TERRORIZING ADVOCACY AND THE FIRST AMENDMENT: FREE EXPRESSION AND THE FALLACY OF MUTUAL EXCLUSIVITY

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Traditional free speech doctrine is inadequate to account for modern terrorist speech. Unprotected threats and substantially protected lawful advocacy are not mutually exclusive. This Article proposes recognizing a new hybrid category of speech called "terrorizing advocacy." This is a type of traditionally protected public advocacy of unlawful conduct that simultaneously exhibits the unprotected pathologies of a true threat. This Article explains why this new category confounds existing First Amendment doctrine and details a proposed model for how the doctrine should be reshaped.

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INTRODUCTION

Recent concern about modern terrorists' attempts to induce ideologically driven violence in the United States has given rise to a dilemma for First Amendment scholars. On the one hand, one could conclude that to preserve our modern tradition of free expression, unlawful advocacy must be protected unless the expression is likely to produce imminent criminal activity.[1] That First Amendment-protected advocacy might induce harmful but nonimminent violence is simply a cost of doing business for the First Amendment, regardless of the devastation that may result. On the other hand, some suggest that traditional First Amendment protection must be suspended, at least in the specific context of modern terrorist speech to prevent potentially violent catastrophes, regardless of the inevitable harm to free and open communication. Neither approach appears to provide a very satisfactory solution. But perhaps the real problem is that neither scholars nor jurists have recognized the inherent duality in the type of advocacy in which modern terrorists usually engage.

Traditionally, criminal speech has been conceptualized in two mutually exclusive categories: "true threats" and advocacy of unlawful conduct.[2] No one has seriously suggested that true threats—direct expressions by one individual to another of the speaker's intent to harm the other, often conditioned on the victim's willingness or unwillingness to comply with a condition—are protected speech under the First Amendment. Such threats are nothing more than unprotected speech—acts that constitute intimidation, coercion, and terror—antithetical to the free and open communication and persuasion contemplated by the First Amendment. Unlawful advocacy, on the other hand, has had something of a roller-coaster history in First Amendment doctrine. Now, however, under the controlling *Brandenburg* test, it receives a substantial degree of constitutional protection.[3]

Courts generally assume that criminal speech is *either* an unprotected threat *or* substantially protected unlawful advocacy.[4] What they have failed to recognize, however, is that criminal speech can simultaneously constitute *both* an unprotected threat *and* protected unlawful advocacy. Publicly communicated efforts to persuade willing listeners to violently harm a

1. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). For a full discussion of the *Brandenburg* test, see *infra* Part I.B.1.

2. For discussion of these doctrines, see *infra* Part I.B. For discussion of how courts have treated these doctrines as mutually exclusive, see *infra* Part II.A.

3. *See infra* Part I.B.1.

4. *See infra* notes 65–71 and accompanying text.

specific person or group of people falls under the heading of unlawful advocacy and is therefore deserving of the degree of constitutional protection normally afforded such expression. Such speech, however, simultaneously constitutes a threat to those intended victims who witness the advocacy because they may reasonably believe someone may be persuaded to harm them. Indeed, modern terrorist strategy is a textbook illustration of how these two pathologies intersect: publicly distributed advocacy of criminal violence against a designated victim or victim group may well convince a willing listener to take such action, but even if it fails to do so, the speech still has the benefit to the speaker of intimidating the victims.

Just as terrorists strategically view their expression as containing elements of both unlawful advocacy and coercive threats, so too should those interpreting the First Amendment recognize that publicly distributed unlawful advocacy will generally contain elements of both protected expression and unprotected speech-act threats. The goal, then, must be to adjust First Amendment treatment of such hybrid expression in order to simultaneously recognize the coercive nonspeech element, as well as the persuasive expressive element.

We propose recognizing a new hybrid category called "terrorizing advocacy." Terrorizing advocacy is a type of traditionally protected public advocacy of unlawful conduct that simultaneously exhibits the unprotected pathologies of a true threat. Terrorizing advocacy contains both a protected persuasive, expressive element and an unprotected intimidating, coercive element. Based on this insight, First Amendment doctrines dealing with criminal speech must be reshaped to take into account the hybrid nature of terrorizing advocacy.

Our goal in this Article is first to explain this intersecting duality and then to fashion a proposed doctrinal model that seeks to accommodate both the protected and unprotected elements of this kind of expression. Part I discusses the challenge to current First Amendment doctrine posed by terrorist messaging and how various scholars have responded to that challenge.[5] That Part then provides a brief background of the two First Amendment doctrines—advocacy of unlawful conduct and true threats—that are simultaneously implicated by terrorist messaging. Next, Part II explores the concept of "terrorizing advocacy" and explains why this category of speech confounds existing First Amendment doctrine. Part III details our proposed model for how First Amendment doctrine should be reshaped to account for hybrid messaging.

I. TERRORIST MESSAGING AND THE FIRST AMENDMENT

An examination of terrorist messaging within the context of the First Amendment yields many challenges, which are discussed in Part I.A. Part

5. To accomplish the aims of this Article and streamline the theoretical discussion, this Article assumes that terrorist organizations possess traditional First Amendment rights, even though many of those organizations are international entities not entitled to First Amendment rights.

I.B then examines the unlawful advocacy and the true-threats doctrines that arise within terrorist messaging.

A. The Challenge to the First Amendment

Terrorist organizations often broadcast ideological messages publicly in order to build support for their movements by persuading recruits to join their cause. Terrorists use their messages to communicate to a broad and—due to the internet—often global audience.[6] Evidence gathered pertaining to recent domestic terror attacks indicates that this messaging may persuade certain individuals to carry out violent attacks.[7] Terrorist messaging is also used to intimidate those who oppose or do not support terrorist aims. Terrorist organizations aim to instill fear in targets of their attacks.[8] By doing so, these organizations seek to induce fear in a wide audience, amplifying their impact beyond any single attack.[9] Terrorists employ their communications to perform the dual roles of persuading willing sympathizers and instilling fear in potential victims. To the terrorists, these goals are by no means mutually exclusive.

First Amendment scholars have offered a variety of responses to the growth of terrorist messaging. These scholars can be divided into several different camps. First, some scholars argue that the U.S. Supreme Court's current unlawful-advocacy doctrine adequately responds to the challenge posed by terrorist messaging.[10] Constitutional protection afforded to unlawful advocacy is controlled by the highly protective standard established in *Brandenburg v. Ohio*.[11] The Court there held that unlawful advocacy is protected except when the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[12] Scholars defend reliance on *Brandenburg* on the ground that the Constitution guarantees robust protection for free speech, even unlawful advocacy.[13] Although they differ regarding the particular values the First Amendment protects, they agree that the First Amendment should protect the free

6. *See generally* GABRIEL WEIMANN, TERROR ON THE INTERNET: THE NEW ARENA, THE NEW CHALLENGES (2006).

7. *See* William Finnegan, *Last Days: Preparing for the Apocalypse in San Bernardino*, NEW YORKER (Feb. 22, 2016), http://www.newyorker.com/magazine/2016/02/22/preparing-for-apocalypse-in-san-bernardino [http://perma.cc/3KH6-T6V6] (discussing the effect of terrorist organization propaganda on the radicalization of the terrorists who carried out the San Bernardino shootings); *see also* Brendan I. Koerner, *Why ISIS Is Winning the Social Media War*, WIRED (Mar. 2016), https://www.wired.com/2016/03/isis-winning-social-media-war-heres-beat/ [http://perma.cc/K6SN-6N5M].

8. *See* BRUCE HOFFMAN, INSIDE TERRORISM 40–41 (2006).

9. *See id.*

10. *See, e.g.*, Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 660 (2009).

11. 395 U.S. 444 (1969) (per curiam). For additional discussion regarding the evolution of unlawful-advocacy doctrine, see *infra* Part I.B.2

12. *Brandenburg*, 395 U.S. at 447.

13. *See, e.g.*, Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of* Brandenburg, 4 HARV. L. & POL'Y REV. 361, 363–64 (2010); Healy, *supra* note 10, at 660.

exchange of ideas, even objectionable or criminal ones. They assert that the Constitution's framers believed that the exchange of ideas can undermine irrational and dangerous propositions.[14] Scholars in this group generally believe that America must risk the potentially harmful consequences of terrorist messaging because restricting speech creates a greater harm.[15] The framers were not cowards, and allowing threatening speech to circulate is a necessary cost of promoting free and open expression.[16]

Another group of scholars argues that the Supreme Court's current protections for unlawful advocacy may well be too protective of speech, creating an undue risk to security.[17] Professor Cass Sunstein falls into this category.[18] He finds *Brandenburg*'s utility diminished in light of the "genuine risk of large numbers of deaths" that may be caused by terrorist messaging.[19] To reduce the risk of terrorist messaging contributing to mass-casualty attacks, Sunstein proposed that the Court adopt a far less protective approach: "If (and only if) people are explicitly inciting violence, perhaps their speech doesn't deserve protection when (and only when) it produces a genuine risk to public safety, whether imminent or not."[20] Sunstein's proposal revokes *Brandenburg*'s imminence requirement in order to remove constitutional protection from most advocacy of unlawful conduct.

Finally, some scholars argue that terrorist messaging gives rise to unique challenges, so it is necessary to create terrorism-specific exceptions to otherwise strong free speech protection.[21] They propose highly speech-restrictive approaches to combat terrorist messaging. For example, Eric Posner advocates "anti-propaganda" laws

> that make[] it a crime to access websites that glorify, express support for, or provide encouragement for ISIS or support recruitment by ISIS; to

14. These scholars, to support their position, typically rely on ideas expressed by Justice Louis Brandeis. *See* Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

15. *See* William W. Van Alstyne, *Remarks of William Van Alstyne on the* Brandenburg *Panel*, 44 TEX. TECH L. REV. 85, 88 (2011) ("I frankly have seen nothing, including the terrorism acts of 9/11 and its aftermath, that should cause one to regard [the *Brandenburg* test] as less appropriate for our time than the very troubled time it finally came of age."); *see also* Adelman, *supra* note 13, at 363–64; Healy, *supra* note 10, at 660.

16. Justice Brandeis's concurring opinion in *Whitney* offers support for this proposition, as well. *See Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.").

17. *See* Cass R. Sunstein, *Islamic State's Challenge to Free Speech*, BLOOMBERG (Nov. 23, 2015), https://www.bloomberg.com/view/articles/2015-11-23/islamic-state-s-challenge-to-free-speech [http://perma.cc/XUB2-53LY].

18. *Id.*

19. *Id.*

20. *Id.*

21. This approach parallels the manner in which certain scholars responded to the challenges presented by Communism. *See, e.g.*, Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 173 (1956).

> distribute links to those websites or videos, images, or text taken from those websites; or to encourage people to access such websites by supplying them with links or instructions.[22]

Scholars in this camp believe that the threatening messages terrorist organizations disseminate are of such low social value[23] and may produce "historic and unprecedented danger from foreign radicalization and recruitment"[24] that draconian censorship is required.

Ultimately, none of these camps persuasively articulates a rationale for either maintaining or modifying current First Amendment doctrine in light of the First Amendment challenges posed by terrorist organizations. On the one hand, scholars who argue for an exception from traditionally protective standards due to the supposed uniqueness of the current threats risk abandonment of protection during all periods of public fear. On the other hand, no one can seriously doubt that terrorist messaging can influence individuals to carry out attacks. It is, of course, principled to believe that we should ignore the possible consequences of terrorist messaging in the name of fostering free speech. But this attitude appears cavalier in light of the harmful consequences of terrorist messaging. Even if, as Justice Louis Brandeis famously informed us, the framers would not have cowered before such speech,[25] it is still not unreasonable to seek to limit this harmful messaging.

Yet, extreme restrictions on unlawful advocacy or draconian censorship are not appropriate responses. History demonstrates that, during pathological periods of national paranoia, America tends to severely restrict free speech in response to perceived threats.[26] These harsh restrictions are inconsistent with the democratic values underlying the First Amendment.[27] Intelligently reforming the current approach to terrorist messaging requires a more nuanced response. This response must be able to blend two wholly distinct free speech doctrines: unlawful advocacy and the "true threat."

B. Doctrinal Background

Advocacy of criminal conduct often implicates two related but distinct First Amendment doctrines. The first doctrine consists of cases concerning

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22. Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html [http://perma.cc/WVK3-XMXT].

23. *Id.* ("The major justification for freedom of speech is the marketplace of ideas—the claim that if people can say whatever they want, the best ideas will flourish. But just what is it that we can learn from ISIS? The social value of beheading apostates? The finer points of crucifixion? Those who regard free speech as fundamental need to consider whether legal principles that arose centuries ago make sense in the age of Snapchat.").

24. *Id.*

25. *Cf.* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("Those who won our independence by revolution were not cowards.").

26. *See* MARTIN H. REDISH, THE LOGIC OF PERSECUTION: FREE EXPRESSION AND THE MCCARTHY ERA 46–62 (2005).

27. *Id.*

First Amendment protections for advocacy of unlawful conduct. The second is the "true threats" doctrine. To varying degrees, terrorist messaging implicates each of these distinct doctrines.

1. Unlawful-Advocacy Doctrine

The degree of First Amendment protection afforded to unlawful advocacy has fluctuated over the past century.[28] Such speech has at times received broad protection while at others received very limited protection. The Supreme Court in *Schenck v. United States*[29] first established a test to determine when unlawful advocacy may be censored in compliance with the First Amendment. In that case, Justice Oliver Wendell Holmes established the "clear and present danger" test.[30] Superficially, the test provided substantial protection to unlawful advocacy. Yet in practice, the test was often invoked to justify the government's suppression of unpopular speech, even when it presented no realistic danger of harm.[31] The Court subsequently modified the test in *Gitlow v. New York*[32] in favor of an approach highly deferential to the legislative judgment regarding the appropriateness of prohibiting unlawful advocacy.[33]

Soon after, Justice Brandeis's concurring opinion in *Whitney v. California*[34] explained the conditions under which unlawful advocacy deserved constitutional protection. He recognized that,

> although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That 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 substantive evil which the state constitutionally may seek to prevent has been settled.[35]

Brandeis's concurrence envisioned a highly speech-protective approach to unlawful advocacy: censoring unlawful advocacy is permitted when and only when such restrictions are necessary to "protect the state from

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28. This Part provides a brief history of the unlawful-advocacy line of cases. For a more detailed discussion of the history and evolution of the doctrine, see generally Kent Greenawalt, *Speech and Crime*, 4 AM. B. FOUND. RES. J. 645 (1980); Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1164 (1982).

29. 249 U.S. 47 (1919).

30. *Id.* at 52.

31. *See* Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 60 (2004).

32. 268 U.S. 652 (1925).

33. Greenawalt, *supra* note 28, at 705. This highly deferential standard was "on occasion referred to as the 'bad tendency' test: if there was any possibility that the feared harm might occur as a result of the prohibited words, the legislation would be upheld." Redish, *supra* note 31, at 61 (footnote omitted).

34. 274 U.S. 357 (1927).

35. *Id.* at 373 (Brandeis, J., concurring).

destruction or serious injury."[36] The speaker must intend for this speech to produce such a harm. And there must be a "clear and imminent danger" of the harm coming about. Despite Brandeis's speech-protective approach to unlawful advocacy, the Court did not incorporate such broad protections into its unlawful-advocacy doctrine for many years.

In *Dennis v. United States*,[37] the Court's plurality opinion further refined the unlawful-advocacy doctrine by revising the "clear and present danger" test.[38] Chief Justice Fred Vinson's plurality opinion adopted the statement of the test as announced by Chief Judge Learned Hand in the court of appeals below: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[39] This approach rejected the true clear and imminent danger standard advocated by Justice Brandeis in favor of one that permitted the government to regulate the advocacy of seriously harmful unlawful conduct, even if it would take place far in the future.

In 1969, the Supreme Court in *Brandenburg* substantially revised controlling unlawful-advocacy doctrine. The Court held that the First Amendment establishes

> the principle that the 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.[40]

The Court found abstract teaching of the "moral necessity for a resort to force and violence" distinct from preparing a group to commit criminal action.[41] It held that even speech advocating violence should receive First Amendment protection absent a disqualifying risk that the speech would cause imminent harm.[42]

The Court in *Brandenburg* was correct in providing substantial—albeit not absolute—protection for advocacy of unlawful conduct. Justice Brandeis's concurring opinion in *Whitney* details the rationales for protecting unlawful advocacy.[43] First, Justice Brandeis noted the value the framers placed on providing citizens the independence to develop their faculties and deliberate without fear of government censorship.[44] Deliberation among citizens protects against "the dissemination of noxious doctrine."[45] Unlawful advocacy, "however reprehensible morally, is not a justification for denying

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36. *Id.*
37. 341 U.S. 494 (1951).
38. *See* Redish, *supra* note 31, at 47.
39. *Dennis*, 341 U.S. at 510 (plurality opinion) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).
40. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).
41. *Id.* at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961)).
42. *Id.*
43. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
44. *Id.*
45. *Id.*

free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."[46]

Punishing unlawful advocacy invites speaker self-censorship and therefore undermines the democratic values the First Amendment is designed to serve. While an absolutist would presumably reject *any* limitation on unlawful advocacy, one need not go that far to conclude that unlawful advocacy should be protected, at least in the absence of a threat of imminent harm. This appears to be the controlling doctrine.

2. True-Threats Doctrine

In contrast to unlawful advocacy, true threats are categorically excluded from constitutional protection. The Court first recognized the concept of true threat in *Watts v. United States*.[47] It observed: "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech."[48] Yet the Court in *Watts* did not articulate its rationale for why true threats failed to qualify as protected speech.

In *R.A.V. v. City of St. Paul*,[49] the Court provided a rationale for why true threats are categorically excluded from First Amendment protection. There, the Court held unconstitutional an ordinance regulating speech based on its content.[50] Justice Antonin Scalia, writing for the majority, noted that "threats of violence are outside the First Amendment" for the following three reasons: "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."[51] Justice Scalia cited *Watts* as support for these propositions.[52]

The Court in *Virginia v. Black*[53] further clarified the concept of a true threat and the rationales for denying First Amendment protection to true threats. The Court first explained that the "hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."[54] Despite this apparent commitment to the free exchange of ideas, the First Amendment does not guarantee absolute protection for speech; the government may constitutionally regulate certain categories of expression.[55] One such category includes "true threats."[56] The Court defined "true threats" as those

46. *Id.* at 376.
47. 394 U.S. 705 (1969) (per curiam).
48. *Id.* at 707.
49. 505 U.S. 377 (1992).
50. *Id.* at 391.
51. *Id.* at 388.
52. *Id.* (citing *Watts*, 394 U.S. at 707).
53. 538 U.S. 343 (2003).
54. *Id.* at 358 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).
55. *Id.* (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)).
56. *Id.* at 359; *see also R.A.V.*, 505 U.S. at 388; *Watts*, 394 U.S. at 705.

"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."[57] The Court then repeated the rationales from *R.A.V.* for excluding true threats from the scope of First Amendment protection.[58]

3. Rationalizing the Exclusion of True Threats

Despite the Court's occasional efforts to justify exclusion of true threats from First Amendment protection, it appears to have failed to grasp the fundamental justification for its categorical rejection of free speech protection. Simply put, a true threat is a coercive act, not speech. The First Amendment does not protect every use of words. It protects the right of the speaker to voluntarily express herself in order to persuade a willing listener to adopt a certain belief or take a certain action. Using speech in this fashion is properly characterized as expression. Promoting free and open exchange of expressive speech is essential to promoting a vibrant democracy in which individuals are able to think and speak as they please, without fear of government censorship. Protection of expressive speech advances individual self-realization, the core value the First Amendment is designed to promote.

Unlike expressive speech, a "speech-act" involves the use of words to accomplish ends other than to inform or to persuade a willing listener to freely adopt a certain belief or take a certain action.[59] This is especially true when speech is used to perform a coercive act. For example, a mugger brandishing a gun who shouts "your money or your life" at a victim engages in a nonexpressive speech-act.[60] Although the mugger used his vocal cord, what he uttered was not speech, at least in the sense contemplated by the First Amendment. The mugger did not attempt to persuade a willing listener to voluntarily hand over his money. Instead, the mugger's words constituted an act. In effect, his words are the equivalent of hitting the victim over his head and taking his wallet. The mugger used words but only as a coercive tool in the execution of his robbery. Thus, the mugger's speech is properly characterized as a nonexpressive speech-act because the speech is itself an act. It is for these reasons that such coercive speech-acts as blackmail and extortion are categorically excluded from the scope of constitutional protection.

As a normative matter, coercive speech-acts are excluded from First Amendment protection because they do not advance the democratic values the First Amendment exists to protect. To the contrary, they directly undermine those values. The First Amendment promotes individual self-realization by establishing a societal commitment to the free and open

57. *Id.*

58. *Id.* (citing *R.A.V.*, 505 U.S. at 388); *see also* Elonis v. United States, 135 S. Ct. 2001, 2016 (2015).

59. *See* Redish, *supra* note 31, at 85.

60. *Id.* at 69.

exchange of ideas.[61] To this end, the individual must be empowered to freely decide what to say, what to think, and, within legally imposed limits, how to act. This is "central to a respect for one's autonomy and integrity as a person."[62]

From this, it follows that individuals may attempt to persuade others to adopt a certain belief or take certain action. But individuals may not rely on the First Amendment to protect efforts to force others to think or act a certain way. Coercive speech-acts do not contribute to the free and open exchange of ideas that underpins a robust public sphere. They "manifestly disregard[]" the listener's will and "the integrity of the [listener]'s mental processes."[63] Whatever subsequent belief the listener adopts is the product of the speaker's coercive nonexpressive speech-act, not the listener's autonomous decision-making process.

True threats, then, are not excluded from the First Amendment because—as the Court has occasionally suggested—the harm they cause outweighs their expressive value. They are denied protection because they are properly viewed not as "speech" at all, at least in the sense contemplated by the First Amendment, but rather as coercive speech-acts.

II. "TERRORIZING ADVOCACY" AND THE CHALLENGE TO FREE SPEECH DOCTRINE

Terrorizing advocacy raises complications that challenge the First Amendment. Part II.A discusses how the two doctrines of criminal speech are not mutually exclusive, as courts consistently—and incorrectly—assume. Part II.B then explains how terrorizing advocacy is actually a hybrid of both unlawful-advocacy and true-threat doctrines. Part II.C uses the prior discussions of the mutual exclusivity fallacy of terrorizing advocacy and sheds light on the implications of this fallacy in the courts.

A. The Fallacy of Mutual Exclusivity

The unlawful-advocacy and true-threats doctrines have evolved in separate First Amendment universes. All of the Supreme Court's true-threats cases involved directly coercive, first-party communications from speaker to victim; no element of protected persuasive expression was involved. Unlawful advocacy, however, is subject to the test outlined in *Brandenburg*, and this advocacy is excluded from First Amendment protection only if it gives rise to imminent danger.[64]

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61. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1001–02 (1978) ("Thus, the political morality summed up by the first amendment requires protection for speech that manifests or contributes to the speaker's values or visions—speech which furthers the two key first amendment values of self-fulfillment and participation in change—as long as the speech does not involve violence to or coercion of another.").

62. *Id.* at 1000–01.

63. *Id.* at 1001.

64. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *see also supra* Part I.B.1.

Courts appear to assume these two doctrines are mutually exclusive. They characterize criminal speech *either* as advocacy of unlawful conduct *or* as a true threat.[65] One example is the Ninth Circuit's decision in *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*.[66] The court considered whether messages that plaintiffs alleged threatened specific doctors who performed abortions constituted true threats and therefore lacked constitutional protection.[67] Defendants argued that their speech was protected political advocacy. The majority declared that "while advocating violence is protected, threatening a person with violence is not."[68] It concluded that the speech in question fell under the true-threats line of cases, and thus fell outside the scope of First Amendment protection.[69] Dissenting judges, however, found the speech in question to be protected advocacy of unlawful conduct.[70] Both the majority and the dissents considered the speech to be *either* protected unlawful advocacy *or* an unprotected true threat.[71]

This binary approach to speech classification is problematic, because this either-or method excludes the possibility of speech being *both* unlawful advocacy *and* a true threat. This Article describes this analytical pitfall as the fallacy of mutual exclusivity. Split decisions by appellate courts reflect this analytical fallacy; one judge may view speech as unlawful advocacy, while another may view the same speech as a true threat.[72] For example, the Ninth Circuit judges on both sides of the decision in *American Coalition of Life Activists* failed to recognize that speech advocating violence could be perceived as advocacy of unlawful conduct from the perspective of the listeners yet simultaneously perceived as a threat from the perspective of the targets who hear or read the speaker's words.

Such an analytical fallacy necessarily distorts the analysis of the case. How speech is categorized of course determines what—if any—First Amendment protection it receives. If categorized as a true threat, expression is automatically denied protection. Yet if categorized as unlawful advocacy, the speech loses protection only if it gives rise to the danger of imminent

65. We agree with Professor Karst that "the doctrinal relationship of 'advocacy' to 'threat' does not pose an 'either/or' choice for judges." Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1390–91 (2006). Yet, as we discuss, in practice judges proceed on the assumption that these two doctrines do pose an either-or choice. *See infra* Part II.B.

66. 290 F.3d 1058 (9th Cir. 2002) (en banc).

67. *See infra* Part III.

68. *Am. Coal. of Life Activists*, 290 F.3d at 1072 (recognizing that if the speakers "had merely endorsed or encouraged the violent actions of others, [their] speech would be protected").

69. *Id.*

70. *See id.* at 1101 (Berzon, J., dissenting) ("[T]he speech for which the defendants are being held liable . . . is, on its face, clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment.").

71. For example, Judge Marsha Berzon, in dissent, stated that she "would police vigorously the line between inducement and threats." *Id.* at 1107.

72. Another example comes from *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013), where the majority and dissent disagreed about whether the speech in question constituted unlawful advocacy or a true threat.

injury.[73] A court in a given case risks ignoring a harm or benefit if it forces such a hybrid speech-act into a single category.

B. The Hybrid Nature of "Terrorizing Advocacy"

Terrorizing advocacy is properly seen as a mixture of protected speech and unprotected acts.[74] It does not fit neatly into either the unlawful-advocacy or true-threats categories. Thus, it is necessary to treat terrorizing advocacy as a hybrid category distinct from the traditional line of unlawful-advocacy and true-threats cases.

In one sense, terrorizing advocacy is a form of expressive speech (unlawful advocacy) because its aim is to persuade willing listeners to take unlawful action. Focusing on this element, terrorizing advocacy would be properly tested under the unlawful-advocacy line of cases. For example, it is conceptually indisputable that publicly broadcasting the message that "all Israelis living in Chicago should be killed" is a form of expressive unlawful advocacy. The speaker is attempting to persuade willing listeners to engage in a criminal act. Thus, absent the disqualifying danger of causing imminent violence,[75] this advocacy is properly deemed protected expression under *Brandenburg*. However, focusing only on the persuasive element of terrorizing advocacy ignores its coercively intimidating impact on unwilling listeners.

Terrorizing advocacy simultaneously exhibits the pathologies of a true threat. Public advocacy directed at persuading a willing listener to commit violence against specific individuals or groups can intimidate unwilling listeners or readers who are potential targets of that violence. However, purely under the unlawful-advocacy line of cases, the coercive impact on an unwilling listener would not be taken into account. Instead, only the physical harm that may come about as a result of voluntary criminal actions taken by the willing listeners is considered.[76] Terrorizing advocacy recognizes how expressive speech can simultaneously be used to coerce as well as persuade, thus exhibiting the pathologies of both a true threat and unlawful advocacy.

Yet terrorizing advocacy cannot properly be categorized exclusively as a traditional true threat. On the one hand, true threats typically involve what can be characterized as *first-party threats*. That is, true threats involve speakers issuing a threat of coercive behavior directly to unwilling listeners. Speakers use words to coerce unwilling listeners because unwilling listeners

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73. *See Am. Coal. of Life Activists*, 290 F.3d at 1091 (Kozinski, J., dissenting) ("[A] statement does not become a true threat because it instills fear in the listener."); *id.* at 1095 ("[E]ven when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.").

74. Although Professor Karst recognized that "some alleged threats . . . are mixed in with speech that contains advocacy addressed to public issues," he did not investigate this phenomenon in great detail. Karst, *supra* note 65, at 1390. This Article is the first attempt to perform such an analysis and propose corresponding modifications to free speech jurisprudence.

75. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

76. *Id.*

reasonably fear that the speaker will follow through on the threat.[77] A slight modification on the previous example clarifies this point: if a speaker were to walk up to an Israeli living in Chicago and say, "I will murder all Israelis who live in Chicago," that constitutes a traditional true threat. The speaker used words not to persuade but to intimidate directly an unwilling listener because the unwilling listener reasonably fears that the speaker may commit the harm. Terrorizing advocacy operates in a similar, but not identical, fashion.

On the other hand, terrorizing advocacy involves what can be characterized as *third-party threats*. A third-party threat involves a speaker publicly attempting to persuade a willing listener to commit harm against an unwilling listener. By publicly issuing the threat, the speaker presumably intends that the unwilling listener hears and finds credible such a threat. And he is simultaneously attempting to persuade willing listeners to take unlawful action. Third-party threats share the pathologies of a first-party threat because they can intimidate those unwilling listeners who are the targets of the threat. The speaker uses words to intimidate indirectly an unwilling listener; but the intimidation comes from the intended victim's perception that a willing listener may be persuaded to harm him. The unwilling listener does not necessarily fear that the speaker will act; instead, he reasonably fears that a third party may be persuaded by the speaker to act.

One might be tempted to conclude that the coercive element of terrorizing advocacy should cause such expression to be treated exclusively as true threats. After all, terrorizing advocacy gives rise to the very same nonexpressive harms as do true threats. But while the *harm* of terrorizing advocacy is fungible with the harm of true threats, the *expressive value* of the two is by no means identical. Classic first-party true threats cannot even properly be characterized as speech in the sense contemplated by the First Amendment. No harm to First Amendment interests results from suppressing true threats. Unlike classic true threats, terrorizing advocacy exhibits qualities of fully protected speech. Harm to First Amendment interests *does* result from suppression of such speech. To treat the two forms of true threat identically, then, ignores the pure expressive element inherent in terrorizing advocacy.

Messaging from the Islamic State of Iraq and Syria (ISIS) illustrates the phenomenon of messaging that simultaneously seeks to threaten and persuade. ISIS, through public channels such as social media and its online magazine, disseminates messages advocating the murder of specific persons or groups of people. Specifically, ISIS regularly urges the killing of infidels and nonbelievers. Often, ISIS does not directly threaten these individuals; ISIS instead makes normative claims that urge others to murder specified targets. ISIS aims to persuade a willing listener—such as an ISIS

77. *See Am. Coal. of Life Activists*, 290 F.3d at 1091 (Kozinski, J., dissenting) ("In order for the statement to be a threat, it must send the message that the speakers themselves—or individuals acting in concert with them—will engage in physical violence."); *see also id.* at 1106 (Berzon, J., dissenting) ("[T]he separate constitutional category of unprotected speech for threats does not include statements that induce fear of violence by third parties.").

sympathizer—to commit violent acts against those targets. For example, ISIS's propaganda magazine features the following exhortation:

> Muslims currently living in Dar al-Kufr[78] must be reminded that the blood of the disbelievers is halal, and killing them is a form of worship to Allah, the Lord, King, and God of mankind. This includes the businessman riding to work in a taxicab, the young adults (post-pubescent "children") engaged in sports activities in the park, and the old man waiting in line to buy a sandwich. Indeed, even the blood of the kafir[79] street vendor selling flowers to those passing by is halal to shed—and striking terror into the hearts of all disbelievers is a Muslim's duty.[80]

Through this, ISIS tries to persuade willing listeners to act by reminding them that killing businessmen, young adults, the elderly, and merchants—that is, "all disbelievers"—is a Muslim's sacred duty.[81] Thus, ISIS aims to persuade sympathizers to commit violence against disbelievers. In doing so, ISIS issues third-party threats. This messaging is not a direct threat against a specific target—that is, through this message, ISIS does not claim that it as an organization will attack the disbelievers. Instead, ISIS attempts to persuade its potential sympathizers—willing listeners—to harm specific targets. The declared targets of ISIS's messaging—unwilling listeners—who are aware of this message may reasonably fear that they will be attacked.[82] Even if the messaging fails to persuade anyone to attack those declared targets, ISIS's messaging can still succeed in inducing fear in those targets. ISIS's history of persuading its sympathizers to commit attacks against specific groups of people whom it declares to be enemies makes this fear particularly reasonable. This messaging performs a hybrid role by attempting to persuade willing sympathizers to commit violence while inducing fear in those who may be targeted by this violence. Analytically, messaging of this sort should be characterized as terrorizing advocacy.

C. The Mutual Exclusivity Fallacy in the Courts

The courts have consistently applied this form of fallacious mutual exclusivity in approaching third-party threats. The Second Circuit in *United States v. Turner*,[83] for example, applied the assumption of mutual exclusivity

78. *Dar al-Kufr*, translated, essentially means the "land of disbelief." ABU ISMAEL AL-BEIRAWI, ESSAYS ON IJTIHAD IN THE 21ST CENTURY 98 (2016).

79. *Kafir*, translated, essentially means nonbeliever. *Id.* at 23.

80. Al Hayat Media Center, *The Kafir's Blood Is Halal for You, So Shed It*, RUMIYAH, 2016, at 36, https://www.clarionproject.org/factsheets-files/Rumiyah-ISIS-Magazine-1st-issue.pdf [http://perma.cc/4XWM-X5NE]. Al Hayat Media Center is the foreign language media division of ISIS.

81. *Id.*

82. Admittedly, most Americans do not read ISIS's terror magazine. But the magazine is publicly available, widely distributed, and often receives media coverage. So, even if a potential target does not read the actual magazine, he or she may still become aware of the threat—as ISIS likely intended with its decision to put the magazine on the internet, where it is publicly available. By posting the message through such a medium, ISIS can build support for its own cause and generate fear through the public circulation of these threats.

83. 720 F.3d 411 (2d Cir. 2013).

in determining the level of First Amendment protection afforded to a blog post by an internet media personality that included violent language directed at three Seventh Circuit judges for an opinion concerning the scope of the Second Amendment.[84] The defendant operated a publicly accessible website that appealed to white supremacist groups.[85] His post included the following statement: "These Judges deserve to be killed. Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions."[86] Turner remarked:

> These Judges are traitors to the United States of America. They have intentionally violated the Constitution. . . . These Judges deserve to [be] made such an example of as to send a message to the entire judiciary: Obey the Constitution or die.[87]

Turner updated his blog post the following day, adding information about the target judges including their names and photographs, their work addresses, and a map of the courthouse.[88] The Second Circuit concluded that Turner's speech was properly characterized as a true threat and thus lacked First Amendment protection.[89]

In reaching this conclusion, the court failed to recognize the hybrid nature of Turner's speech. On one hand, the court correctly recognized that Turner's intended victims could reasonably perceive the blog post as a coercive threat. In this regard Turner's blog post contained an intimidating, coercive element not protected by the First Amendment. The post induced fear in the judges and sought to coerce them into deciding future cases in accordance with Turner's wishes. The court categorized the blog post as a true threat, even though the post was not a traditional *first-party* threat. Instead, the post constituted a *third-party* threat: Turner, the speaker, attempted to persuade willing listeners to murder unwilling targets—the judges—which simultaneously had the effect of coercively intimidating the judges. The Court however, did not discuss the difficulty of fitting a third-party threat into the true-threat line of cases.

The court's failure was problematic because Turner's post, while clearly containing a threat element, simultaneously constituted protected expressive speech under *Brandenburg*. Turner defended his speech on the ground that his post was an act of political speech in which he expressed his strong opposition to the Seventh Circuit's ruling regarding the scope of the Second Amendment.[90] He had expressed opposition to the Seventh Circuit's decision and had urged readers to commit unlawful acts.[91] Turner's post was likely intended to persuade willing listeners to kill specific judges. The court even recognized that "Turner was constitutionally entitled to condemn and

84. *See generally id.*
85. *Id.* at 414.
86. *Id.* at 415.
87. *Id.*
88. *Id.* at 414.
89. *Id.* at 424–25.
90. *Id.* at 420.
91. *Id.* at 420–23.

disparage the Seventh Circuit."[92] Judge Rosemary Pooler, dissenting, recognized that Turner's statements were aimed at persuading willing listeners, leading her to conclude that his statements constituted protected unlawful advocacy.[93] But the majority rejected this conclusion on the basis of the following reasoning:

> Turner's political criticism was not the basis for his conviction. Rather, he was convicted of doing something more—of threatening the lives of three judges . . . . The evidence was more than sufficient, moreover, for a jury to conclude that Turner's statements were not "political hyperbole," as he contended, but violent threats against the judges' lives.
>
> . . . .
>
> The full context of Turner's remarks reveals a gravity readily distinguishable from mere hyperbole or common public discourse.[94]

Even though the court apparently recognized the speech's expressive and political nature, it concluded that the threatening nature of the speech nullified any First Amendment protection that the speech may have deserved.

The Ninth Circuit in *American Coalition of Life Activists* confronted the issue of whether the defendants issued prolife messages that violated a federal statute prohibiting threats against abortion providers.[95] The court was called upon to determine whether certain messages constituted threats appropriately excluded from First Amendment coverage. Defendants issued three messages: First, "the Deadly Dozen 'GUILTY' poster which identifies [two plaintiffs who are doctors] among ten others";[96] second, a "GUILTY" poster featuring the name, addresses, and photograph of another reproductive services provider;[97] and third, the "Nuremburg Files" website, which included a compilation of doctors that provide abortion services.[98] The court described the Nuremburg Files website in the following manner:

> Approximately 200 people are listed under the label "ABORTIONISTS: the shooters," and 200 more are listed under Files for judges, politicians, law enforcement, spouses, and abortion rights supporters. [Three plaintiff doctors] are listed in the "abortionists" section, which bears the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)." The names of [recently murdered abortion doctors] are struck through.[99]

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92. *Id.* at 420. Whether Turner's right to criticize the judges deserved First Amendment protection would still be subject to the *Brandenburg* imminence test. *See* Brandenburg v. Ohio, 395 U.S. 444, 444–47 (1969) (per curiam).

93. *See Turner*, 720 F.3d at 434 (Pooler, J., dissenting).

94. *Id.* at 421.

95. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1064 (9th Cir. 2002) (en banc).

96. *Id.* at 1062.

97. *Id.*

98. *Id.* at 1065.

99. *Id.*

The court concluded that these messages constituted unprotected true threats.[100]

As in *Turner*, the majority failed to recognize the hybrid nature of the posters and Nuremburg Files website. The court correctly concluded that the targeted abortion doctors could reasonably consider the posters and website threatening.[101] Similar posters used previously by prolife activists also named specific abortion doctors, and after the dissemination of these past posters the doctors targeted on the posters were murdered.[102] It was conceivable that the posters persuaded individuals to carry out those murders. At the very least, due to these past murders, "the poster format itself had acquired currency as a death threat for abortion providers."[103] The majority asserted that the prolife activists should have recognized that producing posters depicting specific doctors would intimidate those doctors, causing them to fear that they may be future targets of violence.[104]

The majority also failed to recognize that the posters and website simultaneously constituted expressive, persuasive speech. To be sure, the court considered the possibility that the posters were a form of protected expression.[105] But the court reasoned that the intimidating nature of the posters went "well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too."[106] Thus, the posters exceeded the bounds of permissible, persuasive advocacy and instead constituted constitutionally proscribable threats. In reaching such a conclusion, the majority seemed to assume that it had to make an either-or choice: the messages were either persuasive advocacy or a true threat.

Like the Second Circuit in *Turner*, the Ninth Circuit incorrectly assumed expressive mutual exclusivity by concluding that the messaging could not simultaneously be characterized as both a true threat and unlawful advocacy. The posters, even if a form of intimidation, also carried political messages

100. To the extent that the posters and Nuremburg Files website constitute threats, they appear to be *third-party* threats. The American Coalition of Life Activists who produced these messages may have intended simultaneously to attempt to persuade sympathizers to murder these doctors and to intimidate the targeted doctors. The Ninth Circuit majority ignored the third-party element of the threat. Instead, the Ninth Circuit majority treated the messages as if they were *first-party* threats. *See id.* at 1085 ("Physicians could well believe that ACLA would make good on the threat."). The court failed to acknowledge that the targeted doctors may fear that the posters may inspire prolife sympathizers who are not members of the ACLA to murder the doctors, as happened with previous posters of this nature. *See id.* at 1079–80.

101. The majority reached this conclusion despite the fact that it was "literally true" that "the posters contain[ed] no language that is a threat." *Id.* at 1072. Instead of relying on the literal language of the messages, the Ninth Circuit examined the context and medium used to communicate the message to find the posters to be true threats. *See id.* at 1078 ("Indeed, context is critical in a true threats case and history can give meaning to the medium.").

102. *Id.* at 1079–80.

103. *Id.* at 1079.

104. *Id.* at 1085–86 ("[N]o one putting [the plaintiff doctors] on a 'wanted'-type poster, or participating in selecting these particular abortion providers for such a poster or publishing it, could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed.").

105. *Id.* at 1079.

106. *See id.* at 1079–80.

designed to persuade willing listeners. The intimidating features of the posters and the Nuremburg Files website were inseparable from the political context in which these messages were deployed: fervent prolife advocacy. Judge Alex Kozinski, in dissent, found that the "defendants' speech, on its face, is political speech on an issue that is at the cutting edge of moral and political debate in our society."[107] To him, the posters "were unquestionably of a political nature" and featured publicly available information "in a format designed to convey a political viewpoint and to achieve political goals."[108] The majority, however, by establishing at the outset of its analysis an either-or choice between viewing the speech as protected unlawful advocacy or as an unprotected true threat, ultimately rejected the speech as protected expression.

The majority should have instead recognized that the posters were expressive statements that were "designed *both* to rally political support for the views espoused by defendants, *and* to intimidate plaintiffs and others like them into desisting abortion-related activities."[109] The posters were a hybrid of both political speech (vehement opposition to abortion) and third-party threat (thinly veiled death threats designed to intimidate doctors into not performing abortions). As such, the messages exemplify the hybrid nature of terrorizing advocacy.

III. RESHAPING FIRST AMENDMENT DOCTRINE TO DEAL WITH TERRORIZING ADVOCACY

We propose reshaping First Amendment doctrine to account for the hybrid nature of terrorizing advocacy. Essentially, our proposed model mirrors the recognition by terrorist organizations that persuasive advocacy can simultaneously perform a coercive function. Coercive speech-acts do not receive First Amendment protection because they definitionally and normatively fall outside the purview of the First Amendment. First-party threats are not protected speech because they do not attempt to persuade or inform a willing listener. Instead, threats aim to coerce an unwilling listener, either by instilling fear or forcing him to take a certain action. Such threats are anathema to the democratic values the First Amendment is designed to promote. But as previously noted, the complication in the context of terrorizing advocacy is that the threat is couched in expressive words designed to persuade willing listeners to act. The government has a legitimate interest in constitutionally regulating speech-acts as a regulation of conduct, even when such a regulation incidentally restricts free expression. But, to avoid impermissibly burdening free expression, the proper First Amendment response must be narrowly tailored. Thus, the definition of what can be characterized as terrorizing advocacy should be narrow.

Because terrorizing advocacy is a hybrid of expression and conduct, it seems to follow logically that terrorizing advocacy should be tested under the

107. *Id.* at 1097 (Kozinski, J., dissenting).
108. *Id.* at 1092.
109. *Id.* at 1093 (emphasis added).

intermediate scrutiny test the Supreme Court established for mixed expression and conduct in *United States v. O'Brien*.[110] But the Court has failed to invalidate any infringements of speech under this intermediate scrutiny standard. Thus, we propose an alternative model which gives more attention to the protective value of the pure speech element. We can, however, glean insight from *O'Brien* into why prohibiting terrorizing advocacy is permissible, even where such an exclusion incidentally restricts protected expression.

O'Brien supports the idea that when confronted with a situation of harmful conduct inextricably intertwined with expressive speech, the government may permissibly regulate or prohibit the conduct element. For the most part, such a regulation is permissible even if it has the effect of incidentally restricting otherwise protected expression.[111] Specifically, the Court in *O'Brien* held that a statute criminalizing the burning of a draft card did not violate the First Amendment, even though such a statute had the incidental effect of limiting O'Brien's freedom of expression.[112] Preventing the disruption to the selective service system caused by burning a draft card was held to justify the incidental restriction on the ability of people to express themselves through such acts.[113]

Although this Article's approach, like *O'Brien*'s, begins with recognition of the expression's hybrid nature, this Article does not endorse an approach that allows government to restrict all advocacy simply because an expression may also include a coercive, nonexpressive element. Instead, the proposed approach protects advocacy that contains an element of a nonexpressive, coercive speech-act but only if the speech involved satisfies certain strict criteria.

Determining when terrorizing advocacy is properly excluded from First Amendment protection must be done with care. An unduly vague definition of unprotected terrorizing advocacy risks creating a situation where government may adopt a broad definition that is underprotective of the expressive value inherent in the expression. To that end, we refuse to define terrorizing advocacy based upon the identity of the speaker; whether the government defines the speaker as a "terrorist" or "terrorist organization" should not affect whether the speech in question is characterized as unprotected threat or protected persuasion. Such an approach could chill individuals from advocating for unlawful conduct out of fear that the government may characterize their speech as a threat. And this chilling effect undermines the free exchange of ideas upon which democratic deliberation depends.

The following set of five criteria aims to both clarify and narrowly define what constitutes unprotected terrorizing advocacy. Each factor is intended to

110. 391 U.S. 367 (1968).

111. *Id.* at 376 ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

112. *Id.*

113. *Id.* at 382.

serve as a necessary condition for justifying suppression of terrorizing advocacy.

A. Intentional Communication to Intended Victim

Suppression of terrorizing advocacy requires that the speaker intentionally communicate a third-party threat to an intended victim of the advocacy. This means that the speaker must communicate the third-party threat in such a way or through such a medium that, even though the speech is not actually directed at the victim, the speaker reasonably expects the unwilling listener—that is, the target—to be made aware that the advocacy of harm has been expressed. This factor is essential because excluding terrorizing advocacy from First Amendment protection is justified largely on the ground that it has been designed to instill fear in the target. If the target is not made aware of the speech, then the speech cannot intimidate the target. If the advocacy does not induce fear, then that advocacy does not share the pathologies of a true threat. And there is no longer a principled basis for categorically excluding that speech from First Amendment coverage. Thus, where the speaker could not reasonably be expected to know that an intended victim was likely to hear or read the speaker's advocacy of violence against him, the speaker cannot be deemed to have intended to threaten the victim.

Determining whether the speaker intentionally communicated what amounts to a third-party threat to the intended victim should be based on an objective evaluation of the speaker's reasonable beliefs. If the speaker were to communicate a terrorizing message through a publicly accessible medium, then it is reasonable for a court to infer that the speaker intended that the target be made aware of the message. Indeed, by definition, third-party threats are designed to persuade willing listeners to act *and* simultaneously to induce fear in targets. Courts could reasonably assume that a speaker's decision to choose certain public channels to communicate terrorizing advocacy was designed to reach the intended victims as well as willing listeners.

Courts should treat messaging conveyed through public channels such as online or print media, radio or television broadcasts, public websites, internet forums, or publicly accessible social media channels as intended to communicate a threat to a target. Terrorist organizations' public circulation of terrorizing advocacy through online magazines, Turner's public blog post, and the American Coalition of Life Activists' public display of posters during prolife rallies and creation of a publicly accessible website all exemplify speaker choices that satisfy this intentionality requirement. A court evaluating any of these situations could reasonably infer that the speaker chose a publicly accessible medium, intending that the target would perceive the message. But if a speaker were to post a message on a private social media page or to verbalize a threat during a private gathering, then a court should not automatically conclude that the speaker intended to communicate a threat to the target.

One could raise the counterargument that this requirement of intentional communication creates an illogical loophole where privately issued threats

receive full First Amendment protection, yet publicly issued threats receive no protection. At first glance, this would seem to run counter to First Amendment doctrine's commitment to promoting robust, wide-open, public expression. Yet, as explained previously, terrorizing advocacy is not the pure expressive speech that the First Amendment aims to protect. Instead, terrorizing advocacy also includes a coercive speech-act that is anathema to core democratic values underlying the First Amendment. The public performance of such a coercive speech-act will generally be essential to inducing fear in the target. Additionally, privately issued exhortations to commit violence against specific persons do not receive absolute First Amendment protection. Private speech of that sort is—and should continue to be—subject to the existing *Brandenburg* doctrine that governs advocacy of unlawful conduct.[114]

B. Unambiguous Communication of Unlawful Advocacy

The speaker must unambiguously advocate criminal behavior in order for a communication to be characterized as unprotected terrorizing advocacy. This requirement draws on an approach advocated by Judge Learned Hand many years ago in his famed district court decision in *Masses Pub. Co. v. Patten*.[115] There, Judge Hand concluded that the First Amendment does not protect the "direct" advocacy of criminal behavior but does protect such advocacy when it is implied or indirect.[116] "Direct" advocacy of criminal behavior requires the speaker in no uncertain terms to have advocated the commission of an unlawful act.[117] In other words, the advocacy of unlawful conduct must be apparent from the four corners of the language used by the speaker.

Judge Hand's approach as the sole measure of protection for unlawful advocacy for which it was intended suffers from numerous serious flaws.[118] But in the limited context of separating protected from unprotected terrorizing advocacy, the approach has much to recommend it. In the context of pure unlawful advocacy, it is questionable whether such a sharp distinction should be drawn between explicit and implied unlawful advocacy. But in the case of terrorizing advocacy, where under *Brandenburg*'s imminence test the expressive element of such advocacy deserves full constitutional protection, the scope of a speaker's right is more limited.

In order to justify punishment of otherwise fully protected advocacy, government should be required to establish the unambiguous threat of unlawful harm to a third party on the face of the speaker's statement. This requirement is designed to make clear to the speaker, listener, and reviewing

114. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

115. 244 F. 535 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

116. *Id.* at 540 ("If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation."); *id.* at 540–41 (finding that the plain meaning of the language in question did not advocate criminal activity).

117. *Patten*, 244 F. at 540–41.

118. *See* Redish, *supra* note 28, at 1187–89.

courts that speech must clearly threaten a specific target to be considered unprotected terrorizing advocacy. This requirement clarifies for speakers what sort of speech lacks First Amendment protection, thereby avoiding situations where speakers may be chilled from engaging in lawful speech out of fear that their words may be found to be a threat by a court or listener who misunderstands or misinterprets the speaker's words. This requirement also aims to prevent sensitive listeners, who may perceive harsh language as threatening, from being allowed to censor too broad a range of speech.

A requirement that the threat be apparent from the four corners of the speech is vulnerable to the counterargument that it ignores veiled or indirect threats. This is a valid concern. A speaker may use nonthreatening language to communicate a message, but, based on tone, word choice, or context, the speaker may communicate that message in a threatening fashion.[119] Our approach to terrorizing advocacy would not prohibit speakers from intimidating targets through veiled threats. We recognize that these veiled threats may have the same coercive effect on the listener as a direct threat. On balance, however, extending the prohibition to encompass veiled threats is undesirable. Including veiled threats in the purview of prohibited terrorizing advocacy casts too wide a net; innocuous speech may easily be misinterpreted as a veiled threat by a listener or a court. Categorically excluding veiled third-party threats from First Amendment protection and inviting searching judicial inquiry into the speakers' intended meaning of her words may have too damaging an impact on expressive speech. At the same time, speakers would not have carte blanche to issue veiled threats. Courts could address those veiled threats under the existing *Brandenburg* doctrine to determine whether the veiled threat should receive First Amendment protection.[120] Also, veiled first-party threats, whether direct or indirect, should still be deemed beyond the scope of First Amendment protection.

C. Genuine Threat

After finding that a speaker has intentionally and unambiguously communicated a threat, the next issue is whether the threat should reasonably be perceived by the victim as concrete and genuine. Whether the speech in question represents a concrete threat should be measured by an inquiry into the reasonable belief of the intended victim. That is, the listener must possess a reasonable fear that the speaker's words will persuade a willing listener to carry out the threat. This inquiry is essential to ensuring that only genuine threats are excluded from protection. Absent this limitation, courts might subsume within the category of unprotected threats those statements that are merely expressions of abstract advocacy or hyperbole.[121]

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119. This concern has been referred to as the Marc Antony funeral oration problem: Marc Antony, during his funeral oration in Shakespeare's *Julius Caesar*, "praised" Brutus in such a way that he actually roused listeners to harm Brutus. *See* Martin H. Redish, *supra* note 31, at 75.

120. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

121. Theoretically, the situation could arise where it may be objectively reasonable for a listener to fear the speaker's threat, yet there may be evidence that the listener subjectively did

Determining whether a listener should reasonably fear a third-party threat is a difficult process. This evaluation can be informed by the context in which the words are spoken both in terms of the identity of the speaker and the surrounding circumstances.[122] The identity of the speaker matters insofar as there may be a history of a speaker's advocacy causing—or at least contributing to—subsequent physical harm. On the one hand, for example, a threat issued by a terrorist leader with a history of followers who commit violence based on his commands would more reasonably inspire fear in someone targeted by the leader's threat. On the other hand, a threat issued by an anonymous internet commentator absent proof that his words have persuaded anyone to commit violence would be less likely to inspire fear in a reasonable listener.

The surrounding circumstances also matter. Evaluating context can help prevent hyperbolic or satirical statements from being deemed genuine threats. For example, a threat issued by a comedian during a stand-up routine should not inspire fear in a reasonable listener. By contrast, a threat issued by a Ku Klux Klansman during a public rally in support of white nationalism likely would inspire fear in a reasonable listener.

Additionally, threats too abstract to induce fear in a reasonable listener should not be excluded from First Amendment coverage. Measuring abstractness of a threat is difficult task. But it should be clear that the broader the threat is (for example, "Death to America!"), the more abstract—and therefore the more diluted—the threat is. It is therefore unreasonable for any individual to fear being subjected to physical violence. In that regard, the more specific the threat (for example, "America should be destroyed through a series of bomb attacks directed at government facilities!"), the more reasonable the listener's fear.

There is, admittedly, a seeming inconsistency between this argument's eagerness to avoid contextual analysis in determining whether a threat has been made on the one hand and its willingness to incorporate such analysis in determining the reasonableness of the victim's fear on the other. The inconsistency exists simply because, where feasible, the argument attempts to favor a noncontextual approach to a contextual one. However, in the case of the reasonableness of the victim's fear, it is not feasible to divorce the inquiry into the reasonableness of the fear in an individual case from an inquiry into the specific circumstances surrounding the threat.

D. Threat to Kill or Seriously Injure

For terrorizing advocacy to be characterized as an unprotected true threat, the speaker must advocate that a willing listener kill or seriously injure a

not fear the threat. In that case, the defendant would be responsible for producing specific affirmative evidence to show that the listener did not fear the speech. Such evidence would demonstrate that the threat from the speaker was not genuine and therefore that the speech did not constitute terrorizing advocacy.

122. For a detailed discussion of the important role that context plays in cases involving threats, see generally Karst, *supra* note 65.

target. This is an intentionally high bar. Such a stringent requirement stems from the need to accommodate competing considerations. The first consideration is the need to protect the First Amendment right of individuals to engage in persuasive speech, even if that speech advocates unlawful behavior. Free speech is too central to the functioning of a liberal democracy to deny protection to speech that fails to rise to the level of threatening violence. The public sphere would atrophy if such widespread censorship were constitutionally permitted.

The Court has recognized the need to allow individuals to express themselves in ways that may be distasteful to others.[123] Indeed, it is presumably for just such reasons that unlawful advocacy is protected in the first place. Speech of this type is still a form of persuasive expression; a speaker is attempting to convince a willing listener to adopt a certain belief or take a certain action. The importance of preserving robust protection for individual free speech rights leads us to conclude that only a coercive speech-act that induces substantial fear of physical violence in the intended victim justifies exclusion of third-party threats from First Amendment protection.

Within the boundaries described, terrorizing advocacy loses its First Amendment protection because of the coercive harm the threat element causes to an unwilling listener. The harm to the individual upon hearing the speech must be sufficiently substantial to justify restricting the free speech rights of a speaker engaging in persuasive expression. Threats to cause serious bodily harm induce existential fear in the targeted individual.[124] Threats of violence are appropriately deemed categorically different from a threat, for example, to defame someone. Threats to kill or seriously injure a target are of such a seriously coercive nature that including them under the purview of First Amendment protection cannot be justified, even when coupled with otherwise protected expressive advocacy.

E. Specific Person or Group

The final requirement imposed by our model is that the third-party threat must be directed toward a specific person or group. The more general the threat, the less likely it is to reasonably induce fear in any single target. Advocacy that threatens "infidels," "America," or "the West" is less likely to reasonably induce fear in any single target than advocacy of violence against a particular person, race, religion, ethnic group, or community. Requiring the threat to be confined to a specific person or group assures that the advocacy actually terrorizes. If a threat is general, it is less plausible that someone will actually be intimidated.

By way of illustration, the threatening messaging in *American Coalition of Life Activists* targeted both specific individuals (the named doctors) and a specific group (doctors who perform abortions). This group of doctors—and, in particular, the named doctors—would no doubt reasonably feel intimidated

123. *See, e.g.*, Cohen v. California, 403 U.S. 15, 24–25 (1971).

124. For additional discussion regarding the harms caused by a threat to kill or seriously injure someone, see Karst, *supra* note 65, at 1340–45.

by the activists' messaging. Similarly, the named judges in *Turner* make up a group of specific individuals to whom death threats were addressed.

Establishing a bright-line rule for the requisite specificity is difficult. If the terrorizing advocacy in the previously mentioned cases had been directed toward broader audiences, such as "all doctors" or "all judges," then it might be less reasonable for those within the targeted group to feel threatened. Yet under certain circumstances, it is at least arguable that threats against a broad audience may still reasonably induce fear in targets. Thus, one possible way to accommodate competing interests is for courts, based on past experience, to inquire into the likelihood of the speech persuading individuals to commit violence against the specified groups. In other words, courts should determine whether a speaker's generally framed threats have previously persuaded willing listeners to attack members of those general groups. The more evidence of past criminal conduct as the result of prior terrorizing advocacy, the broader the group that can reasonably fear violence as the result of similar future advocacy.

CONCLUSION

To the best of our knowledge, this is the first detailed account of the phenomenon of the hybrid category of terrorizing advocacy and the first attempt to shape First Amendment doctrine accordingly. The intended contribution of this Article is twofold. Initially, it urges recognition of the fallacy of mutual exclusivity between unprotected true threats and protected unlawful advocacy. Secondly, it proposes a doctrinal model to determine under what circumstances the expressive element in these hybrid situations is to receive First Amendment protection.

Others will likely criticize this approach either for being underprotective or for being overprotective of free speech. On the one hand, one could plausibly suggest that, by turning the focus away from advocacy toward the threat element, the doctrine risks undermining the free flow of public discourse. On the other hand, the doctrine could just as easily be criticized for its willingness to protect what arguably amounts to indirect coercive threats. In certain senses, both positions present valid criticisms. But as is often the case when one seeks to resolve sharply competing yet important interests, the likelihood of such contrasting critiques perhaps suggests the worthiness of this effort at developing an alternative compromise position.

We of course invite criticisms of the proposed model. This Article identifies a strand of traditionally unlawful advocacy that shares the pathologies of a true threat. This sort of unlawful advocacy is simultaneously expressive and coercive. The present proposal to recognize the existence of a hybrid category and to restructure First Amendment doctrine accordingly is designed to impose only a limited burden on expressive speech that fosters First Amendment values while simultaneously excluding most coercive speech-acts that undermine the values underlying the First Amendment.