up the school.

The mode of communication. In deciding whether to assign a threatening meaning to a statement, or deciding whether the speaker intended to threaten, a juror or a judge can be expected to consider the manner in which the statement is conveyed from the speaker to an alleged target or to others. For instance, the simplest case for applying the threats exception—a face-to-face statement that the speaker is going to do physical harm to the listener—is unlikely to prompt much debate before an appellate court. Linguistics are also relevant. Generalized threatening language can be contrasted with a statement focused on a target who is expressly named.

Even where the target is named, it is one thing to make an open statement—as Hanna did in posting his rantings about President Clinton—and quite another to write a statement containing threatening language with the intention of keeping the writing to one’s self. Thus, the majority in the *Doe* case, although it upheld J.M.’s suspension, said the school board had been “unnecessarily harsh” in disciplining him for his letter, in form addressed to K.G. but not delivered to her until another boy stole it from J.M.’s bedroom at K.G.’s urging.¹⁶² For another example, an unscripted, off-the-cuff remark blurted out in an agitated environment¹⁶³ can be contrasted with a carefully

162. *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 627 (8th Cir. 2002). J.M. was not blameless. He did “publish” the letter, as that term is technically used in libel cases, when he let D.M. read it. And, when pressed by K.G., he did admit to her that the letter (or “song”) had referred to killing her. Surely he was negligent, but he seems to have thought he had not made his words public—and he had not.

163. *See, e.g., Watts v. United States*, 394 U.S. 705 (1969) (creating threats exception after speaker made hyperbolic statement at a rally about shooting President Lyndon B. Johnson), in *Lucero v. Trosch*, 928 F. Supp. 1124 (S.D. Ala. 1996), Geraldo Rivera, in a television interview, kept egging on an antiabortion speaker—Father David Trosch—until Trosch finally uttered words that seemed threatening—and shortly thereafter softened them. *See id.* at 1127 (noting hypothetical statements of “I would kill him” and “he should be dead”—followed by, “I am presenting a problem philosophical, theological to the whole human race, and as long as I can present the question, I am more valuable to saving innocent life than taking him out”). The target, thus set up by Rivera, was a doctor who performed abortions. He had voluntarily joined the show, having heard the same speaker make similar statements in a previous television appearance—and almost certainly knowing of Rivera’s habit of whipping interviewees into a lather. In a way, the doctor had volunteered to be a target. The district court concluded that—*under all the circumstances*, including Rivera’s assiduous (and highly predictable) effort to pry a threat out of the speaker—there had been no serious threat. *Id.* at 1131. I do not disagree. However, Blakey and Murray criticize the court for deciding that there was no threat as a matter of fact, rather than as a matter of law (e.g., a ruling that the statement was protected abstract advocacy or that a conditional statement could not be a threat). *See Blakey & Murray, supra* note 7, at 991-97.

planned statement in a press release or other similar setting. But which way does the spontaneity of the statement cut? Is a spur-of-the-moment outburst a signal of unfocused intention or of sincerity in expressing a threat? Is a statement at a press conference a form of reasoned debate or an indication of cold-blooded advance resolution to put the target in fear? Here, there are no rules. Necessarily, a juror or judge will make a holistic judgment “under all the circumstances”—the sort of inquiry that is a First Amendment danger signal. We can hope that judges will heed the signal as they proceed.

Did the alleged threat cause harm? The direct harms of fear—psychological and physical—and their long-term impacts are the main concern of the threats exception. In assigning meaning to an allegedly threatening statement, should a court consider the actual reactions of the putative target to the statement? In four of our sample cases, judges did just that, relying on testimony that Judge Bremer was frightened by Whitfield’s last set of letters; that K.J. became frightened some hours after Kilborn told her he was going to shoot up the school; that Agent Egan was frightened by Fulmer’s “silver bullets” reference; that K.G. cried after she read the letter that D.M. purloined for her. Such evidence is regularly received—and given weight—even though the doctrine of the threats exception does not require a showing that the message actually put the target in fear. Evidently the courts have regarded the evidence as relevant to determining not only the meaning a “reasonable recipient” could understand, but also the meaning that a “reasonable speaker” should expect the recipient to find in the message. The model jury instruction follows prevailing doctrinal formulas, which require findings not as to a *target’s* (or recipient’s) likely understanding, but as to a *speaker’s* likely understanding of the message in question. In *Viefhaus*, the one recipient—the journalist who phoned the FBI—took the hotline phone message to indicate that something ominous was going on. In *Viefhaus’s* bluster about bombs in fifteen cities, no person or city was identified as a target. Yet, the harm of “disruption” did occur; the FBI was mobilized.¹⁶⁴ Similarly, Hanna’s documents about President Clinton, probably unknown to the President, caused the mobilization of the Secret Service and the local police.

Did the target of the statement instigate the legal proceedings? In the two cases where the targets directly invoked the law enforcement system, *Whitfield* and *Fulmer*, the prosecutions were successful in that appellate courts concluded that the evidence supported jury determinations that the statements were threats. In *Kilborn*, although K.J. did not herself call the police, her report about the classroom conversation instigated her mother’s call, and Kilborn was convicted—until cooler heads prevailed in the Washington Supreme Court. On the other hand, in *Doe*, K.G. never complained against the author of the letter, but the school board suspended him, and the court of appeals, finding a threat,

164. The search was justified and so was the prosecution for illegal possession of weapons.

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upheld the board's decision. And in the remaining two cases, *Hanna* and *Viefhaus*, no target complained.¹⁶⁵ Yet, in both cases, appellate courts concluded that the evidence supported jury findings of threats. Perhaps the target's decision to commence a lawsuit, or complain to the prosecutor, should be taken as evidence of the genuineness of his or her belief that a threat has been issued or his or her harms from fear—but this is a big “perhaps.”

A generalized sense of the justice of the case. A jury's, or a reviewing judge's, sense of the justice of the whole case may tilt toward calling a message a threat or, alternatively, toward calling it protected speech.¹⁶⁶ Kilborn's felony conviction did, indeed, look like a tragedy. Similarly, J.M.'s suspension from school was an overreaction—in the view of the dissenting judges, that is. Even the majority agreed, but it believed more strongly that the courts should stand aside and let the board run its own shop. On the other hand—and here is the disturbing part—when the speaker is seen by jurors or judges (or both) to be a bad actor, that belief can affect the resolutions of ambiguous meaning, tilting toward a finding of an unprotected threat.¹⁶⁷ For this proposition, Exhibit A is the discovery of a threat in *Viefhaus's* outgoing phone message. This case exemplifies the need for judges to make their own independent review of the evidence in applying the threats exception.

The indeterminacy of a sum-of-the-factors approach. Many other factors can affect the determination of whether a statement should be interpreted as a threat. One example: even where the speaker and putative target have not been personally acquainted, the jury may properly infer a shared understanding of a statement's meaning from past events well known to both speaker and target. A second example: suppose the Columbine school massacre had happened *after* Kilborn's juvenile court trial for his wisecrack about shooting up the school, but *before* the case was appealed to the Washington Supreme Court. Would that court have taken the case at all—let alone reached the same conclusion? Judges, like jurors, get part of their acculturation from events in the news.¹⁶⁸

165. *Hanna's* target, President Clinton, seems never to have been involved, and *Viefhaus's* telephone message did not specify a target.

166. Supreme Court Justices have been known to be influenced by their generalized sense of “doing the right thing.” Justice Powell comes to mind. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 236-41 (1982) (Powell, J., concurring); *Schweiker v. Wilson*, 450 U.S. 221, 239-47 (1981) (Powell, J., dissenting). The Court's majority sometimes behaves this way, writing opinions that leave doctrinal purists unsatisfied. *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

167. On the influence of affect on judgments and decisions, see Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 397 (Thomas Gilovich et al. eds., 2002).

168. Blakey and Murray point out that the September 11, 2001, terrorist attacks occurred between the Ninth Circuit's panel decision for the defendants in the *Planned Parenthood* case and its en banc opinion affirming a verdict based on alleged threats—with the result that the nation took a new and fearful view of terrorism and terrorists. *See* Blakey & Murray, *supra* note 7, at 851 n.53. In this passage, the authors emphasize the need for vigilant enforcement of the freedom of speech in a time of hostility against “outsiders” of all

We have seen that no single factor is likely to be conclusive as to the meaning assigned to a particular statement. In short, the more complex the context, the more material will be available for deciding whether the threats exception should be applied. A decisionmaker will consider every circumstance that seems to illuminate the statement's relevant meanings and will then make a gestalt decision. The variations in this task from one factual setting to another prevent the construction of bright-line rules that decide, automatically, whether the threats exception is or is not appropriate to the case at hand.

Consider, too, the multiplicity of mental processes by which each of us takes in information and acts in response. For many years, psychologists have recognized that perception, feeling, and thinking are interrelated,¹⁶⁹ the aggregate of these internal processes is difficult if not impossible to separate from action. Still, the evaluations of intentions remain central to the threats exception in two ways. First comes the question of assigning meaning to a statement: does the *message* convey an intention of the speaker to harm the target? Second comes the question of the speaker's actual *intention* to threaten. Fortunately for all of us, trial judges are fairly good evaluators of intentions, and jurors, considering such questions in groups, may be even better. The role of intuition in judgment, of course, raises First Amendment concerns about discretion and chilling effects. I confront those concerns later.¹⁷⁰

C. *The Chimera of Doctrinal Purification: Herein of the Planned Parenthood Decision and Its Critics*

Commentators on the common law tradition—including the development of constitutional law case by case—have occasionally offered a rosy picture of “principles . . . worked pure by rubbing against the hard face of experience.”¹⁷¹ One can see this process at work in American constitutional law, even in some areas of First Amendment law: “fighting words” doctrine, for example, or the doctrine governing speech rights in a “traditional public forum.”¹⁷² But disappointment awaits anyone who seeks a purified model of the doctrine governing the threats exception and, at the same time, expects decisions to conform to the model thus announced. The Holy Grail for those who pursue doctrinal stability would be a clear-cut definition that fully protects freedom of speech, but also allows government to punish expression that is properly

kinds. I do not read their remarks as saying that the *Planned Parenthood* majority was giving in to antiterrorist fervor.

169. See BRUNER, *supra* note 40, at 69, 113-18.

170. See *infra* text accompanying notes 336, 350.

171. Archibald Cox, *Paul A. Freund*, 104 PROCEEDINGS OF MASS. HIST. SOC'Y 196, 197 (1992) (quoting Paul A. Freund).

172. The “rubbing” process—if perhaps not the purification—is easiest to see when we define the hard faces of experience to include the effects of presidential politics on judicial appointments.

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assigned a threatening meaning. Yet, because meanings typically are cultural artifacts, heavily influenced by the settings in which the communications are made, “no absolute rule can possibly cover the full range of possible situations in which true threats are communicated.”¹⁷³ Of necessity, appellate courts have abandoned the hunt for rules in favor of generalized standards.¹⁷⁴ Hence, juries and judges inevitably exercise a considerable measure of discretion in assigning meanings to communications. The unattractive alternative would be for the courts to force the disorder of real life into a template of abstract principle that approaches absolutism. On one hand, the threats exception might be narrowed to the point that it is nearly meaningless, so that serious harms are inflicted on the targets of threatening speech. Alternatively, the exception could be broadened to allow punishment of political advocacy whenever it can be read as threatening. Either course would produce a rule in drag, promoting certainty of result at the expense of justice.

In the remainder of this Article I use the *Planned Parenthood* case as an example of what I have just suggested. It seems the perfect illustrative case, for all eleven judges of the Ninth Circuit’s en banc panel agreed on a doctrinal formula defining the relevant meanings that constitute a threat—and then divided 6-5 on the formula’s application to the case before them. I begin with the facts and the Ninth Circuit’s opinion, then turn to the dissenters and the academic critics, and conclude with a further word on the ways in which, in this field, the facts are taking over the law.

1. Planned Parenthood: *The facts and the decision*¹⁷⁵

Although the case has been heavily cussed and discussed in the law reviews, the commentary has offered remarkably little information about the facts. Here I provide a “skeletonized” version of the facts; later I offer further particulars on (1) the defendants’ connections with each other, (2) the defendants’ interactions with persons who expressed support for antiabortion violence by committing violence themselves, and (3) the plaintiffs’ knowledge about the defendants’ activities and connections. Some details about individual defendants appear only in footnotes, but even these are material to an understanding of the central issues in *Planned Parenthood*. The detail may be

173. Gey, *supra* note 10, at 581; see also John T. Nockelby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653, 672-73 (1994).

174. See Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

175. The most convenient sources for the facts in this case are the summaries of evidence in (1) *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999); (2) Appellants’ Opening Brief, *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (Nos. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333, 99-35405) [hereinafter Defendants’ Brief]; and (3) Brief of Plaintiffs-Appellees, *Planned Parenthood*, 290 F.3d 1058 [hereinafter Plaintiffs’ Brief].

painful, but it is necessary to illustrate this Article's general arguments.

a. *The background*

Several earlier events set the stage for the messages involved in the *Planned Parenthood* case. In 1994, a number of leading pro-life activists in Operation Rescue condemned the bombing of birth-control clinics and the killing of doctors. In response, a group of militant antiabortion advocates, including all the individual defendants in this lawsuit, split off to form the American Coalition of Life Activists (ACLA), based in Portland, Oregon.¹⁷⁶ Portland was already the home of Advocates for Life Ministries (ALM), which had previously joined with a number of the founders of ACLA in public statements defending persons charged with or convicted of killing doctors who had performed abortions.¹⁷⁷ ALM's Portland office became the hub for ACLA's activities. The individual defendants had stayed in remarkably close touch with one another from a time antedating the formation of ACLA.¹⁷⁸ ALM published a magazine, *Life Advocate*, and defendant Michael Bray's book, *A Time To Kill*,¹⁷⁹ which was offered in evidence at trial by the defendants. The central argument propagated by ALM and ACLA, outlined in Bray's book, is an extended justification of antiabortion violence. Bray deploys biblical quotations as proof that God's law accepts such acts in defense of the preborn and prevails over state law. One chapter celebrates past heroes who destroyed clinic property by means including fires and bombings. Bray does not explicitly advocate killing doctors, but he emphatically approves of those who do kill doctors, saying they are "defending . . . another innocent person,

176. *Planned Parenthood*, 41 F. Supp. 2d at 1136; see also *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1064 (9th Cir. 2002) (en banc). The twelve individual defendants in the case—all members of ACLA or ALM or regular participants in those organizations' activities—were Michael Bray, Andrew Burnett (founding member of ACLA, Northwest regional director, founder, and executive director of ALM, and publisher of *Life Advocate*), David A. Crane (ACLA president and national director), Michael B. Dodds (South Central regional director), Timothy Paul Dreste, Joseph L. Foreman (founding member and drafter of ACLA constitution), Charles Roy McMillan (founding member of ACLA), Bruce Evan Murch (Northeast regional director), Catherine Ramey (ALM associate director and author of *In Defense of Others*, a tract justifying killing of abortion doctors), Dawn Marie Stover (ALM associate director), Donald Treshman (Southwest regional director), and Charles Wysong (Southeast regional director). Two others are named defendants in the heading of the Ninth Circuit's opinion, but they are not named in the district court's findings, and they seem to have been dropped from the case.

177. *Planned Parenthood*, 41 F. Supp. 2d at 1138-39.

178. The many meetings and phone consultations over the period relevant to the case are detailed in the trial court's elaborate findings of fact, categorized by individual defendant. See *id.* at 1131-53.

179. MICHAEL BRAY, *A TIME TO KILL: A STUDY CONCERNING THE USE OF FORCE AND ABORTION* (1994). Defendant Bray participated in ACLA's planning meetings, poster unveilings, and other joint activities with ACLA and ALM. See *Planned Parenthood*, 41 F. Supp. 2d at 1138-40. *Life Advocate* apparently stopped publication in 1999.

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[as] authorized by God to exercise lethal, defensive force.”¹⁸⁰ Killing a doctor who is performing abortions, in his view, is not murder but justifiable homicide.¹⁸¹ Bray’s publicly stated view is that “[a]nyone who truly believes that the slaughter of children [is] what we have with abortion could go out and shoot an abortion provider.”¹⁸² Bray is no mere theorist; he served four years in a federal prison for conspiracy to bomb seven clinics.¹⁸³

This point of view came to public attention in various ways. In March 1993, Michael Griffin shot and killed Dr. David Gunn as he was entering a clinic in Pensacola, Florida.¹⁸⁴ Before the killing, posters appeared featuring Gunn’s name, photograph, and address. A “WANTED” poster described Gunn as an abortionist, asked readers to pray and fast on his behalf, and encouraged them to write and phone him, offering to help him give up his abortion practice. An “unWANTED” poster gave the locations where Gunn “kills children,” saying that he was, to “defenseless unborn babies . . . heavily armed and very dangerous.”¹⁸⁵ After Gunn was killed, Bray and Paul Hill (not a named defendant) prepared a statement announcing that the homicide was justified, and called for Griffin’s acquittal. In addition, the statement was signed by ALM and seven individuals who would later be named as defendants.¹⁸⁶ Paul Hill published an article in *Life Advocate* defending Griffin’s killing of Dr. Gunn.¹⁸⁷

In August 1993, Dr. George Patterson, operator of the clinic where Dr. Gunn had worked, was shot and killed by an unknown assailant. The episode may have been a robbery attempt.¹⁸⁸ However, a “WANTED” poster had circulated before the shooting, giving the address where Patterson was performing abortions and noting that he had hired Dr. Gunn to perform abortions at his clinic.¹⁸⁹

A month later, in August 1993, Rachelle (Shelley) Shannon shot Dr. George Tiller in Wichita, Kansas.¹⁹⁰ At the time, she was carrying several

180. BRAY, *supra* note 179, at 175.

181. *Id.* at 173-75.

182. *Planned Parenthood*, 41 F. Supp. 2d at 1139.

183. *Id.* at 1136.

184. See William Booth, *Doctor Killed During Abortion Protest*, WASH. POST, Mar. 11, 1993, at A1.

185. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1063-64 (9th Cir. 2002) (en banc).

186. *Id.* at 1064. Those seven defendants were Burnett (ALM), Ramey (ALM), Stover (ALM), Crane, Dodds, Foreman, and McMillan. *Planned Parenthood*, 41 F. Supp. 2d at 1134. Additionally, on the morning of Dr. Gunn’s murder, defendant Treshman issued a press release endorsing the actions of Michael Griffin and announcing a fund to support him. *Id.* at 1150. On the eve of Griffin’s trial for murder, defendants McMillan, Bray, Burnett, and Crane attended a dinner at Paul Hill’s house, where they reaffirmed that the shooting of Dr. Gunn was “justifiable homicide.” *Id.* at 1146.

187. *Id.* at 1148.

188. Killings, as every television viewer knows, can be staged to look like robberies.

189. *Planned Parenthood*, 41 F. Supp. at 1134.

190. *Id.* at 1135.

issues of *Life Advocate* featuring articles about, and photographs of, Dr. Tiller; she had brought the magazines to identify Dr. Tiller, his clinic, and his car.¹⁹¹

ACLA was organized in the spring of 1994 and held its first public event in August of that year.¹⁹² The group planned the unveiling of the Crist poster, discussed below,¹⁹³ and drafted a document called “Contract with the American Abortion Industry.”¹⁹⁴

In July 1994, Dr. John Bayard Britton, who had replaced Dr. Gunn, was murdered by Paul Hill,¹⁹⁵ who had helped prepare public statements of support for Michael Griffin and Shelley Shannon.¹⁹⁶ Before the killing, Hill and John Burt had helped to prepare an “unWANTED” poster that described Dr. Britton physically and stated his home and office addresses and phone numbers.¹⁹⁷ The poster charged Britton with “crimes against humanity.”¹⁹⁸ A similar poster, which included Britton’s picture, called him “extremely dangerous to women and children” and suggested praying that he soon be apprehended.¹⁹⁹ Hill killed Dr. Britton outside the clinic where the posters had been displayed. A defense petition supporting Hill, signed by ALM, Bray, Burnett, Crane, McMillan, Ramey, and Stover, was circulated; it was virtually identical to the petition Hill had circulated in support of Griffin, the killer of Dr. Gunn.²⁰⁰

191. *Id.* at 1132, 1137-38. Paul Hill prepared, and defendants Bray, Burnett, Dodds, and McMillan signed, a petition calling for Shannon’s acquittal because she shot Dr. Tiller in defense of the unborn. *Id.* at 1139, 1140, 1143, 1146. After this shooting and the killing of Dr. Gunn, Hill and defendant Stover appeared on ABC television’s *Nightline* program. Stover said that if Shannon’s “intent was to save the children that George Tiller was going to kill that day, then Shelley, in my eyes, is a heroine.” *Id.* at 1149-50. Shannon later pled guilty to arson and butyric acid attacks on eight abortion facilities, including the Eugene, Oregon, facility of plaintiff Portland Feminist Women’s Health Center. *Id.* at 1135. The district court found that Shannon was “a close friend and associate of the defendants.” *Id.* After Dr. Tiller survived the shooting, defendant Dodds suggested his name for inclusion in the Deadly Dozen poster. *Id.* at 1143.

192. *Id.* at 1136.

193. *See infra* text accompanying note 213.

194. This wording resonates against the “hit contracts” known in Mafia circles. *See infra* text accompanying note 310. Indeed, the district court used the name “Contract on the American Abortion Industry.” *Planned Parenthood*, 41 F. Supp. 2d at 1137 (emphasis added).

195. *Planned Parenthood*, 41 F. Supp. 2d at 1135. Hill also killed Dr. Britton’s escort, James Barrett, and wounded Barrett’s wife. *Id.*

196. *Id.* at 1139.

197. *Id.* at 1135.

198. *Id.*

199. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1064 (9th Cir. 2002) (en banc). Hill and Burt had been videotaped taking Dr. Britton’s picture for use in the poster. Prior to these murders, defendants Burnett and Ramey visited Burt (Hill’s partner in making the poster of Dr. Britton, whom Hill then killed) to discuss the making of further “WANTED” posters. *Planned Parenthood*, 41 F. Supp. 2d at 1135-36.

200. *Planned Parenthood*, 41 F. Supp. 2d at 1135. Three months later, defendant McMillan called Hill “a patriot” who had “fired the first shots in this war.” *Id.* at 1135. After

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b. *The messages at issue*

The plaintiffs alleged that three of the defendants' messages constituted threats:

First message. In late 1994, the national director of ACLA prepared a poster with the word "GUILTY" (originally drafted to say "WANTED"²⁰¹), followed by "OF CRIMES AGAINST HUMANITY."²⁰² The text referred to the 1945-1946 war crimes trials of German Nazis, identifying abortions as one such crime.²⁰³ The poster listed, under "THE DEADLY DOZEN" heading, the names of thirteen doctors, including three who became plaintiffs in the case²⁰⁴ and Dr. Tiller (who had survived the shooting by Shelly Shannon).²⁰⁵ Each entry included the doctor's home address. The poster offered a "\$5000 REWARD" "for information leading to the arrest, conviction and revocation of license to practice medicine," followed at the bottom with the phrase "ABORTIONIST."²⁰⁶ ACLA called the media to a January 1995 press conference, where an enlarged version of the poster was unveiled. Eleven of the twelve individuals who became defendants in the case joined in the unveiling.²⁰⁷ As these individuals knew, law enforcement officers were also present. The following day, FBI agents offered twenty-four-hour protection to the listed doctors and advised them to take various security precautions, including the wearing of bulletproof vests.²⁰⁸ The doctors did so. With

Hill was convicted and sentenced to death, ALM's editor-in-chief, Paul Parrie, said of Hill: "The man's a hero. May his tribe increase." *Id.* One thing that did increase in tempo was the shooting of doctors. In an interview on national television, defendant Treshman praised one such shooting in Vancouver, British Columbia, saying, "[T]hat was certainly the superb tactic. It was certainly far better than anything that was seen in the States because the shooting was done in such a way that the perpetrator got away. I would think more abortionists would quit as a result of it." *Id.* In December 1994, after John Salvi murdered two clinic workers and wounded five others at two clinics in Massachusetts, he drove to Norfolk, Virginia, and fired shots into the windows of the Hillcrest Clinic. *Id.* at 1135-36. Defendant Crane was present at Hillcrest Clinic that morning. The Hillcrest Clinic was one of those bombed by defendant Bray. *Id.* at 1136.

201. Defendant Crane had previously prepared and circulated other "Wanted" or "Guilty" posters. One was a poster of Dr. Abraham Anderson; after its circulation, Anderson stopped performing abortions because he feared for his life. *Id.* at 1143.

202. *Planned Parenthood*, 290 F.3d at 1064.

203. *Id.* It was, of course, *coerced* abortion in the concentration camps that was a Nazi war crime.

204. *Id.* at 1064-65. These three were Drs. Elizabeth and James Newhall, of Portland, Oregon, and Dr. Warren Hern, of Colorado.

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

206. *Planned Parenthood*, 290 F.3d at 1065.

207. *Id.* at 1064. The twelfth defendant, Timothy Paul Drete, explicitly ratified the release of the Deadly Dozen poster and stated his regret that the poster did not include the name of Dr. Robert Crist—who would soon be awarded a poster of his own. *See id.* at 1065.

208. *Id.* at 1065. At trial, the judge instructed the jurors that they were to consider the agents' warning only in evaluating the doctors' states of mind and not to take the warning as showing that the FBI had decided that the poster was a threat. The agents were not allowed

knowledge of these precautions, ALM editors reprinted the poster in the March 1995 issue of *Life Advocate*, which bore a cover picturing the Grim Reaper holding a scythe.²⁰⁹ Defendant Murch republished the poster in his own newsletter, *Salt & Light*,²¹⁰ and ACLA republished it at public events in August 1995 and January 1996.²¹¹

The second message. In August 1995, at a ceremony in St. Louis, ACLA released another “GUILTY . . . OF CRIMES AGAINST HUMANITY” poster that included a photograph of plaintiff Dr. Robert Crist and listed his home and work addresses.²¹² Two other posters, each naming a different doctor, and three naming reproductive healthcare clinics, were released at the same event.²¹³ The Crist poster asks readers to “write, leaflet or picket his neighborhood to expose his blood guilt”; offers a “\$500 REWARD” to any ACLA organization that persuades him “to turn from his child killing”; and states “ABORTIONIST” at the bottom.²¹⁴ Defendants Burnett, Crane, Dreste, McMillan, Ramey, Stover, and Wysong attended this unveiling; all the other individual defendants assisted in planning this event and ratified the poster’s release.²¹⁵ Copies of the poster were tacked to telephone poles and distributed in the parking lot of the clinic where Crist had performed abortions that day. During this ACLA event, Crist was already under twenty-four-hour protection by federal agents.²¹⁶

The third message. At a January 1996 conference, ACLA introduced Paul deParrie of ALM to unveil the “Nuremberg Files,”²¹⁷ a list of some 200 people under the heading “ABORTIONISTS: the shooters” and about 200 judges, political officials, law enforcement officers, spouses, and abortion rights supporters.²¹⁸ The “ABORTIONISTS” section included the names, addresses, and phone numbers of four plaintiffs—Drs. Crist, Hern, and the Newhalls—along with names of a number of other doctors and employees affiliated with Planned Parenthood and Portland Women’s Health Center.²¹⁹ The same section also featured the legend “Black font (working); Greyed-out Name (wounded);

to testify as to their opinions of what the posters meant. *Id.* at 1082-83.

209. *Id.* at 1065.

210. *Id.*

211. *Id.*

212. *Id.* Dr. Crist was also a plaintiff. The poster was prepared by defendants Wysong, Burnett, Crane, and Dreste. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1151 (D. Or. 1999).

213. *Planned Parenthood*, 290 F.3d at 1065. One of the clinics listed was the Planned Parenthood clinic where Dr. Crist worked.

214. *Id.*

215. *Planned Parenthood*, 41 F. Supp. 2d at 1132-33.

216. *See infra* text accompanying note 319.

217. The name refers to the listing’s ostensible purpose: to gather information for the trials, at some future time, of persons responsible for abortions in the present era.

218. *Planned Parenthood*, 290 F.3d at 1065. The list also included several other doctors who practiced at Planned Parenthood in Portland and the director of the Portland Feminist Women’s Health Center. Both organizations were plaintiffs.

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

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Strikethrough (fatality)”; the names of Dr. Gunn, Dr. Patterson, and Dr. Britton were struck through.²²⁰ ACLA arranged for posting of some of the Nuremberg Files on an Internet website bearing the name of ACLA.²²¹

c. The states of mind of the speakers and the targets

There can be no doubt that the posters were designed to frighten the doctors and others who worked at the clinics and to keep them fearful. The defendants were glad to know they were succeeding in causing doctors to fear being killed. In the September 1993 issue of *Life Advocate*, ALM announced that an “unwanted” poster was being prepared for Dr. Britton (killed the following July).²²² ALM also said, “Plans to visit this man at his home as well as his private practice are now in the works for next week.”²²³ In *Life Advocate*, ALM noted its satisfaction that the killing of Dr. Gunn had frightened abortion providers.²²⁴ Defendant Bray, commenting on a doctor who had stopped performing abortions, said “it is clear . . . he was bothered and afraid.”²²⁵ Defendant Wysong made a similar comment,²²⁶ and at trial, several defendants testified that they knew that shootings of doctors caused fear among other physicians.²²⁷ Indeed, defendant Crane, the director of ACLA, kept a “wanted” poster of himself and Paul Hill in a file labeled “death threats.”²²⁸

The doctors and clinic employees portrayed in the posters, including the plaintiffs, were, indeed, afraid they might be killed by the defendants or some confederates. One of the plaintiffs saw a pattern connecting earlier posters to murders of doctors—a pattern that affected him with special force when he was depicted on a poster.²²⁹ The doctors’ lives were also seriously disrupted. They engaged in a variety of strategies to protect themselves and their families. The bulletproof vests were only the beginning. The Newhalls bought wigs and other disguises and installed an alarm system in their home.²³⁰ They talked with their children and their children’s teachers about evacuation plans. Dr. Hern had federal marshals living with him for several months, beginning immediately after the Deadly Dozen poster was released.²³¹ He also bought window

220. *Planned Parenthood*, 290 F.3d at 1065.

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

222. *Id.* at 1138.

223. Plaintiffs’ Brief, *supra* note 175, at 29.

224. *Planned Parenthood*, 41 F. Supp. 2d at 1138.

225. *Id.* at 1139.

226. *Id.* at 1151.

227. For details on these comments, see *infra* text accompanying notes 312-315.

228. *Id.* at 1143.

229. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1066 (9th Cir. 2002) (en banc) (testimony of Dr. Hern).

230. Plaintiffs’ Brief, *supra* note 175, at 23.

231. *Id.*

coverings for his home and office. The clinics bought bulletproof vests for their staff members and installed video surveillance equipment where the Newhalls worked.²³² Defendant Burnett was caught on camera outside plaintiff James Newhall's office,²³³ in violation of an earlier injunction. He had previously assaulted a pregnant worker at Newhall's office.²³⁴

d. *The lawsuit, decision, and appeal*

The two reproductive-services clinics named above, together with the four named doctors, brought a civil action in federal district court against ACLA, ALM, and fourteen individuals active in one or both defendant organizations or their activities,²³⁵ seeking damages and injunctive relief. The action was founded on the Freedom of Access to Clinic Entrances Act (FACE) of 1994, which provides for criminal penalties and civil remedies against one who "by force or threat of force . . . intentionally . . . intimidates . . . any person because that person is or has been . . . obtaining or providing reproductive health services . . ." ²³⁶ After a three-week trial, the trial judge instructed the jury on the definition of a 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 [sic] or assault."²³⁷

After four days of deliberation, the eight jurors unanimously found for the plaintiffs and awarded huge amounts of damages—more than half a million in compensatory damages and \$107 million in punitive damages—no doubt

232. *Id.*

233. Burnett was famous. *See infra* note 322 and accompanying text. But he was particularly well known to plaintiffs Elizabeth and James Newhall. He had protested at their home as well as at their Portland office. *Planned Parenthood*, 41 F. Supp. 2d at 1140.

234. *Planned Parenthood*, 41 F. Supp. 2d at 1140. Injunctions of this type are not always effective. In 1996 (after the messages involved in this case but before the trial), Charles Roy McMillan, one of the defendants, entered into a consent decree in a federal district court, agreeing not to use force or threats to intimidate employees or patients of a clinic in Jackson, Mississippi. He resumed his picketing and over a period of weeks repeatedly screamed at one of the doctors, "Where's a pipebomber when you need him?" *United States v. McMillan*, 53 F. Supp. 2d 895, 896 (S.D. Miss. 1999). (This was at a time when the Unabomber had just been captured, and the bombing at the Atlanta Olympic Games was a recent memory.) Holding that McMillan had threatened the doctor, the court imposed a fine of \$1000 for contempt of court. The court said that if future violations should occur, it "would not want to be committed to the \$1,000 figure." *Id.* at 908.

235. During the litigation the number of defendants was reduced to twelve. *See supra* note 176.

236. 18 U.S.C. § 248(a)(1) (2006).

237. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1080 (9th Cir. 2002) (en banc) (reciting jury instruction). The Ninth Circuit, sitting en banc, later held that this instruction properly stated the law of the circuit and remarked that FACE itself required a showing of intent to threaten—which the jury had found and the evidence supported. *Id.* at 1077.

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reflecting their outrage at the severity of the harms of fear suffered by the plaintiff doctors and the clinics' employees.

The district judge made an independent review of the record. He concluded that the evidence supported the verdict, and he made elaborate findings of his own as to each of the twelve remaining defendants. The findings carefully traced the repeated joint actions and interactions among the defendants and with others who promoted and practiced antiabortion violence in the three years before issuance of the posters at issue in the trial. Applying his prior instruction to the jury, the judge found that each of the defendants, by issuing the three posters, had threatened the plaintiffs and that each defendant had specifically intended to threaten the plaintiffs.²³⁸ The court thus entered judgment on the jury's verdict and also granted a permanent injunction forbidding the defendants, their agents, and others acting in concert with them from threatening the defendants or republishing the posters or the Nuremberg Files website with the specific intent of threatening.²³⁹

It is this judgment that an en banc panel of the Ninth Circuit affirmed on the merits, by a 6-5 vote.²⁴⁰ The appellate court nonetheless remanded the case to the district court for reconsideration of the damages award in light of a recent precedent setting out guidelines for punitive damages.²⁴¹ The U.S. Supreme

238. *Planned Parenthood*, 41 F. Supp. 2d at 1153-54.

239. *Id.* at 1155-56. The court also enjoined continued possession of such posters, and the Ninth Circuit found no error in this part of the order.

240. *Planned Parenthood*, 290 F.3d 1058. A panel of the Ninth Circuit first reversed the district court's judgment. *See Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *vacated*, 268 F.3d 908, 909 (9th Cir. 2001). I discuss the Ninth Circuit's en banc decision here. The panel decision is discussed later.

241. On remand, the district court reconsidered damages; after reconsideration, the court reaffirmed the award in its entirety. *See Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 300 F. Supp. 2d 1055 (D. Or. 2004).

The plaintiffs filed an appeal, and a panel of the Ninth Circuit held in September 2005 that the punitive damages vastly exceeded constitutional limits. In an opinion by Judge Rymer (author of the en banc majority opinion), joined by Judges Fernandez and Kleinfeld (one of the five en banc dissenters), the panel reduced the punitive damages award, calling for a remittitur of punitive damages for each plaintiff to a sum of nine times that plaintiff's compensatory damages. Thus, the total compensatory damages remained at just over half a million dollars, and the total punitive damages were about \$4.7 million. *See Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005).

The defendants, following the directions of ACLA's constitution, made conveyances of their property shortly after the suit was filed and well before the 1999 trial. Indeed, they had already made themselves judgment proof in response to earlier awards of damages. *See Steve Duin, We All Must Wait for that Final Judgment*, OREGONIAN, Aug. 26, 1993, at D5. On the defendants' use of the automatic-stay requirement of the Bankruptcy Code, see *Hearings on Bankruptcy Revision Before the Senate Comm. on the Judiciary*, 109th Cong. (2005) (statement of Maria Vullo, Partner, Wharton Garrison LLP), available at 2005 WLNR 1880812. The plaintiffs may collect no money at all. Even so, the damages awarded seem likely to have some symbolic importance.

Court denied a writ of certiorari in 2003.²⁴² Solicitor General Theodore Olson, representing the United States as an amicus, had urged the Court to deny review, arguing that the Ninth Circuit had employed the correct legal standard for defining threats and that the case was an inappropriate occasion for deciding on a constitutional requirement of intent to intimidate, given that the jury and trial court had found such an intent as required by FACE.²⁴³

e. The Ninth Circuit majority opinion

Writing for the six majority judges, Judge Pamela Rymer concluded that the trial court had properly instructed the jury and that the jury's verdict was supported by substantial evidence. The majority specifically concluded that the Crist and Deadly Dozen posters, reinforced by the Nuremberg Files posting of the doctors' names and addresses along with a section "where lines were drawn through the names of doctors who provided abortion services and who had been killed or wounded," amounted to a threat within the meaning of the threats exception to the First Amendment.²⁴⁴ Further, the threat was communicated with the intent to threaten, as required by FACE.²⁴⁵ The majority reached these conclusions after making an independent review of the record.

After discussing a number of opinions by several circuits in threats cases, the majority reaffirmed the Ninth Circuit's "reasonable speaker" test, as I have set it out above, with one exception.²⁴⁶ The court concluded that, in this case, "the poster format itself had acquired currency as a death threat for abortion providers";²⁴⁷ the defendants knew this and also were aware of "the fear generated among those in the reproductive health services community who were singled out" on a poster;²⁴⁸ and the defendants intentionally put the names of the plaintiff doctors on "GUILTY" posters in order to intimidate them.²⁴⁹ (It is clear that the majority regarded the posting of the Nuremberg Files as little

242. *Am. Coalition of Life Activists v. Planned Parenthood of Columbia/Willamette, Inc.*, 539 U.S. 958 (2003).

243. Brief for the United States as Amicus Curiae, *Planned Parenthood*, 539 U.S. 958 (No. 02-563).

244. *Planned Parenthood*, 290 F.3d at 1063. Elsewhere, the court makes clear its awareness that the names of wounded doctors were not struck through, but highlighted in grey. *Id.* at 1080.

245. *Id.* at 1077.

246. The formula is stated in my model jury instruction. *See supra* text accompanying note 59. The majority, however, did not hold that the constitutional test included a requirement of an intent to intimidate. It noted that FACE did include such a requirement and said the evidence was sufficient to show the defendants' intention. As I have said elsewhere in this Article, *Virginia v. Black*, 538 U.S. 343 (2003), decided the following year, made clear that the threats exception is applicable only to cases in which such an intention is established. *See supra* note 57 and accompanying text.

247. *Planned Parenthood*, 290 F.3d at 1079.

248. *Id.*

249. *Id.* at 1079-80.

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more than a makeweight.)

f. *The dissents*

Three of the five dissenting judges filed opinions. Judge Alex Kozinski's dissent was joined by all five. He agreed with the majority's definition of a threat that is not entitled to First Amendment protection²⁵⁰ but concluded that the majority had misapplied its own test. His doctrinal analysis proceeded in two main steps. First, a political statement cannot be a threat for First Amendment purposes unless it conveys the message that the speakers, or their associates, will commit physical violence on the target.²⁵¹ Second, if a political statement does not explicitly make such a threat, the First Amendment forbids assigning it a threatening meaning absent a showing, outside the statement itself, that the speakers "or someone associated with them would carry out the threatened harm."²⁵² The second proposition, said Judge Kozinski, is required by the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*²⁵³ He dissented because he thought the evidence had not satisfied these tests.

Judge Marsha Berzon, joined in this part of her dissent by three colleagues, agreed with Judge Kozinski that the threats exception was improperly applied to this case—and largely for the same reasons. Her dissent is notable, however, for its recognition of some of the strengths of the plaintiffs' case and for its sympathy for the targeted doctors and their families.²⁵⁴ Judge Berzon starts by noting that the posters' explicit messages were public advocacy, fully protected by the First Amendment and directed to an important public issue.²⁵⁵ When she turns to the defendants' prior advocacy of the moral justification of killing doctors who perform abortions, she properly notes that those statements, too, were protected speech. The question for her is whether those statements, considered along with the circumstances of the creation of similar posters,

250. *Id.* at 1089 (Kozinski, J., dissenting).

251. *Id.* at 1089-90.

252. *Id.* at 1092. I do not understand this language to insist on proof that the speaker actually intended to carry out the threat. Rather, it is a demand for evidence, outside the allegedly threatening statement, that makes the statement credible as a threat that the speaker, or an associate of the speaker, will cause physical harm to the target. The disagreement here between the dissenters and the majority would seem to go to this question: Was the pattern of prior killings following prior posters, along with the defendants' prior activities, including repeated statements approving the killing of doctors, sufficient to make a reasonable speaker aware that the targets of the current posters would see them to threaten violence? For a more complete discussion, see *infra* text following note 269. See generally *supra* note 175 (detailing summaries of evidence in the *Planned Parenthood* litigation).

253. *Id.* (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915, 926-27 (1982)); see also *infra* text accompanying notes 357-366.

254. I came away from this opinion believing that Judge Berzon had agonized over her decision. If I am correct about this, I want to note my applause. Sometimes a 6-5 vote is a good indicator that both sides of a disagreement have claims worth serious consideration.

255. *Planned Parenthood*, 290 F.3d at 1102 (Berzon, J., dissenting).

followed by killings of doctors, could imbue the current posters with threatening messages.²⁵⁶ (None of the dissenting opinions discusses previous threatening speech by some defendants, nor do the dissenters discuss the defendants' joint activities and other connections with persons who had actually committed antiabortion violence.²⁵⁷) Analogizing the case to one of defamation of a public figure, Judge Berzon quotes Justice Brennan's famous comment that public debate should be "uninhibited, robust, and wide-open," even including "vehement, caustic, and sometimes unpleasantly sharp attacks."²⁵⁸ At this point she says that the posters targeting the doctors "were encased in documents and public events that promoted—at least for those listeners not 'in the know'—precisely the kind" of debate Justice Brennan had described.²⁵⁹ Of course, Judge Berzon is aware that, among abortion providers and antiabortion advocates of doctor-killing, *everyone* was in the know about the earlier posters and killings—particularly, all the defendants who published the posters at issue in this case and all the plaintiffs named in them. She is merely pointing out that the posters would also reach the "naïve reader"²⁶⁰—the person ignorant of the earlier posters and killings—who might take the statements as no more than a contribution to the abortion debate. In sum, Judge Berzon concludes, the posters, taken at face value, are constitutionally protected, "even if they induced fear in the plaintiffs that people *unconnected with the defendants* might harm them."²⁶¹

By using italics, Judge Berzon emphasizes her agreement with Judge Kozinski as to the proper assignment of meanings to the three messages at issue—that is, his view that there is no evidence supporting the finding that those posters, in context, constituted threats that the doctors would be killed or harmed by the defendants or their associates. Still, she does not deny that the plaintiffs' showings of context had persuasive force. Referring to the extensive evidence of defendants' efforts to justify doctor-killings of the recent past, Judge Berzon says:

This evidence is certainly of some pertinence as to what the defendants may have intended to do. It is more likely that someone who believes in violence would intentionally threaten to commit it. It is also pertinent to what persons in the plaintiffs' position—that is, persons involved in the abortion controversy and alert to the division of opinion within it—would likely understand concerning defendants' communication. Individuals who believe in violence are not only more likely to *threaten* to commit it but also actually to commit it, and so defendants' views might well influence plaintiffs' perception of their speech. And since the defendants would know that,

256. *Id.* at 1103.

257. For the details, see *infra* text accompanying notes 296-315.

258. *Planned Parenthood*, 290 F.3d at 1104 (Berzon, J., dissenting) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

259. *Id.*

260. *Id.* at 1110.

261. *Id.* at 1004 (emphasis in original).

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defendants' *public* statements approving the use of violence against doctors who perform abortion are relevant to whether reasonable speakers in defendants' position would expect their communications to be understood as threats.²⁶²

It is easy to imagine a judge in the majority who reads the foregoing in her chambers and murmurs, "Well, yes; I couldn't have said it better myself." But at this point Judge Berzon worries that the jury, thinking the very thoughts she just put in writing, might "hold the defendants liable for their abstract advocacy of violence rather than for the alleged coded threats in the posters and website, the instructions to the jury to the contrary notwithstanding."²⁶³ Her solution is a lawyer's solution: assignment of a severe burden of proof. For the defendants in this case, who engaged in "public protest speech," the threats exception could apply only if the plaintiffs convinced the judges that the statement was an "unequivocal" threat.²⁶⁴ Here, although the evidence cited in her above-quoted remarks indicates some likelihood of both the intent to threaten and the speaker's perception that the statements would be taken as a threat, she concludes that the evidence is not unequivocal: "People do not always practice what they preach, as the stringent incitement standard recognizes."²⁶⁵

Judge Stephen Reinhardt, who joined the Kozinski and Berzon dissents, added a one-paragraph dissent of his own to emphasize the difference between publicly delivered political speech, even "ugly or frightening," which "lies at the heart of our democratic process" and thus deserves the First Amendment's full protection, and private threats delivered one on one, which do not.²⁶⁶ Concluding that the majority had not been willing to recognize the difference, he would dissent for this reason alone.²⁶⁷

2. Planned Parenthood: *The critics' quest for doctrinal purity*

In the discussion that follows, I take up the major criticisms of the *Planned Parenthood* decision, offering my own perspective along the way. The views of critics in the law journals, and also those of the dissenters, are merged into my

262. *Id.* at 1110 (emphasis in original) (footnote omitted).

263. *Id.* at 1111.

264. *Id.* Unequivocal, in this sense, means "unambiguous, given the context, . . . clearly and convincingly apparent." *Id.* at 1109.

265. *Id.* at 1111. Judge Berzon refers here to the "imminent likely harm" standard governing incitement to unlawful action, set out in *Brandenburg v. Ohio*, 395 U.S. 444 (1969)—a standard which her opinion already rejected for threats cases. Her reason for rejecting the imminence part of the incitement test in a threats case seems to me to be just as persuasive at this stage of her opinion as it was several pages before: incitement "will result in harmful action only if someone else is persuaded by the advocacy," while a threat "works directly" to cause immediate harm, which can even be heightened by the passage of time. *Planned Parenthood*, 290 F.3d at 1106-07 (Berzon, J., dissenting).

266. *Planned Parenthood*, 290 F.3d at 1089 (Reinhardt, J., dissenting).

267. *Id.*

analyses, arranged by subject. The critics diverge here and there on the details, but they share a wish to establish a formulation of First Amendment doctrine that will maintain the widest scope for free speech. They share a sense that the Ninth Circuit's decision risks sacrificing too much freedom of expression. More specifically, they worry that the majority opinion may invite future prosecutors, civil litigants, jurors, and judges to deploy the law of threats for the ulterior purpose of squelching advocacy for unpopular causes. One potential doctrinal technique for minimizing the likelihood of this result would be to identify certain hard-edged requirements for applying the threats exception—a set of rules, as opposed to general standards. Alas, defining the boundaries of the threats exception simply cannot be done by rules.²⁶⁸ Still, a standard need not imply total discretion for the decisionmaker; standards defining legal doctrine vary along a continuum from narrow to wide, and most critics of the *Planned Parenthood* decision prefer to walk on the narrow side. One narrowing device might be to adapt a standard from another area of First Amendment doctrine.

The critics' arguments look to the future. They overlap, and of course they can be sorted in a variety of ways. I have chosen to discuss them under three broad—and interrelated—categories. First, there is the concern about protecting political advocacy. Second, there is the concern about avoiding the imposition of legal responsibility, criminal or civil, on a speaker, based on the past or potential behavior of other persons. Third, there is the concern about avoiding “chilling effects” on future would-be speakers.

a. *Protecting political advocacy*

A statement that is a pure and simple threat—“We’re going to kill you!” uttered face to face, in isolation from other speech—is easy to place outside the First Amendment’s protection because it is typically worthless in relation to the main goals of the freedom of speech. Such a threat does not inform citizens in their decisionmaking, nor does it promise to advance a search for truth. Arguably, a pure threat may serve the speaker’s sense of self-realization, but it does so at the cost of diminishing the target’s sense of self to at least an equivalent degree.²⁶⁹ The allegations in the typical threats case—including most of our sample cases—are fairly close to this model of a pure threat. But some alleged threats follow the pattern of the *Planned Parenthood* facts, for they are mixed in with speech that contains advocacy addressed to public issues. In considering such a case, it is important to remember that the doctrinal relationship of “advocacy” to “threat” does not pose an “either/or” choice for

268. See Gey, *supra* note 10, at 581 (quoted in text accompanying note 173).

269. See *supra* text accompanying note 46. One can also imagine that the existence of such threats might inform citizens’ decisions to punish threats, but why enter that chamber of mirrors?

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judges. In the *Planned Parenthood* case, the plaintiffs argued, and the Ninth Circuit agreed, that the defendants' posters, although they unquestionably advocated the position that abortion is wrong and should be criminalized, also constituted threats to do serious physical harm to the plaintiffs.²⁷⁰ There is no inconsistency here, any more than there would be if a defendant were to advocate a political position in a speech inciting a person or group to an imminently likely murder. In the latter case, *Brandenburg v. Ohio*²⁷¹ would not bar a prosecution for incitement to crime.

Seeking to protect political advocacy, Stephen Gey has argued that the threats exception itself should be governed by an adaptation of *Brandenburg's* doctrine governing incitement to unlawful action.²⁷² In this view, a statement could not be considered a threat for First Amendment purposes unless it were (1) intended to threaten serious harm and (2) uttered under circumstances in which that harm was imminently likely.²⁷³

The "intent to threaten" element has been widely supported,²⁷⁴ and the Supreme Court's more recent decision in *Virginia v. Black* demands some version of this element before the threats exception can be applied.²⁷⁵ The *Planned Parenthood* majority did not identify "intent to threaten" as a constitutional requirement, but it did remark that both the jury and the trial judge had found such an intent, as required by FACE. Undoubtedly, the majority could have been more responsive on the constitutional point, and from now on, we can expect judges to reach the point squarely. In any case, the evidence was plainly sufficient to justify the findings of intent to threaten. I do not understand the *Planned Parenthood* dissenters to disagree with the conclusion that the defendants distributed their posters with the purpose to frighten the doctors.²⁷⁶ For the future, the intent to threaten element of the

270. In one view, the greater the threat, the more powerful the advocacy: "Does anyone really doubt that an anti-abortion message is made more forceful by the speaker's announcement that he is willing to engage in illegal action to carry out those views?" Gey, *supra* note 10, at 590. So far as I know, no court has allowed this consideration to negate application of the threats exception.

271. 395 U.S. 444 (1969).

272. See Gey, *supra* note 10, at 546-53, 591-92.

273. *Id.* at 594.

274. See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1107-09 (9th Cir. 2002) (en banc) (Berzon, J., dissenting). Jennifer Rothman had made the same point in her article, written before she became Judge Berzon's clerk. See Rothman, *supra* note 8, at 314-19, 333. For a more elaborate argument to the same effect, see Blakey & Murray, *supra* note 7, at 1062-75. Frederick Schauer points out that the *Brandenburg* opinion speaks only to "direct" incitement, without saying that this term is a proxy for a requirement that the speaker have intended to cause the advocated unlawful conduct. See Schauer, *supra* note 1, at 218-20. He acknowledges, however, that the opinion is widely understood to mean just that. *Id.* at 220 n.72.

275. See *supra* note 57 and accompanying text.

276. Judge Berzon did fault the majority for failing to adopt the constitutional requirement explicitly—as *Virginia v. Black* would require a year later—and she thought the

Brandenburg analogy appears to be settled law.

As for the “imminent likely harm” element, the *Brandenburg* analogy breaks down, as Judge Berzon’s dissent makes clear.²⁷⁷ Advocating crime when there is no imminent likelihood of crime allows time for counter-persuasion and reflection—in short, “more speech.” In sharp contrast, as Judge Berzon indicates and as we have seen previously, a death threat causes grave harms at the moment it is communicated to the target, and it will go on causing those harms to the target and her family until some unknowable future time.

The dissenters nonetheless seek to drag the case into the sphere of influence of incitement doctrine, asserting that if there was any threat in the posters, it “came not from the posters themselves, but from the effect they would have in rousing others to take up arms against the plaintiffs.”²⁷⁸ That, most emphatically, is not what the majority decided. To them, the meanings of “the posters themselves” were properly found to be threatening because those meanings were informed by a multitude of previous acts by the defendants and persons closely associated with them. The dissenters criticize the majority for interpreting the posters as coded death threats by reference to other factors that did not themselves indicate a threatening meaning clearly enough. In particular, they object to the consideration of the defendants’ prior statements justifying the killing of doctors and other violence as indicators that the posters were implied threats against the people they portrayed.²⁷⁹ Applause for the killing of “abortionists” is, of course, protected advocacy, just as the defendants’ posters, considered literally, would be protected advocacy if they were published by some persons who had no knowledge of the previous posters, no history of threatening behavior, and no connection with practitioners of violence. To the dissenters and critics, the court abandoned the First Amendment when it used the earlier statements as aids in interpreting the recent ones as unprotected threats. Apparently their view is that the First Amendment provides a *cordon sanitaire* around each statement; if each, considered alone, would be protected, then that is the end of the inquiry.

If this were the command of the First Amendment, then the notion that communication normally draws its meanings from the common acculturation of speaker and recipient would be lost in the cracks. But, when the central

jury was not accurately instructed along that line. These are good points, but it is extremely unlikely that anyone was misled. Plainly, the defendants intended the posters to be threats that would put the doctors and the clinic operators in fear. See *infra* notes 312-34 and accompanying text. If that discussion fails to satisfy you, I recommend a reading of the trial judge’s findings. See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1131-53 (D. Or. 1999).

277. *Planned Parenthood*, 290 F.3d at 1106-07 (Berzon, J., dissenting); see also Rothman, *supra* note 8, at 320, 329; *supra* note 265 and accompanying text.

278. *Planned Parenthood*, 290 F.3d at 1098 (Kozinski, J., dissenting).

279. For the moment I defer the parallel argument that the posters did not specify that their publishers—or confederates of the publishers—would be the ones who might kill or maim the doctors. See *infra* text accompanying note 293.

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question is the propriety of assigning a threatening meaning to a statement, the First Amendment does not command this tunnel vision. The Supreme Court has recognized—in the context of antiabortion protest—that words, innocent in their abstract linguistic meaning, can constitute “veiled threats.”²⁸⁰ Similarly, when Whitfield’s final batch of letters reached Judge Bremer, she read them—as did the courts—with a mind-set informed by his earlier letters. The same potential relationship between the meaning properly assigned to a statement—declaring an intent to inflict harm—and the speaker’s earlier behavior (including speech) was visible in the *Planned Parenthood* case, as Judge Berzon correctly noted.²⁸¹

The insistence that a threat can be found only in an “unequivocal” message, at first blush, might seem inconsistent with the Court’s recognition that some threats are real although “veiled.” But, says Judge Berzon:

“Unequivocal” cannot mean literal. . . . Instead, “unequivocal” means to me unambiguous, given the context. As such, the requirement is essentially a heightened burden of proof, requiring that a threatening meaning be clearly and convincingly apparent . . . , [using the majority’s objective standard] in determining whether the speech in fact communicates an intent to harm specific individuals.²⁸²

Despite such a strong disclaimer, at this very point Judge Berzon reverts to the literal: the posters are presumed to be protected speech if they would not be seen by “the naïve reader” as threatening.²⁸³ The plaintiffs can overcome this interpretation only by clear and convincing proof that a coded meaning was intended and conveyed.

This starting place—which would likely be the ending place, given Judge Berzon’s application to these plaintiffs of a heavy burden of proof—gives presumptive effect to a message’s likely meaning for a hypothesized stranger who is ignorant of what the statement means to the speaker and the target. This

280. *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 773 (1994).

281. I invite the reader to look again at Judge Berzon’s words. *See supra* text accompanying note 262.

282. *Planned Parenthood*, 290 F.3d at 1109 (Berzon, J., dissenting). The Supreme Court of California recently reaffirmed its long-standing interpretation of the term “unequivocal” in the state’s statute punishing threats: “A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication’s meaning.” *In re George T.*, 93 P.3d 1007, 1016 (Cal. 2004). After a careful review of the context, the court concluded that a fifteen-year-old student’s “dark” poems, although containing images of violence and alienation, were not “sufficiently unequivocal to convey to [two female classmates] an immediate prospect that minor would bring guns to school and shoot students.” *Id.* at 1018. The immediacy requirement is written into the California statute, and I am curious whether it entered the *Planned Parenthood* dissenters’ proposed constitutional test through the back door.

283. *Planned Parenthood*, 290 F.3d at 1110 (Berzon, J., dissenting). Here Judge Berzon seems to be referring to dictionary meanings—what some philosophers of language have called “timeless meaning,” as opposed to “occasion meaning,” which is “the meaning intended in the situation in which the locution was uttered.” BRUNER, *supra* note 40, at 84.

is an unappealing priority for several reasons. First, the presumption gives too much leeway for “the ingenuity of threateners”²⁸⁴ who can couch their threats in unique terms that naïve readers will miss, but the targets will understand very well. Second, the strong and uncontested evidence of the defendants’ purposeful deployment of the posters to instill fear suggests that they should bear the burden to explain why the targets’ well-demonstrated fears were unjustified.²⁸⁵ Third, and most important, the central question for those who find that the facts in every threats case go beyond the literal linguistic meaning of the words uttered is whether *this* speaker has communicated a threat to *this* target.²⁸⁶ All the *Planned Parenthood* defendants, like all the plaintiffs, shared a body of “genre knowledge”²⁸⁷ informing the meanings of communications on the subject at hand: the treatment that abortion doctors deserve at the hands of their adversaries. Both the defendants and the plaintiffs were very much “in the know” concerning the defendants’ connections with the sponsorship and execution of recent antiabortion violence, and “anyone in the know” would recognize the posters’ coded meanings.²⁸⁸ The determinations to this effect by the jury and the trial judge were founded in part on the defendants’ extensive acts justifying and supporting the killing of doctors.²⁸⁹ But the crucial evidence bearing on the question whether the posters were coded threats also bears on the question whether the majority imposed liability on the defendants on the basis of other people’s actions. So, I defer my detailed review of the evidence bearing on the “coded threat” claim until the discussion that follows.²⁹⁰

If the *Brandenburg* incitement analogy fails, an alternative doctrinal strategy, aimed at protecting future advocacy, might be to say that advocacy in a public arena always deserves the First Amendment’s protection, even when it is threatening.²⁹¹ Judge Reinhardt’s short dissent approaches the edge of this position—although it surely is not his position, for he joins in the other two

284. *United States v. Malik*, 16 F.3d 45, 50 (2d Cir. 1994).

285. Whether the Supreme Court’s insistence on a showing of intent to threaten be interpreted as a “purpose” requirement or as a requirement that the speakers understand that recipients of the messages would take them as threats, the *Planned Parenthood* defendants’ conduct qualifies for the threats exception.

286. A naïve reader of Whitfield’s last batch of letters to Judge Bremer would likely call them love letters. A naïve reader of J.M.’s letter to K.G. would surely call it a threat—for the reader would not know that J.M. had not delivered the letter to K.G.

287. On “genre knowledge,” developed “in response to the sociocognitive needs of individual users,” see AMSTERDAM & BRUNER, *supra* note 160, at 171 (quoting CAROL BERKENKOTTER & THOMAS N. HUCKIN, *GENRE KNOWLEDGE IN DISCIPLINARY COMMUNICATION: COGNITION/CULTURE/POWER* 6 (1995)).

288. This is Judge Berzon’s phrase. *See supra* text accompanying note 259.

289. I say “acts” deliberately, for conduct was not limited to antiabortion advocacy.

290. *See infra* text accompanying notes 293-335.

291. A variation on this notion is Stephen Gey’s suggestion that “threats that are announced in public to the entire world are akin to the speech of the incitement cases, which advocated illegal action and encouraged members of the audience to consider violating the law.” Gey, *supra* note 10, at 590.

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dissents. At the very least, he is critical of the majority for not making more of the public quality of the defendants' political speech. That seems a fair criticism—and of course Judge Reinhardt is not arguing for an absolute rule protecting threats issued in public. What he calls for is “heightened scrutiny” for public political speech,²⁹² and I do not know of anyone, judge or commentator, who would disagree. The majority surely thought they were subjecting the crucial findings—concerning FACE’s requirement of intentional intimidation and the existence of a threat in the constitutional sense—to heightened scrutiny. So do I.

b. *Limiting legal responsibility to an individual’s own actions*

The critics of the *Planned Parenthood* decision make the independent, though related, point that the law should hold an individual responsible only for his or her own behavior and not for the actions of others. This is another general proposition with which the majority implicitly concurs;²⁹³ indeed, no one disagrees. The proper question in this case was whether the defendants—by their own actions—threatened the plaintiffs with bodily harm. The dissenters, and some academic critics, charge that the court imposed liability on the defendants without a showing that their posters contained a threat that the defendants personally, or persons in concert with them, would inflict harm.

The defendants’ posters did not explicitly say that the speakers themselves, or their confederates, would commit violence against the doctors or others at the clinics. But consider the behavior of the defendants in the time leading up to the publication of the posters. Should that behavior be taken into account in determining whether the posters should be assigned a meaning that the defendants, or people in concert with them,²⁹⁴ would commit violence against

292. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002) (en banc) (Reinhardt, J., dissenting). Similarly, Judge Kozinski’s panel opinion had called for “the maximum level of protection” for public speech addressed to public policy. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *vacated*, 268 F.3d 908, 909 (9th Cir. 2001).

293. This is my reading of the majority’s definition of a threat. Such a communication must be “a serious expression of intent to inflict bodily harm upon that person.” *Planned Parenthood*, 290 F.3d at 1077. Judge Kozinski rightly reads “inflict” to imply that the speaker, or “someone acting in concert with him,” “will take an active role in the inflicting.” *Id.* at 1089 n.2, 1090 (Kozinski, J., dissenting). He criticizes the majority, not for adopting this test, but for misapplying it.

294. The *Planned Parenthood* dissenters argued that a message can be taken as a threat only if it says that the speaker, “or someone acting in concert with him, will resort to violence.” *Id.* at 1090 (Kozinski, J., dissenting). Various locutions for this idea appear in the dissents: persons “in concert” with the speaker, *id.* at 1090, 1091 (Kozinski, J., dissenting); “agents” of the speaker, *id.* at 1104, 1107 (Berzon, J., dissenting); persons in the speaker’s “control,” *id.* at 1106 (Berzon, J., dissenting); or “someone associated” with the speaker, *id.* at 1092 (Kozinski, J., dissenting). In this Article I use the word “confederates” to embrace these terms. The district judge found that the defendants were all members of a conspiracy to

the posters' targets? Some of the following account repeats bits and pieces of my statement of the facts of the *Planned Parenthood* case. It is important to bring them together here.²⁹⁵

From the time ACLA's organizers, together with Paul Hill, left Operation Rescue,²⁹⁶ ACLA had one, and only one, reason for existence: to act as a support group—a "Violence-R-Us"—for those who commit antiabortion violence. The defendants who had come together to form ACLA were not a sprawling collection of unrelated individuals; even before the organization's formal beginning, these people were a team, typically carrying on their support operations together. When someone bombed a clinic or killed a doctor, the defendants were either literally on the scene, raising defense funds, or offering instant public justification. For example:

- After the poster depicting Dr. Gunn was followed by his killing, Paul Hill and defendant Michael Bray jointly authored a public statement defending the killer, Michael Griffin. Hill and Bray then issued the statement jointly with *Planned Parenthood* defendants ALM, Burnett, Crane, Dodds, Foreman, McMillan, Ramey, and Stover.²⁹⁷
- On her first visit to Wichita, Kansas, Shelly Shannon—"a close friend and associate of the defendants"²⁹⁸—had protested against Dr. Tiller.²⁹⁹ On her second visit, she shot Dr. Tiller. Paul Hill joined with defendants Bray, Burnett, Dodds, and McMillan in issuing a petition

threaten. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1153-54 (D. Or. 1999). Blakey and Murray use different language: they say the speaker is responsible for violence of others only if "he authorized it, directed it, or ratified it." Blakey & Murray, *supra* note 7, at 843. They then say the *Planned Parenthood* majority's use of "evidence of context to interpret one person's statements in light of another person's conduct where the other person is legally unrelated to the speaker" is "disturbing," and its use of "similar evidence of context to show the state of mind of the speaker himself is little short of revolutionary." *Id.* at 837.

295. If you find the degree of detail unbearable, you can skip forward several pages. *See infra* text following note 335.

296. Defendant Foreman had organized a Chicago meeting of Operation Rescue members to debate the subject of antiabortion violence. At the meeting, two leaders of Operation Rescue argued that supporters of this sort of "justifiable" homicide should not be members of the organization. The view favoring violence was presented by Hill and adopted at that same meeting by ALM and seven individuals who would later be defendants in the *Planned Parenthood* case: Bray, Burnett, Crane, Foreman, McMillan, Ramey, and Stover. *See* Plaintiffs' Brief, *supra* note 175, at 25-26 (citing record). The pro-violence group left Operation Rescue. Not long afterward, Hill put his view into action, killing Dr. Britton and his escort and wounding the escort's wife. Days later, ACLA held its first public event. *Id.*

297. *See supra* note 186.

298. *Planned Parenthood*, 41 F. Supp. 2d at 1135. On Shannon's associations with *Planned Parenthood* defendants, *see supra* note 191 and accompanying text.

299. *Planned Parenthood*, 41 F. Supp. 2d at 1132. In the October 1993 issue of *Life Advocate*, Andrew Burnett wrote that "we [ALM] were very proud to be associated with [Shelly Shannon]." *Id.* *Life Advocate* has also featured three doctor-shooters on its cover: Michael Griffin, Paul Hill, and Shelley Shannon. *Id.* at 1137.

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defending Shannon.³⁰⁰ Hill, along with defendant Stover, also made an appearance in a network television interview to offer their praise of Shannon.³⁰¹ Hill and Shannon then carried on a correspondence, and he visited her in jail in Kansas before he shot and killed Dr. Britton.³⁰²

- After Hill killed Dr. Britton, defendants ALM, Bray, Burnett, Crane, McMillan, Ramey, and Stover jointly issued a petition defending Hill's action.³⁰³

Each of the statements approving the killing of doctors who performed abortions, viewed in isolation, is protected by the First Amendment, and the *Planned Parenthood* dissenters rightly say the defendants' liability cannot be predicated on protected speech by itself. But, as Judge Berzon noted, the earlier statements are relevant to the assignment of meanings to the posters. We have seen how, from ACLA's earliest days, the individual and group defendants were engaged in concerted activity to promote antiabortion violence. Some of the confederates—Hill, Hannon, and Bray—were well known for engaging in violence itself.

Before the unveiling of the three posters at issue in the *Planned Parenthood* case, some of the confederates had engaged in other expression that was threatening—with only the thinnest of veils:

- An ALM article in *Life Advocate* featuring Hill's surveillance of Dr. Britton said, "Plans to visit this man at his home as well as his private practice are now in the works for next week."³⁰⁴
- Defendant Dreste, who founded a militia group called First Missouri Volunteers,³⁰⁵ had the habit of wearing shotgun shells on his hat during his St. Louis clinic protests. After the killing of Dr. Gunn by a firearm, he lent special force to this custom by carrying a sign, directed at a doctor there: "Dr. Shah, do you feel under the Gunn?"³⁰⁶

300. *Id.* at 1132.

301. *Id.* at 1149-50.

302. Dave Hogan & Spencer Heinz, *Shannon Draws 20-Year Term for Clinic Fires*, OREGONIAN, Sept. 9, 1995, at C1.

Here and in a number of the notes that follow I cite press reports in newspapers in and near Portland, Denver, Kansas City, and St. Louis, where the plaintiffs worked. These reports go beyond the evidence considered by jurors or judges in the *Planned Parenthood* case. They are offered for two reasons. First, they make clear that a number of the defendants and their close associates were notorious among providers of abortion services and celebrities among supporters of antiabortion violence. Second, if any analogous future cases should arise, lawyers should understand that such reports can offer useful leads toward evidence of both the plaintiffs' and the defendants' awareness of the settings in which allegedly threatening messages have been conveyed.

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

304. Plaintiffs' Brief, *supra* note 175, at 29 (citing record). Hill did not kill Dr. Britton until some months had passed.

305. Melinda Roth, *The Conviction of Tim Dreste*, RIVERFRONT TIMES (Missouri), May 12, 1999 (featuring lengthy profile of Dreste).

306. *Planned Parenthood*, 41 F. Supp. 2d at 1134, 1145.

- In ALM's *Life Advocate* magazine, defendant Bray told how he had traded in his copy of the *Army of God Manual*, a tract on making lethal weapons for fighting against abortion, for a U.S. Army manual on sniper training.³⁰⁷ Bray had put the words "Army of God" on a sign at the Hillcrest Clinic in Norfolk, Virginia—one of the abortion facilities that he bombed.³⁰⁸
- Defendant ACLA's "Contract with the American Abortion Industry"³⁰⁹ was a reference to killing that all the *Planned Parenthood* plaintiffs and defendants would have understood, especially in light of the killings that had already taken place. The text of the "contract" includes two statements in rapid succession: "Abortion is murder" and "The Bible requires capital punishment for murder."³¹⁰ Perhaps the latter declaration is a call for reform of the criminal law. Perhaps.
- Defendant Treshman's statements that Dr. Crist would be "monitored" and that "appropriate action will be taken" were followed within a few days by a shotgun blast into Crist's home, shattering two windows of his son's playroom.³¹¹

Other statements by the defendants demonstrate a general purpose to cause the doctors and clinic employees immediately to fear for their lives, and to make that fear prolonged in hopes of scaring them away from performing abortions. The defendants also had the specific knowledge that the posters would serve these short- and long-term purposes well:

- When defendant Treshman praised the killing of a doctor in Vancouver, he added, "I would think more abortionists would quit as a

307. *Id.* at 1139.

308. *Id.* Although persons self-identifying with the Army of God abducted an Illinois doctor and his wife for eight days, the label has mainly been connected with bombings and arson. Shelley Shannon evidently got some of her instruction in the latter techniques from the *Army of God Manual*, which the police found buried in her backyard. Under the pseudonym "Shaggy West, A.O.G.," she wrote a minimally fictionalized and detailed description of one of her Oregon clinic burnings. Dave Hogan & Spencer Heinz, *Shannon's Writings Document Making of a Soldier*, OREGONIAN, Sept. 3, 1995, at C1. Defendant Dodds attended ACLA's January 1996 White Rose Banquet wearing a badge reading "Lieutenant Colonel, AOG." *Planned Parenthood*, 41 F. Supp. 2d at 1144. The White Rose Banquets, promoted in *Life Advocate*, *id.* at 1138, are annual events in honor of people who have been imprisoned for antiabortion activities, including violence. At the banquets, sometimes hosted by defendant Bray, ACLA distributes a White Rose Calendar, published by defendant Murch. Its 1996 calendar, issued the same month as the "Nuremberg Files," featured photographs of bombed abortion clinics and people who had killed doctors. *Id.* at 1139.

309. The trial judge called this document "Contract on the American Abortion Industry." *Planned Parenthood*, 41 F. Supp. 2d at 1137.

310. Skipp Porteus, *Secret Files Menace Doctors*, Freedom Writer (Mar. 1996), <http://www.skepticfiles.org/fw/nurember.htm> (last visited Mar. 2, 2006).

311. *Planned Parenthood*, 41 F. Supp. 2d at 1150. Of course, there was no evidence that Treshman himself was the unsuccessful marksman. Still, it would be reasonable if Crist were to take his statement as a threat—and to recall the statement and the shots when ACLA issued the poster featuring Crist himself.

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result of it.”³¹²

- Defendant ALM, in a 1993 *Life Advocate* article, commented that Dr. Gunn’s murder had “sent waves of fear through the ranks of abortion providers across the country. As a result, many more doctors quit out of fear for their lives, and the ones who are left are scared stiff.”³¹³
- Defendant Burnett testified in this case that that the “Guilty” or “Wanted” posters had endangered doctors’ lives and said, “I mean if I was an abortionist, I would be afraid.”³¹⁴
- Defendant Wysong referred to doctors who had left abortion practice, saying, “They said the two things they feared the most were being sued for malpractice and having their picture put on a poster.”³¹⁵

In short, the posters were a power grab by the defendants. The multiple harms of fear caused by death threats were exactly what the defendants sought to inflict. Agreeing with the jury’s verdict, the trial judge found that all the defendants had conspired to publish the posters and to threaten the plaintiffs’ lives.³¹⁶

The targets’—the *Planned Parenthood* plaintiffs—own awareness provides additional and important context for determining the meaning of the posters. Part of the plaintiffs’ acculturation, affecting the meanings they assigned to the posters featuring their pictures and addresses, came from the defendants’ successful use of the local and national media to garner support for bombings, arsons, acid attacks, and shootings of doctors: for example, the use of widely publicized unveilings of posters, press conferences, network television interviews, the defendants’ own magazines, and articles in other publications. All of the plaintiffs knew about the earlier “Wanted” posters that were followed by shootings and knew that the defendants were among those most likely to translate their passion into violent action. Defendant Bray was a celebrity, widely known by everyone “in the know” not only for his book, but also for his bombings.³¹⁷ Surely it could not be claimed that every single plaintiff knew every detail about the interactions of each individual defendant with his or her confederates who had engaged in threatening activity or with persons who had actually engaged in violence. However, there was ample evidence of the individual plaintiffs’ awareness of interactions among defendants and their confederates.

First, Dr. Crist, target of the St. Louis poster, was aware that defendants Drete and Treshman had instigated the Crist poster, and he was fearful because the same two leaders of ACLA had harassed him for years. Out of fear

312. *Id.* at 1150-51.

313. *Id.* at 1138.

314. *Id.* at 1141.

315. *Id.* at 1151.

316. *Id.* at 1153-54.

317. *Id.* at 1134-36, 1138-40.

of violence, Crist had previously stopped his abortion practice for nine months. In 1993, when he announced the resumption of his practice, Treshman had publicly said, “[W]e have been assured that [Dr. Crist] will be monitored and that appropriate action will be taken.”³¹⁸ Within days, a shotgun was fired into Crist’s home. During the ACLA gathering that unveiled the Crist poster, Crist flew from Kansas City to St. Louis under police guard.³¹⁹ After the Crist poster was unveiled, St. Louis police advised him to take additional security precautions. One officer said to him, “Doctor, in my estimation, this is a contract on your life.”³²⁰

Second, the plaintiff clinics and two of the doctors—Elizabeth and James Newhall—were based in Portland, as were defendants ALM and ACLA. In 1993 and 1994, the Portland media outlets were saturated with news and commentary about Shelley Shannon; her career of antiabortion activity as a member of ALM, escalating from protest to trespass to arson to shooting, was detailed almost daily for about a month, and quite often thereafter. The stories included Shannon’s active correspondence with Paul Hill following the shooting of Dr. Tiller. Three of the plaintiff doctors could not help noticing that they were featured on a poster that included Dr. Tiller, whom Shannon had shot but failed to kill. Beginning as early as 1989, interviews with Shannon’s friends and co-members of ALM—defendants Burnett, Ramey, and Stover—appeared with great frequency in the Portland press.³²¹ Burnett had become a national figure,³²² but the Newhalls had local knowledge of him from his surveillance of their home and offices in violation of a federal court’s prior injunction.³²³

Further, the fourth individual plaintiff, Dr. Warren Hern, was based in Boulder, Colorado. After Michael Griffin killed Dr. Gunn in Florida, Hern commented: “This is a political assassination. It’s a terrifying incident, but it’s entirely predictable.”³²⁴ Hern had previously received death threats in the mail, was the target of a 1988 shooting, had worn bulletproof vests from time to time, had been practicing behind bulletproof glass since 1988, and had put a costly steel fence around his office.³²⁵ His awareness may have been intensified by

318. *Id.* at 1150.

319. See Roth, *supra* note 305. For a profile of Crist, see Jo Mannies, *Two Sides Agree: Abortion Doctor a Dedicated Man*, ST. LOUIS POST-DISPATCH, May 4, 1997, at 1A.

320. Roth, *supra* note 305. The trial judge instructed the jury to consider this sort of hearsay statement, not for its accuracy as a description of the poster as a threat, but only for purposes of evaluating the doctor’s state of mind in reacting to the poster.

321. See, e.g., Sura Rubenstein, *Abortion Stirs Impassioned Activism: Andrew Burnett Puts His Freedom on the Line*, OREGONIAN, Aug. 13, 1989, at A1.

322. By early 1995, Burnett had made it to the top of the national charts. He was one of fifteen “enemies of choice” listed by Ms. Magazine. See Tom Bates, *Portland Activist Downplays Action*, OREGONIAN, June 6, 1995, at A9.

323. See *supra* note 234.

324. Editorial, *Killing To Save Lives Is a Twisting of Ethics*, DENV. POST, Mar. 12, 1993, at 6B.

325. See *Abortion Doctor Dons Bulletproof Vest To Admonish Anti-Abortion*

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further publicity in the Colorado papers about the very people who put his name on the Deadly Dozen poster—the defendants³²⁶ and their close associates.³²⁷

The plaintiffs' fears of violence at the hands of the defendants were not relieved when the FBI, federal marshals and local police warned all of them immediately after the posters were released to take elaborate protective measures.³²⁸ They did so, with further disruptions to their lives.

One way the plaintiffs might reasonably characterize most of the defendants would be to think of them as people who had not engaged in violence—at least not yet. In January 1994, Paul Hill was asked by a Portland reporter whether the people who signed the petition defending the killer of Dr. Gunn would be likely to shoot abortion workers. He responded, "Not likely." As the reporter put it: "The reason, [Hill] explains, is they would not be foolish enough to sign such a high profile list if they actually had such plans. . . . [Further,] their family responsibilities preclude them from doing anything that could put them in jail for years."³²⁹ Six months later, Hill killed Dr. Britton and his escort and wounded a third person. Like Hill, other individuals who took to violence—Griffin and Shannon—had started by participating in nonviolent protests. In the words of defendant Dodds, "[P]eople out there who have the kind of commitment and convictions to the unborn children that they have will do the kind of things that Paul Hill, Michael Griffin and Shelley Shannon have done. . . . It's just a question of time before those people deliberate upon their beliefs."³³⁰ This statement is not a threat, but it is one further indicator that the

Movement, GAZETTE (Colorado Springs), Aug. 22, 1993, at B4 (reporting that five shots were fired into Hern's office in 1988); Maureen Harrington, *Doctor on Abortion "Deadly Dozen" List*, DENV. POST, Jan. 25, 1995, at B2 (focusing on Hern); John Sanko, *Abortionist Threatened in Letters*, ROCKY MOUNTAIN NEWS (Colorado), Sept. 28, 1994, at 19A.

326. See Tom Bates, "Pro-life" Movement Echoes Crisis of '60s Anti-War Fight: Militancy Splinters Abortion Foes, ROCKY MOUNTAIN NEWS (Colorado), Nov. 28, 1994, at 28A (featuring Burnett, Foreman, Ramey, and a co-conspirator); see also Bates, *supra* note 322, at A9. Defendant Burnett is quoted as saying, "If a terrorist is one who is dedicated to a cause, maybe we are. But if we are, then John Brown was a terrorist." Bates, *Militancy Splinters Abortion Foes*, *supra*, at 28A.

It is not known whether the plaintiffs recalled—as Burnett apparently did—that in 1856, John Brown, retaliating for the sacking of the free-state town of Lawrence, Kansas, by pro-slavery posses, presided over the execution-style shooting of five men near Pottawatomie Creek. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 167 (1982).

327. See, e.g., Judy Thomas, *Storm Clouds of Violence Gathering as Anti-Abortionists Raise the Ante*, ROCKY MOUNTAIN NEWS (Colorado), Aug. 21, 1994, at 9A (discussing Shannon and Hill); see also Stephen J. Hedges, *Terrorists Targeting Abortion Campaign Against Clinics Suggests Nationwide Ring*, ROCKY MOUNTAIN NEWS (Colorado), Nov. 27, 1994, at 50A (discussing Shannon, Hill, Bray, Burnett, and McMillan).

328. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 41 F. Supp. 2d 1130, 1132-33 (D. Or. 1999).

329. Spencer Heinz, *Protest Methods Cause Schism*, OREGONIAN, Jan. 31, 1994, at A1.

330. Thomas, *supra* note 327, at 9A. This quote, appearing in the *Rocky Mountain*

plaintiffs reasonably read the posters as statements that it was “just a question of time” before one of the defendants would strike.

If you were one of these doctors, or a worker at Planned Parenthood’s Portland clinic, would you read ACLA’s posters to mean that the defendants were out to kill you? Would you take similar precautions? Or was it a surrender to “irrational fears”³³¹ for the doctors targeted by the posters to think that there was a significant likelihood that one or more of these twelve defendants would decide to express their own fervor—or their solidarity with Griffin, Hill, and Shannon—by shooting *them*? The plaintiffs knew—partly because the defendants trumpeted their doings to the press—that ACLA members repeatedly had engaged in joint activities with persons who had proceeded to commit violence. They knew that some defendants had threatened doctors,³³² or conducted surveillance on them.³³³ They knew, too, that defendant Bray, the leading theoretician of this ring of violence patrons, spoke of violence from his own experience as a bomber. Defendants’ single-minded campaign to support antiabortion violence was interwoven with incidents of the real thing. This was the background against which the doctors and other plaintiffs understood the posters as threats of physical violence.³³⁴

The evidence here seems to me to be clear and convincing. The defendants’ behavior demonstrates beyond any serious doubt that (1) the doctors named in the posters quite reasonably understood them as threats of violence to be carried out by the people who issued the posters or by people in concert with them; (2) the defendants knew the doctors would assign this meaning to the posters; (3) the defendants knew the posters would cause the doctors to fear physical harm at the hands of the defendants; and (4) knowing all this, the defendants issued the posters with the purpose to achieve these

News, may have come to Dr. Hern’s attention.

331. Professor Gey, in the conclusion to his first critique of the *Planned Parenthood* decision, seeks support in Justice Brandeis’s famous statement: “It is the function of speech to free men from the bondage of irrational fears.” Gey, *supra* note 1, at 597 (quoting *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring)).

332. For example, they knew about Dreste’s threat to Shah and Treshman’s threat to plaintiff Crist. *Planned Parenthood*, 41 F. Supp. 2d at 1145, 1150.

333. For example, Burnett violated an injunction ordering him to stay away from the Downtown Women’s Health Center—the clinic where plaintiffs Dr. Elizabeth Newhall and Dr. James Newhall performed abortions. *Id.* at 1140.

334. The plaintiffs’ understandings did help support the claim that the posters, in context, could reasonably be understood by the targets to have a threatening meaning. But it bears repeating that the targets’ actual fears are not an essential element for every application of the threats exception. For example, there was no need for President Clinton to be aware of speaker’s threatening communications in *United States v. Hanna*, 293 F.3d 1080 (9th Cir. 2002). Still, *Planned Parenthood* was a civil action; if the targets had not seen the posters as threatening, they would not have been subjected to “intimidation” under FACE—and likely would not have brought suit. See Freedom of Access to Clinic Entrances (FACE) Act, 18 U.S.C. § 248(c) (2006).

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results—and they succeeded.³³⁵

c. Avoiding chilling effects on future speech

For the typical defendant charged with making a threat, exemplified in most of our six sample cases, the chilling-effect problem does not arise. Usually, the defendant is a lone unfortunate individual who has mouthed off in an ugly way at an inappropriate moment. It has not occurred to this defendant to get a lawyer's advice before speaking. The concern about chilling effects is at its strongest when the speaker in question is advocating for a group or a cause. Such a speaker may even consult a lawyer.³³⁶ Two academic critics of the *Planned Parenthood* decision argue that, given "the current state of the law" of threats in all the circuits, future "protestors will necessarily lack the ability to gauge accurately the extent to which a 'context' created by others will be taken into account—well after the fact—by a court or jury in evaluating their speech or expressive conduct."³³⁷ The worry here is that advocates who are innocent of any violent inclination may censor their own speech for fear that someone on the "violent fringes" of their movement will make their speech sound threatening to some future jury.³³⁸ I have suggested that in *Planned*

335. The *Planned Parenthood* majority should have insisted on an intent to threaten as a constitutional requirement, but they reached the same substantive result by applying the FACE intent requirement. See *supra* note 246 and text accompanying note 275. *Virginia v. Black*, 538 U.S. 343 (2003), decided the year following the Ninth Circuit decision, gives constitutional status to the intent requirement. In any case, given the purposefully threatening conduct of these defendants, I find it hard to agree that imposing liability on them means that "First Amendment freedoms are in peril." Blakey & Murray, *supra* note 7, at 1083.

336. My colleague Eugene Volokh puts the chilling-effect question to his classes by asking how a lawyer should respond when such an advocate asks what he can safely say. True enough, the student-lawyer may have some difficulty in advising—and the difficulty escalates when the speaker is a member of a group organized to support killing in the interest of a cause. I have not combed the record of the *Planned Parenthood* litigation, but I doubt that anyone in ACLA sought legal advice before putting out the posters. If we ask what a hypothetical advisor should have said upon examining the posters, surely the lawyer would need to seek information about such things as (1) the previous activities of the speakers, including any threats they may have already made to these and other doctors or clinic operators; (2) their intention to communicate the posters to the potential plaintiffs; and (3) their previous joint activities with people who had practiced violence. Of course, the lawyer ought to try to discover whatever evidence there might be, beyond the clients' statements, of their purpose to use the posters to frighten the targets. In other words, if this hypothetical exercise is designed as a cautionary tale, there is an ample share of caution for everyone who would comment on the *Planned Parenthood* decision, either in support or in condemnation.

337. Blakey & Murray, *supra* note 7, at 1064 (footnote omitted). Understand: *all* the circuit courts have failed to come up to these authors' doctrinal criteria for protecting free speech in cases where the threats exception to the First Amendment is invoked. *Id.* at 1083.

338. I take the phrase "violent fringes" from Eugene Volokh's defense of the Ninth Circuit's panel decision that (for a time) reversed the judgment for the *Planned Parenthood* plaintiffs. See Eugene Volokh, *Menacing Speech, Today and During the Civil Rights Movement*, WALL ST. J., Apr. 3, 2001. I suggest asking the leaders of Operation Rescue who opposed violence in 1994 for their opinion on whether Hill, Bray, and the other defendants

Parenthood itself, the meanings of the defendants' posters were properly assigned on the basis of a context of the defendants' own making.³³⁹ Even so, I agree that the law of threats, dominated by the facts of each case and resistant to rules, inevitably carries a risk of chilling effects,³⁴⁰ thus risking the indirect oversuppression of speech. I agree, too, that it is chiefly the responsibility of judges to prevent that risk from maturing into reality.

And yet, in the modern First Amendment tradition, the usual means by which judges seek to minimize chilling effects is the construction of doctrine. For example, a speech-licensing law must contain fairly precise standards that will make it hard for licensing officials to practice informal and low-visibility viewpoint discrimination. For similar reasons, even a content-neutral law that has the result of restricting expression (say, a law limiting noise in a park) must not be overly broad and go substantially beyond the reasons justifying the prohibition (say, the protection of tranquility in a "quiet zone"). These are not rules, but tightly drawn standards. The problem, once we turn to the threats exception, is that the supply of such doctrinal solutions is distinctly limited. Some refinements to the standards currently applied—as set out earlier in my "Capsule Restatement"³⁴¹—do seem worthwhile. The courts should make clear that, for the threats exception to be invoked successfully, (1) the statement must

who resigned from Operation Rescue precisely because of its antiviolence stance, might themselves be a violent fringe.

339. I do not see the *Planned Parenthood* case as one in which innocent political advocates have unwittingly stumbled into trouble because other people's behavior had made their innocent advocacy seem like a threat of violence. Indeed, I cannot imagine how anyone could conclude that these defendants reaped a whirlwind they did not sow—anyone, that is, who considers the evidence I have recounted here. Perhaps there is a criticism of the decision that goes into these gritty details, but I have not yet seen one. The nearest thing would be the list offered by Blakey and Murray of some 600 references at the trial to various incidents of antiabortion violence committed by people other than the defendants. See Blakey & Murray, *supra* note 7, at 846 n.33. Michael Bray, who was both a bomber and a defendant, did not make this list. Paul Hill, the pro-violence leader who killed Dr. Britton and his escort, is described in the Blakey-Murray list as a "non-party, non-conspirator." *Id.* The shooter of Dr. Tiller and author of multiple arson and acid attacks, Shelley Shannon, is described as a "non-party, non-conspirator." *Id.* Perhaps the authors wanted to suggest that the listed references prejudiced the jury (and even the trial judge). If that were the authors' objective, one could understand why they might not mention the close association of the defendants with these practitioners of violence in the period immediately preceding the posters' issuance.

340. The prevailing standards, summarized in my "Capsule Restatement," offer some protection to the targets' liberty, at the cost of some chilling effects on speakers. See *supra* text accompanying notes 53-58. Such a trade-off is not uncommon. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), three concurring Justices proposed a rule that would wholly immunize a publisher from liability for libel of a public official concerning the performance of official duties. *Id.* at 293-97 (Black, J., concurring); *id.* at 297-305 (Goldberg, J., concurring in judgment). The majority's standard, they said, would chill speech, because a publisher might fear a jury award of damages based on a finding that the publisher had knowingly or recklessly published false reports that defamed an official. Justice Brennan, writing for the majority, accepted this risk of chilling newspapers in the interest of protecting officials against deliberate lies.

341. See *supra* text accompanying notes 53-58.

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identify a particular target;³⁴² (2) the statement must threaten harm to be inflicted by the speaker or his or her confederates;³⁴³ and (3) the speaker must intend that the statement eventually be communicated to the target.³⁴⁴ Even with these refinements, however, the reality in this branch of First Amendment law is that doctrine cannot offer surefire protection against chilling effects.

So, it should be no surprise that the *Planned Parenthood* dissenters agree with the majority's statement of the doctrinal formula governing the threats exception.³⁴⁵ They disagree with the majority not about what constitutes a threat in the abstract, but about what these posters should be taken to *mean*. This issue of constitutional fact is unavoidable. In every case, to decide whether a statement is or is not a threat, a judge, like a juror, will be compelled to assign some meaning to the statement. The center of gravity of a statement's relevant meaning—at least in a civil case, in which the target claims to be harmed—must be the interpretations of the speaker and target. When those interpretations are shared, because the speaker and the target have been acculturated to attach similar meanings to words and other behavior, the task of juror and judge ought to be fairly easy.³⁴⁶ This is my view of the *Planned Parenthood* case.³⁴⁷

342. This provision will guard against recurrence of the result in *United States v. Viefhaus*, 168 F.3d 392 (10th Cir. 1999). See *supra* text accompanying notes 79-81, 130-36 (phone message mentioning bombing of "15 selected cities"). The Supreme Court, without discussion, adopted this requirement in *Virginia v. Black*, speaking of an expression of intent to harm "a particular individual or group." 538 U.S. 343, 359 (2003).

343. See Rothman, *supra* note 8, at 321, 334. The *Planned Parenthood* dissenters also made this point. See also *supra* text accompanying note 293.

344. This would guard against recurrence of the result in *Doe v. Pulaski County Special School District*, 306 F.3d 616 (8th Cir. 2002). See *supra* text accompanying notes 77-78, 120-29 (threatening language in stolen letter). I thank Robert Post for prompting me to bring these doctrinal points into sharp relief.

345. "[T]he majority correctly distills the . . . definition of a true threat . . ." *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1089 (9th Cir. 2002) (en banc) (Kozinski, J., dissenting).

346. Even in a criminal case, such as the one involving Whitfield's letters to Judge Bremer, shared interpretations would seem to be central. But in some criminal prosecutions for threats, there would seem to be no reason to require that the target actually know of the threat—so long as the speaker had reason to expect that it would be communicated to the target. The state, after all, has a strong interest of its own. Perhaps the easiest case here involves a threat to the President. See *supra* text accompanying note 158.

347. This view is akin to Justice Thomas's view of the proper assignment of meaning to any cross-burning. See *Virginia v. Black*, 538 U.S. at 388-95 (Thomas, J., dissenting). Surely, for many African-Americans, every cross-burning—and especially one performed at a Ku Klux Klan rally—will be seen as a generalized threat to an entire race. Here, many European-Americans (I include myself) are candidates for the status of naïve reader. For speculation along these lines, see Schauer, *supra* note 1, at 207-08, 224-28. Timothy Zick persuasively argues that Justice Thomas's interpretation, although not the only one possible, is the most plausible. See Zick, *supra* note 156, at 2340-50. In any case, Robert Post surely is right in saying that *Virginia v. Black* required the Supreme Court to make a choice among competing meanings of cross-burning and that the Court's recognition of a meaning different from Justice Thomas's amounted to "taking sides in a cultural controversy." Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV.

In some cases, there will be no basis for concluding that the speaker and target share an interpretation of the statement. Even in that event, the judge will have to make a judgment about the meanings that, in fairness, ought to be attributed to the speaker's intention, and the meanings that the speaker ought to have known would be the target's interpretation of the communication. Imposing legal liability for a statement the speaker had no reason to think would be threatening—for an arguable example, Fulmer's reference to "silver bullets"³⁴⁸—is patently unfair. But the reason is not to be found in some "true," or essential, meaning of his words. Rather, if justice should require that Fulmer go free, the reason should be that he had no intent to threaten. This reason has nothing to do with the purely linguistic meaning of the words. After all, "human pronouncements *ordinarily* mean more than they say."³⁴⁹ The hypothetical "naïve reader"—whose reading, in practical effect, turns out to be another name for literalism—should be gently but firmly escorted to the exit.

We have seen that the threats exception can be expressed only as a set of abstractions and that the central task of jurors and judges in applying the exception is to assign meaning to the expression at hand. To invoke Holmes once again: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."³⁵⁰ Intuition is very much to the point. As decisionmakers seek to do justice in evaluating an alleged threat, judgment and intuition typically will coalesce,³⁵¹ not only in determining the speaker's intention to threaten but also in assigning meaning to the speaker's communication—that is, whether the speaker has communicated his or her intention to harm the target. Intention is not merely a two-part requisite in proving a constitutionally proscribable threat.³⁵² More generally, intention is a crucial factor in a reading of meaning. Jerome Bruner puts it nicely: "Meaning (or 'reality,' for in the end the two are indistinguishable) is an enterprise that reflects human intentionality and cannot be judged for its rightness independently of it."³⁵³ The capacity to read others' intentions is as basic as any mental capacity can be. If determining intent is one

4, 84 (2003). For an argument that Congress should use its power to enforce the Thirteenth Amendment to enact a total ban on "the intimidating use of historically inflammatory symbols," including any cross-burning, see Alexander Tsesis, *Regulating Intimidating Speech*, 41 HARV. J. ON LEGIS. 389, 405 (2004).

348. See *supra* notes 82-89 and accompanying text.

349. AMSTERDAM & BRUNER, *supra* note 160, at 169 (emphasis added, and authors' original emphasis on "mean" and "say" deleted). To read more generally on the roles of inference, "genre knowledge," and "saying something and meaning more," see *id.* at 167-72.

350. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

351. On the manifold relations of "wordless knowing" to consciousness, see ANTONIO DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* 168-76 (2000).

352. To invoke the threats exception, the plaintiff or prosecutor must show that the speaker intended to threaten and that the message should properly be assigned the meaning of an intent to harm.

353. BRUNER, *supra* note 40, at 158-59.

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of the first things children learn, part of the reason is that intent is immediately and intuitively recognizable: “[I]t seems to require for its recognition no complex or sophisticated interpretive act on the part of the beholder.”³⁵⁴

This point is not a special characteristic of the law governing threats, nor is it specific to the system of law, generally conceived. In all settings, legal and otherwise, judgment and intuition merge. Anyone who claims to be able to separate judgment from intuition is either a great kidder or a naïve reader. Confronting the statements in this paragraph, Holmes would register no surprise.

Jurors certainly have human failings, and no doubt we all have had the experience of misreading the intended meanings of others’ expressions. The tendency to interpret a speaker’s statement through the eyes of the target may cause the jurors to make a mistake in determining the speaker’s intent to threaten or in identifying the message appropriately assigned to his allegedly threatening statement.³⁵⁵ This possibility explains why the First Amendment demands that the trial and appellate judges perform their duty to examine the record independently to satisfy themselves that the evidence has established both the “intent to threaten” and the “threatening meaning” elements of the threats exception. I do not suggest that judges have a special ability to separate intuition from judgment. What they do have is a special responsibility, as guardians of the First Amendment, to scrutinize the record carefully and call the close ones in favor of the freedom of speech.

d. *Reprise: The limited utility of precedent in interpreting meanings*

Given the power of particularized facts to influence “applications” of the doctrinal formulas purporting to govern the threats exception, the force of earlier decisions as precedents is likely to be minimal. If anywhere there is an extreme example that “law is inevitably *interpretive* and case-by-case,”³⁵⁶ this is it. The general social settings for alleged threats do vary from one case to another, but a more fundamental inhibition on the force of precedent arises out of the necessity to decide *this case* by interpreting *this communication*, in *this setting*, by *this speaker* to *this target*. Every speaker and every target come to the moment of communication with their own acculturating histories, which may or may not overlap in ways relevant to the assignment of meaning to this communication—and those histories certainly do not replicate the experiences of speakers and targets in prior cases. Given all these variables, the assignment of meanings simply is not transferable from some earlier instance, involving a *different communication*, on a *different subject*, in a *different setting*, by a

354. *Id.* at 17. Not surprisingly, it is common for jurors to organize the testimony they hear “into a story with characters, motives, and plot.” Ellsworth, *supra* note 159, at 206.

355. See *supra* text accompanying notes 95, 139.

356. AMSTERDAM & BRUNER, *supra* note 160, at 291 (emphasis in original).

differently situated speaker to a *differently situated target*. The effort to create a set of rules—or even sharply precise standards—from the first case and force the resulting grid over the next case typically is doomed to failure.

The multifold discontinuities from one case to another are apparent when we consider the strong reliance of the *Planned Parenthood* decision's opponents—the dissenters and the academic critics—on the Supreme Court's 1982 decision in *NAACP v. Claiborne Hardware Co.*³⁵⁷ In 1966, members of the Mississippi branch of the NAACP organized a boycott of white-owned businesses in Claiborne County, to bring pressure on public officials and private owners to end racial segregation in local schools and other public facilities, to stop racial discrimination in the hiring of police officers, to make public improvements in black neighborhoods, to select black citizens for jury duty, and to integrate bus stations. The boycott lasted some seven years, with periods of intensity separated by periods of relaxation. In 1969, a number of the companies, some owned by local civic figures, brought suit in state court against the NAACP, its state leaders, and 144 other participants in the boycott. When the complaint was filed, Mississippi courts, *ex parte*, promptly attached all fifty-six NAACP bank accounts in the state. The plaintiffs sought damages and injunctive relief. They succeeded in the state courts, winning damages for business losses to the boycott. The U.S. Supreme Court reversed 8-0.

The boycott began with a resolution unanimously adopted in an emotion-charged meeting of the local NAACP on April 1, 1966, attended by several hundred people. Charles Evers, the local NAACP field secretary, addressed the group. According to the testimony of a white sheriff (who, conceivably, was not wholly impartial) seven years later, Evers said that if any “Uncle Toms” broke the boycott, they would “have their necks broken” by their own people.³⁵⁸ Three years later, Evers made two other speeches. On April 18, 1969, a young black man was shot and killed by a local white police officer. The next day, Evers spoke to a black audience; a transcript of the speech is appended to the Supreme Court's *Claiborne* opinion.³⁵⁹

This transcript, from a recording made by the local police, is much quoted by the critics of the Ninth Circuit's *Planned Parenthood* decision. Most of the speech is obviously aimed at persuading Evers's audience not to retaliate in kind against local whites. Evers's brother Medgar, who previously led the Mississippi NAACP, had been murdered, and Charles Evers makes clear that he is not seeking vengeance. Evers says repeatedly that the group is not going

357. 458 U.S. 886 (1982). The following summary is gleaned from the Supreme Court's restatement of the facts. *See id.* at 889-96. In this discussion I draw on the Supreme Court's opinion and on Tracy Casadio's careful analysis of *Claiborne* in her unpublished paper. *See* Tracy Casadio, *Violent-Consequence Speech: A New Paradigm for Speech that Causes Harm* (2003) (unpublished paper, on file with the author).

358. *Claiborne Hardware Co.*, 458 U.S. at 900 n.28. Remember, Evers was addressing an audience that had just supported the boycott without dissent.

359. *Id.* at 934-40.

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to shoot whites, but hit them instead in the pocketbook and the ballot box. Indeed, these moderating remarks are almost certainly the main reason why Justice Stevens appended the speech to his opinion. But Evers does add these words:

Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. He ain't going to offer to sleep with none of us men, I can tell you that. Let's don't break our little rules that you agreed upon here.³⁶⁰

Two days later, speaking to several hundred people at another meeting, Evers called for the discharge of local police officers and a total boycott of all white-owned businesses in the county. According to the trial judge, he said, "If we catch any of you going in any of those racist stores, we're gonna break your damn neck."³⁶¹

Reading all these speeches in relation to the "passionate atmosphere" surrounding their delivery, the Supreme Court agrees that they might have been understood as inviting unlawful "discipline" or intended to create a fear of violence. Monitors took the names of black customers who entered white stores, and the names were published and read at NAACP meetings. There were scattered incidents of violence and mischief: birdshot fired into one man's home and shotgun pellets that hit the wall of another home; a brick thrown through a man's car window while he was having a beer in a white-owned store; and flowers trampled at the home of a woman who violated the boycott.³⁶² There were, however, no findings of violence after 1966. The plaintiff store owners had not been physically threatened, but they recovered damages from the defendants, including Evers (and, through him, the NAACP) for all of their stores' losses to the boycott from 1966 to 1972. The Supreme Court concluded that, if there were any unlawful conduct by any defendants, it could not have caused more than a small fraction of these losses.

To sum up, *Claiborne* is centered on three statements in speeches mainly designed to channel the audience's emotion into peaceful support for the boycott (and, in the 1969 speeches, to deflect anger away from revenge killing). The statements were not carefully scripted for strategic release, but blurted out extemporaneously in feverish situations. Under no conceivable circumstances could the statements have caused the business losses the state courts attributed to them.

Then, what role might have been played by a generalized sense of justice in the case? Here we confront the alligator in the *Claiborne* bathtub. The Mississippi state courts' decisions are easily seen, and surely were seen by the Supreme Court, as one more chapter in the campaign by officials in a number

360. *Id.* at 938-39.

361. *Id.* at 902.

362. *Id.* at 904.

of southern states to rid themselves of the NAACP's pesky legal challenges to white supremacy. The Supreme Court cites six of the resulting cases for the bland proposition that the Court had "recognized repeatedly" the NAACP's associational rights.³⁶³

Not surprisingly, the *Claiborne* opinion concluded that the plaintiff businesses had not satisfied the *Brandenburg* "immediacy" standard for imposing legal responsibility on the incitement of unlawful conduct.³⁶⁴ The Court did not decide whether Evers or the NAACP had threatened other black residents of Claiborne County³⁶⁵ but held that the plaintiffs had not shown that the business losses assessed by the state courts were attributable to any threats by the defendants.³⁶⁶ Arguing that the doctrinal foundations of *Claiborne* should control the application of the First Amendment threats exception to the facts of *Planned Parenthood* requires a stretch. Arguing that the factual setting of *Claiborne* is transferable to the setting of *Planned Parenthood* is a feat only a law-trained professional could accomplish.

CLOSING WORDS

Every invocation of the threats exception raises complex questions about a statement's origins and content. First, does the speaker's statement, in context, convey that he or she has the intention to cause physical harm to the target? Second (assuming the speaker has not "confessed"), does the statement, in context, show that the speaker intended the message to be a threat? Although it is acceptable to call these questions of "fact," both are laden with evaluative elements. Under the circumstances in which the threats exception is invoked, the assignment of meaning is inherently interpretive.

In the search for appropriate determinations of meaning, Clifford Geertz reminds us that law "propounds the world in which its [factual] descriptions make sense."³⁶⁷ The law governing the threats exception propounds not just

363. *Id.* at 930 n.75 (citing *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964); *Gibson v. Fla. Legis. Investig. Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)).

Just to leave no alligator-scale unturned, I note that the Court, in several other cases, had concluded that the First Amendment protected civil rights speech in the face of official hostility in the South. All these decisions antedated the 1969 filing of the *Claiborne* complaint and the Mississippi state courts' immediate freezing of NAACP assets. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536 (1965); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *see also* HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965).

364. *Claiborne Hardware, Co.*, 458 U.S. at 928.

365. Nothing in the record suggested that any such putative targets suffered any immediate emotional or physical harms of fear, or any long-term effects of a threat. For a discussion of such harms, see *supra* pp. 1339-46.

366. *Claiborne Hardware, Co.*, 458 U.S. at 924, 930-31.

367. GEERTZ, *supra* note 5, at 173.

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one world, but the many variegated worlds that find their way into cases. Indeed, the First Amendment law of threats suggests a new dimension for the term “case law.” In one instance after another, we have seen that the cases—not precedent, but the facts before the court for decision—have been governing the law of the threats exception. This conclusion, as a recital of what is going on, is beyond dispute. But I mean for the conclusion to embody a normative dimension, too: in deciding whether to apply the threats exception, the facts of the case at hand—the jury’s or trial judge’s assignment of meaning to this speaker’s communication to this target—should be controlling.

Taking this position does not imply a surrender to lawlessness or an abandonment of principle,³⁶⁸ but merely a recognition that a general standard (as opposed to a clear-cut rule) can be an instrument of justice. Judges can—and should—seek to prevent the erosion of First Amendment protections for advocacy by applying the threats exception’s generalized standards as they have emerged in the opinions summarized earlier³⁶⁹ with the refinements I have suggested.³⁷⁰ Similarly, judges retain constitutional duties: first, to control the introduction of evidence and second, both before and after a verdict, to examine the evidence independently—making both determinations in light of the First Amendment’s limitations. But, just as it would be mistaken to conclude that First Amendment doctrine is unavailing in these cases, it would also be a mistake to assume that the doctrine of the threats exception can offer bright-line solutions to the basic tension between speakers’ freedoms and the freedoms of those who are threatened by that speech. In this doctrinal context, as in many others, you can’t take the judgment out of judging.³⁷¹

Like most standards for applying the First Amendment, the case law of the threats exception does create some risk of chilling speech that is constitutionally protected. But I doubt that the risk will be so great as some critics of the *Planned Parenthood* decision fear.³⁷² The good news for those of us who believe in a strong First Amendment is that all humans have a lifetime’s experience in reading other people’s intentions—and, from that experience, learn a great deal about expressing their own intentions. When jurors and

368. See Eugene Volokh, *The Rehnquist Court: Pragmatism v. Ideology in Free Speech Cases*, 99 NW. U. L. REV. 33 (2004).

369. See *supra* text accompanying note 54.

370. See *generally supra* text accompanying notes 341-44.

371. See Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1641-48 (1987).

372. Judge Kozinski predicts that the *Planned Parenthood* decision “will haunt dissidents of all political stripes for many years to come.” *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1101 (9th Cir. 2002) (en banc) (Kozinski, J., dissenting). Blakey and Murray say, “The sun has not set yet, but it is surely twilight for meaningful First Amendment freedoms in the nine western states covered by the Ninth Circuit . . .” Blakey & Murray, *supra* note 7, at 833. Although most haunting does seem to happen after twilight, I think both of these predictions will turn out to be exaggerated.

judges confront the intention-focused essentials of the threats exception, they exercise the same basic human skill. From infancy forward, the intuitive discernment of intentionality is central in the interpretation of meanings, especially the meanings that directly concern one's own self. The "silver bullets" remind us that targets don't always interpret messages accurately; yet, there is a strong likelihood that they will. Speakers usually know the meanings they intend to communicate and have a pretty good idea about the meanings their targets are likely to assign to what they are saying. If jurors go overboard because they think the speaker is a bad actor, it is the judges' duty, guided by the general principles that govern the threats exception, to set things straight.