3-1-2012

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Mill, Holmes, Brandeis, and a True Threat to *Brandenburg*

Mark Strasser*

I. INTRODUCTION

In *On Liberty* 1 John Stuart Mill offers robust protection of free speech, although stopping short of implying that the right to speak freely is an absolute right. He suggests that an important aspect of the analysis regarding whether speech is protected involves the circumstances under which it is expressed, so certain content might be criminalized if communicated in one context but not in another. 2 Justices Oliver Wendell Holmes and Louis Brandeis argue that the United States Constitution incorporates some elements of a Mill-like analysis with respect to the kinds of expression that can be criminalized, and their view has been captured in important respects by *Brandenburg v. Ohio.* 3

During the same period that *Brandenburg* was decided, the Court was working out what constitutes a true threat, i.e., an actual threat of harm that falls outside of First Amendment protections. In one case in the 1960s and another in the 1970s, the opinions were more focused on what did not count as a true threat. However, more recently, the Court has employed a true threat analysis to permit some convictions but not others, which may mean that determining the limitations of the true threat exception is now more important than ever.

While threats and advocacy are similar in some respects, they differ in others. Whether these different types of expression should receive the same degree of constitutional protection depends upon the purposes behind protecting different kinds of speech. Mill’s analysis suggests why punishment would be appropriate for certain kinds of statements that might be perceived as threatening, but not for others. Regrettably, the Court has failed to offer a coherent analysis of these issues, which means that a potentially giant loophole has been recognized that threatens to

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2. See id. at 53.

eviscerate *Brandenburg* protections to a large extent, because some kinds of speech plausibly construed as advocacy of illegal acts and offered some constitutional protection under *Brandenburg* might also be construed as serious threats of harm and thus not qualifying for those same protections.  

Part II of this Article discusses Mill’s protection of free speech and how some of the essential elements of that position reflect the protections advocated by Justices Holmes and Brandeis that were eventually incorporated in *Brandenburg*. Part III discusses the developing true threats jurisprudence, most recently described and employed in *Virginia v. Black*.

The article concludes that unless the Court explains how to differentiate between advocacy and true threats and, further, identifies the extent to which the Constitution protects advocacy that might also be considered a true threat, First Amendment jurisprudence will become even more confusing and the protections of *Brandenburg* will simply disappear in many cases.

### II. A CLEAR AND PRESENT DANGER OF IMMINENT HARM

John Stuart Mill argues for robust protection of expression. Incorporating some of Mill’s insights in a series of dissenting or concurring opinions, Justices Holmes and Brandeis offer a test to determine whether speech is protected by the Constitution. Ultimately, that test is reflected in *Brandenburg*, where the Court suggests that advocacy of illegal activity is protected unless both intended and likely to cause imminent harm. The *Brandenburg* protections offer significant protection for a category of speech, although that category has never been adequately defined.

#### A. Mill’s Protection of Liberty of Expression

In *On Liberty*, Mill discusses the importance of the liberty of thought, suggesting that such liberty is essential in the development of the individual, and further, such liberty helps society to progress. He

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4. *See infra* notes 117–76 and accompanying text (discussing cases that would likely have been analyzed differently from a constitutional perspective had that been understood to involve true threats rather than incitement).
7. *See Mill*, supra note 1, at 54 (“As it is useful that while mankind are imperfect there should be different opinions, so it is that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when anyone thinks to try them.”); *see also id.* (“If it were felt that the free development of individuality is one of the leading essentials of well-being; that it is not only a co-ordinate element with all that is designated by the terms civilization,
offers a principle by which to determine when the state or society may permissibly interfere in individuals' lives, arguing "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant." Thus, freedom of thought, which only affects the thinker herself in the relevant respect, must be respected.

Yet, freedom of thought must be distinguished from freedom of expression, because the latter is likely to affect others in ways that the former will not. Mill understands that the two are distinguishable, noting that the "liberty of expressing and publishing opinions may seem to fall under a different principle [than freedom of thought], since it belongs to that part of the conduct of an individual which concerns other people." Nonetheless, Mill reasons that freedom of expression "being almost of as much importance as the liberty of thought itself and resting in great part on the same reasons, is practically inseparable from it."

To say that liberty of thought and expression are practically inseparable does not mean that they must be afforded the same protections. One can have a variety of hateful thoughts without injuring anyone. However, expressing such thoughts may lead to great harm, and Mill would be countenancing the production of much disutility were he suggesting that expression is always protected regardless of its consequences.

Mill does not argue that there is an absolute right to say whatever one wishes. He explains that "even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act." The suggestion that positive instigations to mischievous acts are not protected requires further explication. Unless properly understood, that exception has the potential to swallow the rule because a positive instigation might merely be understood to involve something that would have a tendency to cause a particular result; his comment might be interpreted to permit punishment whenever speech would have the tendency to cause harm.

8. See e.g., id. at 32 ("Who can compute what the world loses in the multitude of promising intellects combined with timid characters, who dare not follow out any bold, vigorous, independent train of thought, lest it should land them in something which would admit of being considered irreligious or immoral?").
9. Id. at 9.
10. See id. ("Over himself, over his own body and mind, the individual is sovereign.").
11. Id. at 11.
12. Id. at 11 12.
13. Id. at 53.
Mill offers an example to illustrate what he has in mind:

An opinion that corn dealers are starvors of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard.\(^\text{14}\)

Thus, notwithstanding that the contents of an expression might be the same in two instances, Mill suggests that one but not the other communication may be subject to punishment.

Regrettably, Mill does not articulate the principle justifying treating these types of expression differently. There are several possibilities, although some proposed interpretations are simply in error. For example, it is mistaken to believe that Mill is merely distinguishing between the spoken and written word,\(^\text{15}\) given his distinction between that which is circulated through the press and that which appears in the form of a placard. Further, when Mill uses the term "placard," he is not merely thinking of a sign held by someone at the scene; he is including within his discussion a leaflet that is being passed around among the crowd members.\(^\text{16}\)

Mill’s principle does not protect someone who reads an incendiary editorial aloud to an angry mob assembled next to a corn dealer’s house. Nor does it protect the person who distributes copies of an incendiary editorial to such a crowd. It is for this reason that Mill qualifies the protected speech as that which is "simply circulated through the press."\(^\text{17}\)

He does not say that anything appearing in the press is immunized regardless of how or when it is used.

Part of the justification for protecting what was in the morning paper from punishment is that something said in a newspaper would be less likely to cause harm than something said to an excited mob in front of a potential target’s house. Yet, it is also true that an individual addressing a crowd may only reach a relatively small number of individuals, whereas the newspaper might reach one hundred or one thousand times as many individuals as the orator.

Suppose, then, that it could be established that publishing an incendiary editorial in the press would be as likely to cause harm as

\(^{14}\) Id.

\(^{15}\) See Brian Saccetti, *Recent Decisions: The United States Court of Appeals for the Fourth Circuit*, 58 Md. L. Rev. 1221, 1270-71 (1999) (offering this understanding of Mill’s distinction). The author argues that “[w]ritten material, by its very nature, cannot produce this kind of immediate reaction because reading takes time.” Id. at 1270.

\(^{16}\) Indeed, Mill’s example of a placard involves something that is “handed about among the same mob.” Mill, supra note 1, at 53.

\(^{17}\) Id. (emphasis added).
would delivering that same address to an angry mob, e.g., because the published editorial reaching so many more people would make up for the decreased likelihood that any particular individual reading the editorial at the breakfast table would commit a violent act. Even were the likelihood of eventual harm resulting from fiery oratory no greater than the likelihood of eventual harm resulting from a fiery editorial, Mill’s principle permits the orator but not the editorial writer to be punished. But this means that the likelihood of harm is not the sole determinant for whether punishment of expression is appropriate and, indeed, Mill notes that “it must by no means be supposed, because damage, or probability of damage, to the interests of others can alone justify the interference of society, that therefore it always does justify such interference.”

When explaining why the orator but not the publisher can be punished, Mill notes, “Acts, of whatever kind, which without justifiable cause do harm to others may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind.” On first reading, this might simply be understood as saying that someone whose words bring about harm may justly be punished if the imposition of such harm cannot itself be justified. But such an interpretation must be rejected for two distinct reasons.

First, Mill does not require that harm actually befall the corn dealer in order for the orator to be punished, because the strong probability of harm will suffice to justify the imposition of punishment. But this means that the suggestion that individuals can be punished if they cause harm without justification is a non sequitur insofar as the issue is whether the orator can be punished even when neither the corn dealer nor her property is harmed as a result of a fiery speech, i.e., even when no actual harm occurs.

Second, suppose that harm does occur after the orator delivers his incendiary remarks. Even so, Mill’s position needs further clarification, because he seeks to justify imposing punishment on the orator but not the editorial writer, even supposing that both caused harm. If no physical harm results after the publication of a fiery editorial lambasting corn dealers, then it would not be particularly remarkable for Mill to suggest that the fiery oration resulting in harm should be punished but the fiery newspaper editorial not resulting in harm should not.

The more telling case involves an instance in which the publication of an editorial results in harm to a corn dealer or her property. Mill might

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18. Id. at 93.
19. Id. at 53.
20. See id. at 93.
justify not punishing the publisher of the editorial by suggesting that editorials are less likely as a general matter to cause such harm, even if harm is caused on a particular occasion. However, that would simply be offering a probability analysis—expression that tends to cause harm can be punished, whereas expression that would not tend to cause harm must remain free from punishment. Were that Mill’s method, he would not be offering immunity from punishment for fiery editorials but only for less effective ones. While that is a possible view, it is not the view that Mill articulates in *On Liberty*.

Consider the orator who reads a fiery editorial to an angry crowd, causing a riot. Mill suggests that the orator but not the editorial writer might be subject to punishment. Mill’s comment about “acts” is helpful in explaining why one but not the other may be punished.

While Mill’s suggestion that the state can punish communications unjustifiably causing harm might seem equally applicable to editorial writers and fiery orators, an interpretation that better accounts for the text as a whole points in a different direction. Mill is distinguishing among the individuals who might be described as the actor responsible for the consequences of a particular act. When an individual reads an editorial in a newspaper and then decides to do something about the difficulty discussed in the paper, her eventual action is attributable to her. Basically, because she is a deliberate agent who consciously plans to take action and then does so, she, rather than the editorial writer, is responsible for the consequences of her act. However, when an orator offers a fiery speech or even reads a fiery editorial to an angry mob, members of the mob may be goaded into action. They would not have consciously considered the alternatives and made a plan in light thereof but, instead, might have acted unthinkingly. Mill is suggesting that in this kind of case, the orator might also be held responsible for inciting or instigating mob action, whereas the editorial writer does not, in effect, short-circuit the deliberative process to bring about the harm, and thus should not be held responsible for those consequences.21

B. The Holmes-Brandeis Line of Cases on Punishing Advocacy

In a series of cases, Justices Holmes and Brandeis offer their evolving jurisprudence on the constitutional protections of advocacy. At first, they seem fairly deferential to state limitations on speech, at least

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21. Cf. Stanley Fish, *A Simple Moral: Know Your Job and Do It*, 36 J.C. & U.L. 313, 314 (2009) (book review) (“[E]xpressing an opinion in a newspaper op-ed could also lead a member of the paper’s audience to commit violence, but the chain of causality would be so etiolated that no one—except someone living in a totalitarian state, where the desire (certain to be frustrated) is to control every effect—would think to assign responsibility.”).
during wartime, although they later offer a much less deferential position, culminating in the view written by Justice Brandeis in his concurring opinion in Whitney v. California, which Justice Holmes also signed.

1. The early view

In Schenck v. United States, the Court examined whether an individual (Schenck) violated the Espionage Act of 1917 when he sent anti-war materials to men who had been drafted for military service. Writing for the majority, Justice Holmes explained:

The [anti-war] document in question upon its first printed side recited the first section of the Thirteenth Amendment, said that the idea embodied in it was violated by the Conscription Act and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few.

The document was somewhat guarded in what it advocated, however. As the Court noted, while the document said, “Do not submit to intimidation,” the relevant language “in form at least confined itself to peaceful measures such as a petition for the repeal of the act.” Notwithstanding that the advocacy was limited to legal measures, the Court explained “the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.”

At this point, however, it might be helpful to distinguish among different possible senses of “obstruct.” One might merely mean “impede” or “interfere,” in which case one might describe a policewoman who catches a robber in the act as engaging in a kind of obstruction. While it would be truc to say that she had interfered with the robbery, one would not be implying that there was something wrong with her having prevented it from taking place.

Or, there might in addition be a pejorative connotation associated with the act, where the interference is thought to be illegal or illicit.

24. See id. at 49.
25. Id. at 50–51.
26. Id. at 51 (internal quotation marks omitted).
27. Id.
28. Id.
While the Schenck Court may have been correct that the purpose of the mailing was to impede, that does not in addition establish that the defendant was doing anything wrong. Had he been sending mailers in support of a political candidate who opposed the war or the draft, Schenck might have been inferred to have a purpose to obstruct the war, although presumably no one on the Court would have thought such a mailing punishable.

At issue before the Court was whether the First Amendment to the United States Constitution protected Schenck’s speech. The Court explained that while what was said might have been protected speech in “ordinary times,” that did not settle whether this kind of speech was protected during wartime, because the “character of every act depends upon the circumstances in which it is done.” For example, the “most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”

While Justice Holmes’s example is memorable, its applicability to the case before the Court was not obvious. If an individual falsely shouting fire sincerely but falsely believes that there is a fire, then it is not at all clear that she should be punished for trying to warn people so they can escape. Suppose, for example, she thought she was seeing smoke when she was really seeing dry ice evaporate. Perhaps she should have investigated further before yelling, “Fire!” although in a different case the time taken to confirm that there was indeed a fire might have foreseeably and actually resulted in more people losing their lives because the warning had not been issued earlier. While it would be accurate to suggest that the individual had falsely shouted, “Fire!” in a crowded theater causing a panic, she might nonetheless be thought immune from punishment.

Presumably, Justice Holmes is picturing someone who yells, “Fire!” in a crowded theater, knowing all the while that there is no fire. Such an individual is analogous in some respects to the orator who speaks to the angry mob. Individuals might panic rather than investigate whether there was indeed a fire, just as the angry mob might storm the corn dealer’s house rather than deliberate about whether such action was appropriate. But in Schenck the materials had been mailed, which makes the Schenck scenario more analogous to the person who writes the newspaper editorial than to the person who shouts. “Fire!” in the crowded theater or to the person who excoriates corn dealers in front of a corn dealer’s house where an angry crowd had gathered.

29. Id. at 52.
30. Id. (citing Aikens v. Wisconsin, 195 U.S. 194, 205–06 (1904)).
31. Id.
Justice Holmes explained:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.  

But such an analysis would seem to require a showing that the words were at least likely to bring about the evil at issue; else, it could not be said that there was a clear and present danger that the feared result would occur.

Justice Holmes noted that certain words might be permissible during peacetime but not wartime. Presumably, that was because there was an increased likelihood that the words would have the bad effect (interference with the draft) during wartime, although one still would have expected the Court to discuss how much the probability had thereby been increased. One also would have expected the Court to focus on whether those interferences with the draft would have been illegal, e.g., destroying draft offices, rather than legal, e.g., persuading one’s congressperson to vote to reduce war funding. Instead, the Court pointed out that “if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.” The Court then reasoned that if “the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.”

The Court’s point is well-taken that success alone should not be the determinant, but that is because even a very likely result might fortuitously not occur. However, there is a vast difference between an event that was very likely to occur but fortuitously did not and an event that was extremely unlikely to occur. After introducing the “clear and present danger” test, the Court seemed to apply a “clear and possible danger test.”

In Frohwerk v. United States, the Court examined publications that might undermine the war effort, explaining the following:

[One article] begins by declaring it a monumental and inexcusable mistake to send our soldiers to France, says that it comes no doubt from the great trusts, and later that it appears to be outright murder without

32. Id.
33. Id. ("When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.").
34. Id.
35. Id. (citing Goldman v. United States, 245 U.S. 474, 477 (1918)).
serving anything practical; speaks of the unconquerable spirit and 
undiminished strength of the German nation, and characterizes its own 
discourse as words of warning to the American people.\textsuperscript{37}

Other articles also attempted to undermine the war effort. For example, 
one of the articles deplored the draft riots, although its language used 
“might be taken to convey an innuendo of a different sort.”\textsuperscript{38} The article 
further suggested that those who advocated challenging the war effort 
through legal means were beyond draft age and did not have sons of draft 
age,\textsuperscript{39} as if those individuals had nothing to lose by resorting to slow and 
likely ineffectual legal means.

These comments were clearly anti-war, and the issue before the 
Court was whether they were nonetheless protected by the Constitution. 
The Court suggested that it could imagine circumstances in which such 
comments would be protected even during wartime,\textsuperscript{40} especially because 
there was no effort here to target individuals who had been drafted. 
However, the Court reasoned that it was “impossible to say that it might 
not have been found that the circulation of the paper was in quarters 
where a little breath would be enough to kindle a flame and that the fact 
was known and relied upon by those who sent the paper out.”\textsuperscript{41} Once 
again, when using the clear and present danger test, the Court seemed to 
have used a “clear and possible danger test.” Because it could not be said 
with certainty that the articles would have no effect and because the 
effect would be very undesirable,\textsuperscript{42} the Court refused to reverse the 
conviction.

Justice Holmes wrote another opinion involving a conviction under 
the Espionage Act.\textsuperscript{43} In a public speech, Eugene Debs had allegedly 
“caused and incited and attempted to cause and incite insubordination, 
disloyalty, mutiny and refusal of duty in the military and naval forces of 
the United States and with intent so to do.”\textsuperscript{44} While understanding that 
the main theme of the speech at issue was the growth and eventual 
success of Socialism,\textsuperscript{45} the Court reasoned that “if a part or the manifest 
intent of the more general utterances was to encourage those present to

\textsuperscript{37} Id. at 207.
\textsuperscript{38} Id.
\textsuperscript{39} Id. (“[T]he previous talk about legal remedies is all very well for those who are past the 
draft age and have no boys to be drafted . . . .”)
\textsuperscript{40} Id. at 208 (“It may be that all this might be said or written even in time of war in 
circumstances that would not make it a crime. We do not lose our right to condemn either measures 
or men because the Country is at war.”).
\textsuperscript{41} Id. at 209.
\textsuperscript{42} See id. (“[I]t is impossible to say that it might not have been found that the circulation 
of the paper was in quarters where a little breath would be enough to kindle a flame.”).
\textsuperscript{43} Debs v. United States, 249 U.S. 211 (1919).
\textsuperscript{44} Id. at 212.
\textsuperscript{45} Id.
obstruct the recruiting service and if in passages such encouragement was directly given, the immunity of the general theme may not be enough to protect the speech." 46

Certainly, it is fair to suggest that merely because most of a speech is unproblematic does not immunize the small part of it that is obviously punishable. However, the speech at issue did not contain parts that were obvious violations of law. Indeed, the Court noted Debs’ statement that "he had to be prudent and might not be able to say all that he thought, thus intimating to his hearers that they might infer that he meant more," 47 as if members of the Court were frustrated that Debs had not said anything in obvious violation of law. The Court mentioned that Debs “expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of proceeding in the United States." 48 But if individuals might be subject to punishment for views that they might be inferred to have, then the protections of thought and expression are hardly very robust.

At trial, Debs addressed the jury himself, admitting that he opposed all war. The Court explained that the jury could have found:

[The defendant opposed] not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting. If that was intended and if, in all the circumstances, that would be its probable effect, it would not be protected by reason of its being part of a general program [or by] expressions of a general and conscientious belief. 49

Yet, the Court was now addressing the words that Debs had used while talking to the jury, and that hardly seems to be an appropriate basis upon which to determine whether the speech about Socialism given to the crowd was beyond the reach of the First Amendment.

The Debs Court noted that the jury had been “instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service, &c., and unless the defendant had the specific intent to do so in his mind." 50 The Court did not second-guess the jury’s conclusion about the probable effect of his words, and upheld the conviction.

Arguably, Debs was distinguishable from the others, because Eugene Debs had received over a million votes when running for the

46. Id. at 212 13.
47. Id. at 213.
48. Id.
49. Id. at 215.
50. Id. at 216.
Presidency and was considered a great orator. Perhaps it was plausible to believe from past events that there was sufficient likelihood that his public speech would cause individuals to obstruct recruiting. However, that did not seem to be the Court’s focus, just as the Court did not seem to focus on whether Schenck or Frohwerk were likely to induce individuals to obstruct the draft when upholding their convictions.

2. The developing view

The small likelihood of actual obstruction played an important role in causing Justices Holmes and Brandeis to dissent in Abrams v. United States. The defendants in Abrams had printed and distributed circulars arguing that those who were making weapons to further the war effort against Germany would thereby be providing war materials that might be used in Russia. It was clear that the defendants did not support Germany, although the Abrams Court reasoned “the language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war . . . and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories.” Thus, the Court reasoned, even if the defendants had intended to help Russia rather than Germany, their efforts, if successful, would obviously undermine the war effort against Germany as well.

In a dissent joined by Justice Brandeis, Justice Holmes made a number of points. He argued that the defendants did not have the

51. Robert J. Pushaw, Jr., Justifying Wartime Limits on Civil Rights and Liberties, 12 CHAP. L. REV. 675, 697 n.146 (2009) (“The Court sustained the conviction of labor leader Eugene Debs, Wilson’s political foe who had received over a million votes as Socialist Party candidate for President, for criticizing America’s intervention in the war and urging workers not to join the armed forces.”).
52. Steven G. Gey, Reopening the Public Forum From Sidewalks to Cyberspace, 58 OHIO ST. L.J. 1535, 1538 (1997) (“Thousands of Socialists packed into Union Square in the early days of this century to hang on every word of great progressive orators such as Eugene Debs”).
54. See id. at 621 (“Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.” (internal quotation marks omitted)).
55. See id. at 625 (Holmes, J., dissenting) (“A note adds ‘It is absurd to call us pro-German. We hate and despise German militarism more than do you hypocritical tyrants. We have more reason for denouncing German militarism than has the coward of the White House.’”).
56. Id. at 624 (majority opinion).
57. See id. (“The defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war.”).
58. See id. at 631 (Holmes, J., dissenting) (“Mr. Justice Brandeis concurs with the foregoing opinion.”).
requisite intent.\textsuperscript{59} Merely because an individual had made statements that would both foreseeably and actually have the effect of hindering the war effort would not establish that the individual was appropriately subjected to prosecution. Holmes offered an example:

A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.\textsuperscript{60}

Holmes’s point is well-taken, although the same point might have been made in \textit{Schenck},\textsuperscript{61} where the defendant had urged others to seek the draft’s repeal,\textsuperscript{62} to assert their rights,\textsuperscript{63} and to refuse to submit to intimidation.\textsuperscript{64} However, in \textit{Schenck}, Justice Holmes, writing for the majority, had suggested that the defendants had intended to cause others to obstruct the draft.\textsuperscript{65} But if the “obstruction” advocated in \textit{Schenck} was legal, e.g., using the courts to press one’s claims or petitioning one’s congressperson to repeal the draft, then it is difficult to understand why that kind of obstruction could be prosecuted, whereas the patriot who successfully curtails the production of airplanes could not.\textsuperscript{66}

Citing \textit{Schenck} with approval,\textsuperscript{67} Justice Holmes reiterated in his \textit{Abrams} dissent that the “United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”\textsuperscript{68} He explained the clear and present danger test by noting that it “is only the present danger of immediate evil or an intent to bring it about that warrants Congress in

\begin{footnotes}

\footnotetext[59]{See id. at 621.}
\footnotetext[60]{See id. at 627.}
\footnotetext[61]{See supra notes 23-25 and accompanying text (discussing \textit{Schenck}).}
\footnotetext[62]{\textit{Schenck} v. United States, 249 U.S. 47, 51 (1919) ("It said, ‘Do not submit to intimidation,’ but in form at least confined itself to peaceful measures such as a petition for the repeal of the act.").}
\footnotetext[63]{Id. ("The other and later printed side of the sheet was headed ‘Assert Your Rights.’ It stated reasons for alleging that any one violated the Constitution when he refused to recognize ‘your right to assert your opposition to the draft,’ and went on ‘If you do not assert and support your rights, you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.’").}
\footnotetext[64]{Id.}
\footnotetext[65]{Id. ("Of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.’").}
\footnotetext[66]{See supra notes 34-35 (noting that the anti-war measures advocated in \textit{Schenck} might well have been legal)}
\footnotetext[67]{See \textit{Abrams} v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting).}
\footnotetext[68]{See id.}
\end{footnotes}
setting a limit to the expression of opinion where private rights are not concerned.\textsuperscript{69} But it simply was not credible to believe in the case at bar that “the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.”\textsuperscript{70}

Justice Holmes failed to note in his Abrams dissent that the Schenck Court had downplayed the importance of the actual effect of the mailing.\textsuperscript{71} He also failed to make the analogous point about Frohwerk: though recognizing the publication at issue had a small circulation,\textsuperscript{72} the Court nonetheless implied that the mere possibility that the published articles might cause harm was enough justification for upholding the conviction.\textsuperscript{73} If, indeed, the Court was upholding the convictions in those cases because there had been an intention to produce imminent harm even if there was no reason to believe that such imminent harm would be produced, then the Court was engaging in an act of misdirection by implying that there was a reasonable chance that such harm would occur. Even without a reasonable chance of occurrence, the intent prong would have been met, and that prong being met would suffice to uphold the conviction.

Perhaps Justice Holmes modified the clear and present danger test in light of prompting from Learned Hand, so that test required a real danger of harm rather than a mere possibility of harm.\textsuperscript{74} Yet, before concluding that the Abrams dissent represents Justice Holmes’s ultimate view, one should consider some of the cases subsequently decided.

Justices Brandeis and Holmes dissented in Schaefer v. United States,\textsuperscript{75} because they did not believe that the words published in support of Germany and against the United States in that case could reasonably be said to create “a clear and present danger that they would bring about the evil which Congress sought and had a right to prevent.”\textsuperscript{76} Justice Brandeis made clear that the applicable test was not “the remote or

\textsuperscript{69} Id. at 628.
\textsuperscript{70} Id.
\textsuperscript{71} See Schenck v. United States, 249 U.S. 47, 52 (“We perceive no ground for saying that success alone warrants making the act a crime.” (citing Goldman v. United States, 245 U.S. 474, 477 (1918))).
\textsuperscript{72} Frohwerk v. United States, 249 U.S. 204, 208 09 (1919).
\textsuperscript{73} Id. at 209 (“It is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame . . . .”).
\textsuperscript{75} Schaefer v. United States, 251 U.S. 466 (1920).
\textsuperscript{76} Id. at 483 (Brandeis, J., dissenting).
possible effect\textsuperscript{77} but, instead, whether there was a "clear and present danger."\textsuperscript{78} Thus, their dissent in \textit{Schaefer}, which had been argued on one of the days that \textit{Abrams} was argued,\textsuperscript{79} seemed to reflect their dissent in \textit{Abrams}. So too, both Justices dissented in \textit{Pierce v. United States},\textsuperscript{80} suggesting the defendant had not made statements posing a clear and present danger to the war effort\textsuperscript{81} and, further, that the defendants had not intended to impede the war effort.\textsuperscript{82}

\textit{Gilbert v. Minnesota},\textsuperscript{83} however, seems to provide a counterexample to the claim that Justices Brandeis and Holmes were of one mind with respect to the appropriate standard and were firmly committed to the robust protection of speech. In that case, the defendant (Gilbert) was convicted of interfering with enlistment because he criticized the war. Justice Holmes concurred in upholding the conviction,\textsuperscript{84} perhaps because Gilbert was a well-known figure with many followers.\textsuperscript{85} However, while Gilbert was critical of the war, he did not advocate doing anything illegal. Gilbert said:

\begin{quote}
We are going over to Europe to make the world safe for democracy, but I tell you we had better make America safe for democracy first. You say, what is the matter with our democracy[?] I tell you what is the matter with it: Have you had anything to say as to who should be president? Have you had anything to say as to who should be Governor of this state? Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a great democracy, for Heaven's sake why should we not vote on conscription of men[?] We were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her. I tell you if they conscripted wealth like they have conscripted men, this war would not last over
\end{quote}

\begin{footnotes}
\item[77.] \textit{Id.} at 486.
\item[78.] \textit{Id.}
\item[79.] See \textit{id.} at 466 (\textit{Schaefer} was argued on October 21, 1919); see \textit{Abrams v. United States}, 250 U.S. 616, 616 (1919) (\textit{Abrams} was argued on October 21-22, 1919).
\item[80.] \textit{Pierce v. United States}, 252 U.S. 239 (1920).
\item[81.] See \textit{id.} at 271 (Brandeis, J., dissenting).
\item[82.] See \textit{id.}
\item[83.] \textit{Gilbert v. Minnesota}, 254 U.S. 325 (1920).
\item[84.] \textit{Id.} at 334.
\item[85.] Stephen M. Feldman, \textit{Free Speech, World War I, and Republican Democracy: The Internal and External Holmes}, 6 \textit{FIRST AMENDMENT L. REV.} 192, 247 (2008) ("Gilbert was a well-known Minnesota leader of the National Nonpartisan League, 'one of the most successful third-party movements in United States history.' Gilbert thus might have wielded real influence. His speech might have successfully induced his audience to question whether the governmental decisions to go to war and to institute a draft were reached through fair democratic processes." (quoting Thomas A. Lawrence, \textit{Eclipse of Liberty: Civil Liberties in the United States During the First World War}, 21 \textit{WAYNE L. REV.} 33, 103 (1974); and citing Graber for a discussion of Gilbert's influence. See Mark A. Graber, \textit{Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism} 111-12 (1991)).
\end{footnotes}
Ironically, Gilbert made these comments to an unsympathetic audience, and part of the Court’s justification for upholding the conviction was that the state might have foreseen that his remarks would bring about a disturbance of the peace. However, this statute did not prohibit disturbing the peace but, instead, prohibited interfering with the war effort; and it is hard to see how his words created a clear and present danger that the war effort would be undermined.

In his dissent, Justice Brandeis discussed the breadth of the Minnesota law at issue:

Under the Minnesota law, teaching or advice that men should not enlist is made punishable although the jury should find (1) that the teaching or advocacy proved wholly futile and no obstruction resulted; (2) that there was no intent to obstruct; and the court, taking judicial notice of facts, should rule (3) that, when the words were written or spoken, the United States was at peace with all the world.

It is not clear why Justice Holmes concurred, since he did not issue an opinion. Nonetheless, Gilbert does not represent the robust protection of the First Amendment that is sometimes attributed to the Abrams dissent and Holmes did not sign onto Brandeis’s dissent and object to the watering down of speech protections represented by Gilbert. It is thus difficult to tell whether the post-Abrams Holmes is firm in his belief that the First Amendment offers strong protections of speech. That said, in a subsequent dissent in Gitlow v. New York and concurrence in Whitney v. California, Justices Holmes and Brandeis offered robust defenses of First Amendment protections.

At issue in Gitlow was a conviction for criminal anarchy for advocating the violent overthrow of the government. Gitlow had printed, published, and circulated a manifesto advocating that violence be used to bring down the government, although there was no evidence

86. Gilbert, 254 U.S. at 327 (internal quotation marks omitted).
87. Id. at 331 (“And the State knew the conditions which existed and could have a solicitude for the public peace, and this record justifies it. Gilbert’s remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence.”).
88. Id. at 340 41 (Brandeis, J., dissenting).
89. Feldman, supra note 85, at 246 (“Why would Holmes have voted to uphold the conviction? Unfortunately, because Holmes did not write an opinion, one is left to conjecture.”).
90. C.f. id. at 247 (“Holmes wrote to Pollock in December 1919 admitting doubt even about his vote in Abrams because the record, after all, might have contained sufficient evidence to support convictions on one of the counts in the indictment.”).
93. Gitlow, 268 U.S. at 655.
that this publication had any effect. The Court reasoned:

[U]tterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion . . . [because such] utterances, by their very nature, involve danger to the public peace and to the security of the State.

Echoing the kind of reasoning that Justice Holmes had used in past opinions, the Court suggested that a “single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration.”

Justice Holmes, joined by Justice Brandeis, wrote in dissent that “it is manifest that there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views.” After noting that “[e]very idea is an incitement” and that “[e]loquence may set fire to reason,” Justice Holmes explained that the “redundant discourse” before the Court “had no chance of starting a present conflagration.”

The emphasis on whether the evil targeted by the relevant statute was likely to occur was the focus of Justice Brandeis in his Whitney concurrence. At issue in Whitney was whether the conviction of Charlotte Whitney passed constitutional muster. She was a member of an organization dedicated to the overthrow of the government, even though she did not share those goals.

The Court upheld the conviction. Writing a concurring opinion joined by Justice Holmes, Justice Brandeis explained that while free speech and assembly were not absolute rights, the “necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some

94. Id. at 656.
95. Id. at 669.
96. Id.
97. Id. at 673 (Holmes, J., dissenting).
98. Id.
99. Id.
100. Id.
101. Id.
102. See Whitney v. California, 274 U.S. 357, 371 (1927) (discussing the State’s Syndicalism Act making it a crime to be a member of an organization dedicated to using force, violence or terrorism to achieve political change).
103. See id. at 366 (“She also testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.”).
104. See id. at 372 (“We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.”).
105. Id. at 380 (Brandeis, J., concurring) (“Mr. Justice Holmes joins in this opinion.”).
substantive evil which the State constitutionally may seek to prevent.”

He further explained:

To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

Here, Justice Brandeis emphasizes the importance of the danger being both serious and imminent. If the danger intended and likely to result is not serious and imminent, then the individual cannot constitutionally be punished for advocating illegal conduct.

Suppose, however, that a speech is likely to produce serious harm imminently. Justice Brandeis does not make clear whether the speaker would be protected if she did not in addition intend to produce that harm. Perhaps Justice Brandeis thought that the relevant intention could be imputed to her if the danger was sufficiently clear, although he nowhere expressly makes that point.

Not only is Justice Brandeis unclear about whether the intent to produce harm is necessary if the expression is to fall outside of First Amendment protection, but he is unclear about another issue as well. He writes, “In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.”

Here, he seems to be saying that the clear and present danger test is met if: (1) immediate serious violence is expected or advocated, or (2) past conduct would support that the individual is advocating such violence. But this means that there could be a finding of clear and present danger as long as an individual advocates immediate, serious violence, even if there is no chance that such violence will take place.

Basically, it is difficult to tell whether Justice Brandeis is treating the intent to produce violence and the likelihood of violence as each sufficient for speech to be excluded from First Amendment protection or, instead, as each being necessary for speech to be excluded from First Amendment protection.

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106. Id. at 373 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).
107. Id. at 376.
108. Id.
109. Were he suggesting that it would suffice to show that the defendant advocated imminent serious harm, then he would be offering a position that has been attributed to Justice Holmes. See Thomas Healy, Brandenburg in a Time of Terror, 84 NOTRE DAME L. REV. 655, 665 (2009) (“In 1919, Holmes had written that speech could be punished if it posed a present danger of bringing about immediate harm or was intended to do so. Brandenburg changed that ‘or’ to an ‘and,’ protecting speech unless it was both likely to lead to immediate harm and directed to doing so.” (citing Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J. dissenting))).
In a different part of his concurrence, Justice Brandeis argues:

Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. He does not qualify this statement by saying that this option is only open to a defendant who was not advocating imminent, serious harm. But if this option of challenging the likelihood that serious harm would occur is open to a defendant who admittedly urged others to break the law, then Brandeis’ clear and present danger test is not satisfied merely by showing that the defendant advocated such harm. If there were little or no chance that the harm would occur because no one would pay attention to the advocate, then the test still would not have been met.

Brandeis supported his position by suggesting that the only justification for preventing speech would be where “the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.” He reasoned that where there is “time to expose through discussion the falseshod and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” When arguing that the Constitution incorporates a position favoring speech over censorship, he is echoing a position suggested by Mill, who understood that, given time, false and inaccurate claims or arguments could be corrected through more speech. “Wrong opinions and practices gradually yield to facts and argument; but facts and arguments, to produce any effect on the mind, must be brought before it.” In contrast, the orator speaking to the angry crowd could be punished, because there would be no time to present any counterarguments.

Mill provided additional reasons to support robust protection of the freedom of speech:

111. Id. at 377.
112. Id.
113. Id. (“Such, in my opinion, is the command of the Constitution.”).
114. Cf. David McGowan, From Social Friction to Social Meaning: What Expressive Uses of Code Tell Us About Free Speech, 64 Ohio St. L.J. 1515, 1584-85 (2003) (“When the mob is frenzied and action is easy, the law views the mob as a gun and allows a speaker to be punished for pulling the trigger. Indeed, the classic example of incitement from J.S. Mill involves an enraged mob standing before a corn-dealer’s house while a speaker denounces corn-dealers as starvers of the poor. The speaker is liable in such situations only if his words produce immediate action; otherwise the frenzy subsides and the words become feeble.” (citing MILL, supra note 1, at 53)).
115. Mill, supra note 1, at 19.
[T]hough the silenced opinion may be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied. . . . [E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. 116

Thus, Mill suggests, protecting speech is important for at least two reasons: (1) doing so is likely to reveal some aspects of truth that might otherwise not have been understood or appreciated, and (2) even if no additional facets of truth are thereby revealed, people are more likely to recognize and appreciate the truth when false opinions have been aired. Thus, Holmes, Brandeis and Mill all offered numerous reasons to believe that speech must protected at great cost.

C. The Brandenburg Line of Cases

In Brandenburg v. Ohio,117 the Court incorporated a robust standard by which to protect expression, which made the following clear:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.118

The action arose from a Klan rally where Klan members burned a cross and made derogatory comments about African-Americans and Jews.119 The Klan Rally was captured on film (at the organizer’s request),120 and later broadcast.121

The defendant was convicted under Ohio’s Syndicalism statute for advocating “the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembling with any society, group or assemblage of persons formed to teach or advocate the

116. Id. at 50.
118. Id. at 447.
119. See id. at 446.
120. Id. at 445 (“The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan ‘rally’ to be held at a farm in Hamilton County.”).
121. Id. (“Portions of the films were later broadcast on the local station and on a national network.”).
doctrines of criminal syndicalism." The conviction could not stand, because the punished expression might merely have involved advocacy rather than "incitement to imminent lawless action."

The test offered by the Brandenburg Court reflected at least one understanding of the test offered in Brandeis's Whitney concurrence: for advocacy to be criminalized it would have to be both intended and likely to cause imminent, serious harm. The Court was not forced to address the constitutionality of punishing the expression at issue as a "true threat" because the conviction was under the Ohio statute criminalizing advocacy. Had there been a different statute criminalizing the cross burning, the Court might well have been forced to analyze the conditions, if any, under which the Constitution would protect true threats. This analysis would be necessary because individuals seeing the local broadcast might well have felt that their personal safety was being threatened by the people whose comments and actions were being televised, and the speech might have been thought to fall outside of First Amendment protection under true threat analysis.

The Court has employed the Brandenburg analysis in two subsequent cases: Hess v. Indiana and NAACP v. Claiborne Hardware Company. While both cases involved expression that might have been viewed as threatening, neither case explored whether punishing the expression as a true threat would have passed constitutional muster. Hess involved a defendant convicted of disorderly conduct. On the day of his arrest, there had been an anti-war demonstration at Indiana University. The sheriff and his deputies had been trying to clear the streets when Hess, who was standing off the street, said loudly either "We'll take the fucking street later," or "We'll take the fucking street again." Hess was immediately arrested.

122. Id. at 444-45 (alteration in original) (citing OHIO REV. CODE ANN. § 2923.13).
123. Id. at 448 49.
125. See supra notes 105-114 and accompanying text (discussing whether Brandeis's test required both the intent to produce imminent harm and the likelihood that such harm would occur).
126. Cf. Virginia v. Black, 538 U.S. 343, 348 (2003) (The Court discusses Virginia's cross-burning statute, which provides: "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.") (quoting VA. CODE ANN. § 18.2-423 (2003)) (internal quotation marks omitted)).
129. See Hess, 414 U.S. at 105.
130. Id. at 106.
131. Id. at 107 (internal citation marks omitted).
It was not entirely clear why Hess had said this. Witnesses testified that he had been facing the crowd, but did not seem to have been exhorting them to go back into the street. Indeed, Hess did not even seem to be addressing a particular person or group of people.

After rejecting that this speech could be construed as fighting words, the Hess Court addressed the trial court’s finding that these words could be punished under Brandenburg. Because there was no evidence that “his words were intended to produce, and likely to produce, imminent disorder,” the Court reversed the conviction.

In his dissent, Justice Rehnquist characterized the facts somewhat differently. He argued that the protestors’ presence on the streets “could reasonably be construed as an attempt to intimidate and impede the arresting officers.” Then, Justice Rehnquist addressed whether Hess’s statement could be taken as incitement. After noting the majority’s conclusion that the “advocacy was not directed towards inciting imminent action,” he suggested that “whatever other theoretical interpretations may be placed upon the remark, there are surely possible constructions of the statement which would encompass more or less immediate and continuing action against the harassed police.”

The majority’s plausible interpretation of the remark suggested that, at best, “the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time.” Nonetheless, Justice Rehnquist’s implicit point is well-taken that context sometimes provides a basis for offering an interpretation of language that would not be suggested by the words alone. Certainly, Justice Holmes was quite willing to go beyond the words articulated when imputing an illegal purpose to defendants.

One issue raised but not explored by Justice Rehnquist’s dissent is

132. Id.
133. Id.
134. Id.
135. Id.
136. See id.; see also Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding that First Amendment protections do not extend to fighting words, i.e., words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).
137. Hess, 414 U.S. at 108 (discussing the Indiana Supreme Court’s relying on the trial court’s finding that the statement was intended and likely to incite lawless action).
138. Id. at 109.
139. See id.
140. Id. at 110 (Rehnquist, J., dissenting).
141. Id. at 111.
142. Id.
143. Id. at 108 (majority opinion).
144. See supra notes 26-31 and accompanying text (discussing what Schenck said and must have meant).
that there were at least two possible constructions of Hess’s words: one involving incitement and the other involving a threat against the officers themselves. Justice Rehnquist failed to note that had these words been plausibly construed as a threat rather than an incitement, the Brandenburg imminence requirement would not have been applicable.

Perhaps his reticence on this point is understandable; the trial court had based the conviction on its finding that the defendant’s comments might have been interpreted as inciting the crowd to commit imminent, lawless action. Nonetheless, suppose that the statement might reasonably have been construed as likely to cause serious harm (although not imminently), and that the language at issue could reasonably be construed as either incitement or a threat. Precisely because true threat analysis does not include an imminence requirement, at least suggests that speech might be protected under a Brandenburg but not under a true threat analysis.

The same point is illustrated in Claiborne Hardware, which involved a boycott by African-Americans of white merchants in Claiborne County, Mississippi. The merchants sued the NAACP to recover losses and enjoin further boycott activity. At issue, among other things, were several statements that might have been taken as advocacy of illegal conduct but also might have been taken as true threats.

The Mississippi Supreme Court upheld the judgment of liability on the theory that “petitioners had agreed to use force, violence, and ‘threats’ to effectuate the boycott.” Evidence of the threats and coercion included a speech by Charles Evers in which he suggested that “boycott violators would be ‘disciplined’ by their own people.” In addition, Evers “warned that the Sheriff could not sleep with boycott violators at night.” On a different occasion, Evers had allegedly stated, “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”

The Claiborne Hardware Court described one of the methods used to punish those who violated the boycott:

145. But see supra note 137 and accompanying text (quoting the majority’s characterization of the remark suggesting that it could not reasonably be so characterized).

146. Or, the imminence requirement would be met when the intended victim became aware of the message, because the imminent harm would involve the fear caused by the threat rather than by the threat being carried out. Indeed, there is no requirement that the individual intend to carry out the threat. See Black, 538 U.S. at 359-60.


149. Id. at 889.

150. Id. at 895.

151. Id. at 902.

152. Id.

153. Id.
One form of "discipline" of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these "store watchers" were members of a group known as the "Black Hats" or the "Deacons." The names of persons who violated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the "Black Times." As stated by the chancellor, those persons "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites." 154

The Claiborne Hardware Court discussed some of the other punishments: "In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; in the fourth, a flower garden was damaged." 155 None of the victims stopped patronizing the merchants as a result of these acts, 156 which would not be relevant with respect to whether illegal acts were performed but might be relevant with respect to the tort damages that should be awarded to the merchants as a result of the illegal activity.

The Court explained that some of the coercive acts were constitutionally protected. "Petitioners admittedly sought to persuade others to join the boycott through social pressure and the 'threat' of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action." 157 Careful to distinguish among the various alleged practices, the Claiborne Hardware Court held that "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment." 158

Of course, the Court was only suggesting that some of the activity was constitutionally protected, expressly stating that the "First Amendment does not protect violence." 159 Thus, individuals might still be liable if they had threatened to commit or had actually committed violent acts against other individuals refusing to comply with the boycott. However, the Court pointed out that civil liability may not be imposed against individuals merely because they happen to be members of a group containing other members who have committed violent acts. 160 To impose liability on the nonviolent individuals, one would have to show in addition that the group itself had illegal goals and that the

154. Id. at 903–04.
155. Id. at 904.
156. Id.
157. Id. at 909–10.
158. Id. at 915.
159. Id. at 916.
160. See id. at 920 ("Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence.").
individuals being held liable had personally subscribed to those goals.161

In part because coercion by threats of social ostracism were protected,162 the Claiborne Hardware Court reasoned that there had been a complete failure to demonstrate that the “business losses suffered in 1972—three years after this lawsuit was filed—were proximately caused by the isolated acts of violence found in 1966.” 163 While the business losses directly attributable to violent acts would be compensable, it would have been extremely difficult, even in 1966, to determine which refusals to patronize a business were due to the fear of violent reprisal rather than the fear of social ostracism, and utterly impossible to trace losses in 1972 to a few violent acts performed in 1966. Because of this tracing difficulty, the Court concluded that state power had likely “been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.” 164 Thus, to the extent that the liability was predicated on business losses due to protected activity, the liability could not be imposed without violating constitutional guarantees.

The Court then focused on the judgment against Evers in particular, reasoning that to the “extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his ‘threats’ of vilification or social ostracism, Evers’ conduct is constitutionally protected and beyond the reach of a damages award.” 165 Here, too, liability could not be imposed for his having induced individuals not to patronize certain stores by threatening them with ostracism if they failed to observe the boycott.

Yet, some of Evers’ statements threatened more than mere social ostracism. The Court noted both that “a finding that he authorized, directed, or ratified specific tortious activity would justify holding him responsible for the consequences of that activity” 166 and that “a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period.” 167 Thus, the Claiborne Hardware Court made clear

161. See id. (“For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”).
162. Id. at 921 (“To the extent that the court’s judgment rests on the ground that ‘many’ black citizens were ‘intimidated’ by ‘threats’ of ‘social ostracism, vilification, and traduction,’ it is flatly inconsistent with the First Amendment.”).
163. Id. at 923.
164. Id.
165. Id. at 926.
166. Id. at 927.
167. Id.
that all of Evers’ expression was not immune merely because some of it was constitutionally protected, although the Court was not particularly thorough when describing the relevant categories of speech that were permissibly regulated.

The Claiborne Hardware Court recognized:

[References to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycot violators at night conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.”]

Thus, the Court acknowledged that some of the language was threatening and possibly unprotected, and then set about examining whether the expressions at issue fell outside of First Amendment protection.

After briefly mentioning the fighting words doctrine, the Claiborne Hardware Court focused its discussion on Brandenburg. Reiterating that “mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment,” the Court held that the “emotionally charged rhetoric of Charles Evers’ speeches did not transcend the bounds of protected speech set forth in Brandenburg.” Thus, the Court suggested that Evers’ speech could not be construed as both intended and likely to cause imminent lawless action. Ironically, the Claiborne Hardware Court cited the first true threat case—Watts v. United States—in support of its holding, although more recent developments in the true threat jurisprudence threaten the continued viability of Brandenburg protections in a variety of contexts including the one at issue in Claiborne Hardware.

168. Id.
169. Cf. Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (“The speech at issue here does not come within any of the exceptions to the First Amendment recognized by the Court. Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment or some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. No further inquiry is necessary to reject the State’s argument that the statute should be upheld.”) (citing Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J. concurring)).
170. See supra note 136 (discussing the fighting words doctrine).
171. See Claiborne Hardware, 458 U.S. at 927 n.28.
172. Id. at 927.
173. Id. at 928.
175. See Claiborne Hardware, 458 U.S. at 928 n.71 (citing Watts, 394 U.S. 705).
Initially, the Court’s true threat jurisprudence seemed to track Brandenburg in that each jurisprudence imposed limitations on the kinds of speech that could be criminalized. However, more recently, the Court has employed true threat jurisprudence in a way that practically extends an invitation to lower courts to circumvent Brandenburg protections. Until the Court addresses what to do when expression might reasonably be described both as constituting incitement of illegal activity and as constituting an actual threat of serious harm, the jurisprudence in this area will continue to be in disarray.

A. Watts

Watts v. United States involved an individual, Robert Watts, who at the time of the alleged threat had received his draft classification and was supposed to report for a physical the following week. After announcing that he did not plan on reporting, he suggested, “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. ‘They are not going to make me kill my black brothers.” Watts was convicted of “knowingly and willfully threatening the President.”

The Watts Court noted that “petitioner’s statement was made during a political debate, that it was expressly made conditional upon an event—induction into the Armed Forces—which petitioner vowed would never occur, and that both petitioner and the crowd laughed after the statement was made.” Basically, the Court held as a matter of law that Watts had not threatened the President, explaining that “[w]hat is a threat must be distinguished from what is constitutionally protected speech.” Because the statement was a kind of “political hyperbole” rather than a threat, there was no need to address the constitutionality of the statute under which Watts had been convicted, although Justice Douglas argued in his concurrence that the statute was itself unconstitutional.

Watts might be read as protective of political speech. As the

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177. Watts, 394 U.S. at 706 (“According to an investigator for the Army Counter Intelligence Corps who was present, petitioner responded: ‘They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming.’”).
178. Id.
179. Id.
180. Id. at 707.
181. Id.
182. Id. at 708.
183. Id. at 712 (Douglas, J., concurring) (“Suppression of speech as an effective police measure is an old, old device, outlawed by our Constitution.”).
Claiborne Hardware Court noted, Watts had made his statement at a public rally at the Washington Monument, and his speech was best construed as a kind of political opposition.\textsuperscript{184} Watts also might be read as providing some guidance with respect to what constitutes a threat—statements that provide political commentary or are said in jest do not constitute threats.\textsuperscript{185} That said, the Court did not provide a careful analysis of the kinds of threats that could be criminalized without violating constitutional guarantees, leaving that task to be performed by the Court at another time.

\textbf{B. Rogers}

Six years later, the Court would revisit the conditions under which an individual could be convicted of threatening the President. In Rogers \textit{v. United States},\textsuperscript{186} the Court considered the conviction of George Rogers for having made threats against Richard Nixon. Early one morning, Rogers had wandered into a coffee shop in Shreveport, Louisiana and had said, among other things, that he was Jesus Christ,\textsuperscript{187} that he opposed President Nixon’s planned visit to China because China had a bomb that might be used against the United States, and that he (Rogers) was the only person who knew of that bomb’s existence.\textsuperscript{188} In addition, Rogers “announced that he was going to go to Washington to ‘whip Nixon’s ass,’ or to ‘kill him in order to save the United States.’”\textsuperscript{189}

The police were summoned. The arresting officer asked Rogers whether he had threatened the President, and Rogers responded, “I’m going to Washington and I’m going to beat his ass off. Better yet, I will go kill him.”\textsuperscript{190} During this exchange, Rogers mentioned that he planned to walk to Washington because he did not like cars.\textsuperscript{191} There is nothing in the record about how long Rogers thought that it would take him to walk from Shreveport to Washington D.C. or even whether he knew just how lengthy such a trip would be. His comments are sufficiently incredible that it is difficult to believe that he really was making a threat against the President.

The Court reversed the conviction.\textsuperscript{192} Apparently, the jury had been

\begin{itemize}
  \item \textsuperscript{184} See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 n. 71 (1982).
  \item \textsuperscript{185} See Watts, 394 U.S. at 707 (“[B]oth petitioner and the crowd laughed after the statement was made.”).
  \item \textsuperscript{186} Rogers v. United States, 422 U.S. 35 (1975).
  \item \textsuperscript{187} \textit{id.} at 41 (Marshall, J., concurring).
  \item \textsuperscript{188} \textit{id.} at 41 \& 42.
  \item \textsuperscript{189} \textit{id.} at 42.
  \item \textsuperscript{190} \textit{id.}
  \item \textsuperscript{191} \textit{id.}
  \item \textsuperscript{192} See \textit{id.} at 41 (majority opinion).
\end{itemize}
reluctant to convict. After the jury had deliberated for two hours, the foreman sent a note to the trial judge asking whether the court would accept a verdict of "guilty as charged with extreme mercy of the Court." When the judge responded that such a verdict would be acceptable, the jury returned a guilty verdict five minutes later. The Rogers Court reasoned that the "trial judge’s response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise." The Court then reversed and remanded the case.

The Rogers Court focused on a "potential defect in the verdict" and thus saw no need to explicate the true threat jurisprudence. However, Justice Marshall took the opportunity in his concurrence to express his concern that construing the statute broadly created a "substantial risk of conviction for a merely crude or careless expression of political enmity." He suggested that the statute should be construed to proscribe all threats that the speaker intends to be interpreted as expressions of an intent to kill or injure the President. By this, Justice Marshall did not mean that it would have to be shown that the speaker had intended to carry out the threat, since "threats may be costly and dangerous to society in a variety of ways, even when their authors have no intention whatever of carrying them out." Rather, it would have to be established that the individual had intended that his statement be construed as a threat.

The danger perceived by Justice Marshall was that using a more lenient interpretation might subject a defendant to prosecution for any statement that might reasonably be interpreted as a threat, regardless of the speaker’s intention. While Justice Marshall did not spell out his position as much as might have been desired, he argued that "to permit the jury to convict on no more than a showing that a reasonably prudent man would expect his hearers to take his threat seriously is to impose an unduly stringent standard in this sensitive area." That said, Justice Marshall did not believe that one could only convict upon the speaker’s admission that he intended to harm the President:

193. Id. at 36.
194. See id. at 37.
195. Id. at 40.
196. See id. at 38.
197. Id. at 44 (Marshall, J. concurring).
198. Id. at 47.
199. Id. at 46-47.
200. Id. at 47.
201. Id. at 48.
Proof of intention would, of course, almost certainly turn on the circumstances under which the statement was made: if a call were made to the White House threatening an attempt on the President’s life within an hour, for example, the caller might well be subject to punishment under the statute, even though he was calling from Los Angeles at the time and had neither the purpose nor the means to carry out the threat.

Justice Marshall believed that if the jury had been given the appropriate instruction regarding intent, they would never have found that Rogers “actually intended or expected that his listeners would take his threat as a serious one.” Indeed, there was reason to believe that Rogers may not even have been sober when making these statements: Rogers was an alcoholic who was in a coffee shop early in the morning behaving in a loud and obstreperous way.

While Justice Marshall’s limitation on what might constitute a true threat might have made a difference in the case of George Rogers, it would not have proven particularly effective in some of the other cases. For example, a statute criminalizing threats might well have been applied against Charles Evers, since a jury might have found that his speech was intended to be taken as a serious threat against those who did not honor the boycott. Individuals who heard or saw the events at issue in Brandenburg might well have been intended to feel and actually felt seriously threatened, whether their exposure to the cross burning was in person or as a result of watching local television. Indeed, the most recent true threats cases involved cross burnings. But this means that Brandenburg and Claiborne Hardware might well have had much different results under a true threat analysis.

C. Black

In Virginia v. Black, the Court considered the constitutionality of convictions arising out of two different cross burnings. One of the cases involved Richard Elliott and Jonathan O’Mara, who had attempted to burn a cross in the yard of James Jubilee, an African-American who lived next to Elliott.

Jubilee had complained to Elliott’s mother about shots being fired behind the Elliott home. Elliott and O’Mara, who were not members of

202. Id.
203. Id.
204. Id. at 41.
206. Id. at 350.
207. Id.
208. Id.
the Klan, had attempted to burn a cross on Jubilee’s property in retaliation for his having made that complaint. When seeing the partially burned cross on his property early the next day, Jubilee became very nervous, not knowing what to expect next.

The other cross burning did not involve retaliation for a perceived slight. Rather, Barry Black led a Klan rally at which a cross was burned. The burning took place on private property with permission of the owner just off a state highway. Rebecca Sechrist, who watched the rally, felt “awful” and “terrible” when she saw the cross burned.

The Black plurality noted that “while cross burning sometimes carries no intimidating message, at other times the intimidating message is the only message conveyed.” Further, “when a cross burning is used to intimidate, few if any messages are more powerful.” Indeed, those burning a cross as a method of intimidation often intend that the “recipients of the message fear for their lives.”

When analyzing the constitutionality of the Virginia statute under which these individuals were convicted, the Black plurality discussed true threats jurisprudence, explaining that true threats include “those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.” It is not necessary that the speaker “actually intend to carry out the threat,” at least in part, because “a prohibition on true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’” The plurality summed up the jurisprudence as

209. Id.
210. Id.
211. Id. at 348 (“On August 22, 1998, Barry Black led a Ku Klux Klan rally in Carroll County, Virginia. Twenty-five to thirty people attended this gathering, which occurred on private property with the permission of the owner, who was in attendance. The property was located on an open field just off Brushy Fork Road (State Highway 690) in Cana, Virginia.”).
212. Id. at 349.
213. Id. at 357.
214. Id.
215. Id.
216. Id. at 348 (Virginia’s cross-burning statute provides: “It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.” (quoting VA. CODE ANN. § 18.2-423 (2003)) (internal quotation marks omitted)).
217. Id. at 359 (citing Watts v. United States, 394 U.S. 705, 708 (1969)).
218. Id. at 359-60.
219. Id. at 360 (alteration in original) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)).
follows: "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." The Court noted in addition that "some cross burnings fit within this meaning of intimidating speech."

The Black plurality suggested that "Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate." However, a different part of the statute was constitutionally infirm, namely, that section creating a rebuttable presumption that anyone burning a cross had the intent to intimidate. The plurality reasoned that the prima facie provision failed to distinguish among a number of possible cross burnings: (1) "a cross burning done with the purpose of creating anger or resentment [versus] . . . a cross burning done with the purpose of threatening or intimidating a victim"; (2) "a cross burning at a public rally [versus] . . . a cross burning on a neighbor’s lawn"; (3) "the cross burning directed at an individual [versus] . . . the cross burning directed at a group of like-minded believers"; and (4) "a cross burning on the property of another with the owner’s acquiescence [versus] . . . a cross burning on the property of another without the owner’s permission."

The plurality was correct to point out that each of these factors might play a role in determining whether the expression was constitutionally protected, although there was too little discussion of the respects in which these different factors might be significant. For example, after noting that "a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross," the plurality explained that "this sense of anger or hatred is not sufficient to ban all cross burnings."

Yet, the plurality’s suggestion that this sense of anger or hatred is not enough to ban all cross burnings is ambiguous. It might mean that merely because a cross burning would cause anger in the vast majority of citizens cannot justify banning a cross burning that does not arouse negative emotions in anyone who in fact saw it, e.g., because the harm must not only be foreseeable but must actually occur. Or, it might instead

220. Id.
221. Id.
222. Id. at 362.
223. See id. at 364.
224. Id. at 366.
225. Id.
226. Id.
227. Id.
228. Id.
229. Id.
mean that even in those instances in which anger or hatred has been aroused, that without more will not suffice to justify banning a cross burning.

Many kinds of protected expression foreseeably and actually cause hearers to be angry; thus it seems doubtful that the plurality thought expression causing anger would never be constitutionally protected. Presumably, the plurality is suggesting that even a cross burning causing anger or resentment cannot constitutionally be proscribed merely because the message is unwelcome. One would in addition need to show, for example, that the cross burning constituted fighting words, although *R.A.V. v. City of St. Paul* suggests that even prosecutions of cross burnings under the fighting words exception are subject to certain limitations.

When discussing whether permission had been obtained for burning a cross on private property, the plurality seemed to be contrasting a cross burning intended purely as a symbol of political solidarity with a cross burning intended purely as a message of intimidation. But there are a whole range of possibilities that are simply being ignored by such a characterization. Suppose, for example, that a cross had been burned on Elliott's property with permission as part of a Klan rally. Further suppose that the fiery display had been intended to serve two purposes—to communicate a feeling of solidarity to other Klan members and to communicate a threat of serious harm to James Jubilee. While it would be true that the cross burning had been conducted with the property owner's permission, that might have been taken to augment rather than diminish the threatening nature of the expression, because Jubilee would reasonably believe that his neighbor endorsed the views of the Klan.

When discussing the emotions that might be aroused at a Klan rally cross burning, the plurality simply ignored the possibility that an onlooker might feel threatened and intimidated by such a display. It is as if the plurality envisioned a cross burning at a rally miles away from anyone who was not a Klan member. But such a characterization does

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230. *Cf.* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380 (1992) (The Minnesota Supreme Court construed the St. Paul Bias-Motivated Crime Ordinance as prohibiting fighting words. The statute provided: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Naziswastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." (quoting St. Paul., Minn. Legis. Code § 292.02 (1990))).

231. See id. at 391 (The Court held the St. Paul ordinance unconstitutional because: "[I]t applies only to 'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.' Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use 'fighting words' in connection with other ideas - to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality — are not covered.").
not make sense for two distinct reasons. First, were that the scene envisioned, the plurality would have been offering a non sequitur when pointing out that most people seeing such a display would feel anger or hatred. Ex hypothesi, the display would only have been seen by Klan members and they presumably would not have negative reactions to such a display. Further, the geographically isolated cross burning seen only by Klan members would have little relevance to the case at bar. The Klan rally and cross burning at issue in Black occurred close to a public highway, where individuals in cars passing by would doubtless see the display. In addition, there had been testimony that an individual witnessing the Klan rally at issue in Black had felt awful and terrible when seeing that fiery display.

Suppose that the location had been chosen precisely because passersby would find the fiery display threatening. Then the plurality's discussion of a cross burning directed solely at believers would have failed to capture a crucial element of what had happened. Nonetheless, if the plurality envisioned the cross burning as solely directed at believers, that would help explain why the reversal of Black's conviction was upheld, while the opinion involving Elliott and O'Mara was vacated with a remand for further proceedings. If, as seems likely, it could be established on remand that Elliott and O'Mara had attempted to burn a cross with the intent to intimidate, then constitutional guarantees would not immunize their expression from prosecution.

Given the possibility that the Klan cross burning was intended both to communicate a message of solidarity with fellow believers and to intimidate, the Black plurality should have vacated the state supreme court holding with respect to Black as well, remanding the case to give the jury the opportunity to decide whether the cross was being burned at least in part "to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." If so, then the question would have been whether the intimidating speech was protected because it attempted to communicate a political view or unprotected because it communicated a threat of serious violence.

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232. See Black, 538 U.S. at 348.
233. See id. ("During the approximately one hour that the sheriff was present, about 40 to 50 cars passed the site, a 'few' of which stopped to ask the sheriff what was happening on the property.").
234. Id. at 349.
235. Id. at 367 68.
236. Cf. id. at 357 ("[A]s the cases of respondents Elliott and O'Mara indicate, individuals without Klan affiliation who wish to threaten or menace another person sometimes use cross burning because of this association between a burning cross and violence."). One infers that the Court is quite confident that jury would find on remand that Elliott and O'Mara had in fact burned the cross with the intent to intimidate.
237. Id. at 359 (citing Watts v. United States, 394 U.S. 705, 708 (1969)).
Perhaps, borrowing from fighting words analysis,²³⁸ the Black plurality believed that the Klan cross burning at issue, although intimidating to some, did not pick out a person or group with sufficient particularity to qualify as a true threat. According to such an analysis, a threat would only be punishable if it were clear which person or group had been threatened. Yet, such a requirement does not seem plausible. Someone who threatens to detonate a bomb somewhere in New York City would not have identified with particularity those at risk of harm. Nonetheless, the would-be detonator would presumably not be immunized for causing a panic merely because that person failed to specify where the detonation would take place and thus which groups were at risk.

Regrettably, the Black plurality offered no explanation for why there was no need for a remand with respect to the intent behind the Klan cross burning. Further, the rationales offered for making true threats punishable—protecting people from the fear of violence, preventing the disruption that such fear can engender, and reducing the probability that the harm will in fact occur²³⁹—would seem equally applicable whether or not the speech was political. After all, one might reasonably fear an event that is objectively unlikely to occur. Further, one might take steps to reduce the likelihood that the undesirable event would take place. But this means that the rationales underlying true threat jurisprudence would support criminalizing expression that might otherwise be protected under Brandenburg.

IV. CONCLUSION

John Stuart Mill spelled out some of the reasons that speech must be protected, including not only the truth-reinforcing aspects of a robust policy protecting free speech but also that an act’s bad consequences should not be attributed to a speaker if the actor had time to deliberate before acting. Important elements of that view were eventually embraced by Justices Holmes and Brandeis and, even later, incorporated into Brandenburg.

The justifications for protecting advocacy are not directly applicable

²³⁸ Cf. Cohen v. California, 403 U.S. 15, 20 (1971) (“No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction.”) (citing Feiner v. New York, 340 U.S. 315 (1951); Terminello v. Chicago, 337 U.S. 1 (1949)). The plurality might have envisioned this as a message of solidarity to co-believers and thus not a threat against particular individuals.

to true threats, especially when the focus of the harms caused by true threats involves the fear and disruption resulting from the threat itself. But if indeed these have constitutional weight, then it is not clear why they are not considered in the Brandenburg analysis as well. For example, when an individual is targeted she may not care whether the expression at issue is directed to cause others to commit violent acts or instead involves a threat by the speaker. Either way, the target may feel frightened and may have to take steps to protect herself.

The Brandenburg line of cases makes clear that it is not always easy to say whether a particular expression is better characterized as advocacy or, instead, as a threat. Indeed, some expressions may be intended to be both. But the Court has never faced the difficulties posed for First Amendment jurisprudence by the possibility that particular expression might reasonably be construed as (1) advocacy, (2) a true threat, or (3) both. Instead, the Court has pretended that there was only one characterization that might reasonably be offered and then has analyzed whether the expression was protected in light of the chosen characterization.

The Court’s approach is disappointing in a number of respects. It provides no guidance to lower courts who must decide whether speech is advocacy rather than a true threat—a choice that is quite important because certain protections are afforded under Brandenburg that are not afforded under true threat jurisprudence. Nor does the approach provide any guidance with respect to what a court should do if the challenged expression might reasonably be categorized as either. In practice, the Court has shied away from categorizing arguably political statements as true threats, although the Court has never admitted to doing so.

The current jurisprudence is chaotic, at least in part, because of the Court’s refusal to address the extent to which threatening advocacy is constitutionally protected. While one can hope that the Court will soon offer guidelines that help to distinguish between advocacy and threats—helping lower courts understand which expression is protected even when reasonably construed as either—the Court’s track record in this regard has been disappointing. The most likely scenario is that the Court will continue to refuse to address the relevant issues, inducing lower courts to decide relevantly similar cases differently and adopting an approach that neither protects speech nor increases our security.