INCITEMENT IN THE ERA OF TRUMP AND CHARLOTTESVILLE

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ABSTRACT

In the wake of several violent rallies in 2016 and 2017, debate over incitement cases has begun to appear in the news and the courts. Incitement is a historic exception to the First Amendment that has been rarely used except in times of political unrest. Unsurprisingly, then, as political unrest has re-emerged in the wake of Donald Trump's presidential campaign, incitement has become relevant once again. The organizers and attendees of these modern political rallies make ample use of technology, including ubiquitous media reporting and the ease and anonymity of social media, and therefore present an odd fit for the more traditional incitement definition stated in *Brandenburg v. Ohio*. In particular, this article argues that the 2016 Trump rally in Louisville and the Unite the Right rally in Charlottesville show how incitement should evolve to include more context, and how that context will become essential to properly decide incitement cases going forward.

I. INTRODUCTION

The June 29, 2018 shooting at a newspaper in Annapolis, Maryland made headlines not only for the tragic loss of five lives,[1] but because it came only a few days after both Donald Trump and Milo Yiannopoulos forcefully criticized journalists. Less than three days before the shooting, Trump pointed to a journalist at a rally in South Carolina and called him an "enemy of the people."[2] That same day, the news website the Daily Beast

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[1] Emanuella Grinberg & Dakin Andone, *What We Know About the Annapolis Newspaper Shooting*, CNN (June 29, 2018, 9:32 PM), https://www.cnn.com/2018/06/28/us/what-we-know-annapolis-shooting/index.html [https://perma.cc/3P49-D9ET].

[2] Chris Baynes, *Maryland Shooting: Trump Ducks Questions over Capital Gazette Killings, as President's Attacks on Journalists Come into Focus*, THE INDEPENDENT (June 29, 2018, 10:28 AM), https://www.independent.co.uk/news/world/americas/us-politics/maryland-shooting-trump-reaction-video-questions-capital-gazette-fake-news-journalistskilled-a8422451.html [https://perma.cc/XXF3-MHAF] (Trump was also criticized for refusing to talk to journalists about the shooting and for initially refusing to fly the White House flag at half-mast). *See also* Scott Neuman & Colin Dwyer, *After Delay, Trump Orders Flags At*

(*continued*)

published comments by Yiannopoulos stating, "I can't wait for the vigilante squads to start gunning journalists down on sight."[3] Trump and Yiannopoulos' remarks, and the violence that quickly followed, led some journalists to accuse them of being responsible for the deaths of four journalists and a newspaper staff member.[4] After the Annapolis shooting, Yiannopoulos stated that his comment was just him "trolling" the journalists he wrote to.[5] In contrast, Trump has not toned down his rhetoric since the Annapolis shooting but still publicly rails against "fake news"[6] and still calls the media the "enemy of the people."[7]

Did Trump and Yiannopoulis cause the violence in Annapolis? It's hard to say, particularly because the shooter had filed a defamation lawsuit against the paper and he had also sent letters to employees at the paper, which indicates that the shooting was the result of a personal grudge.[8] But the anti-media rhetoric propounded by Trump, Yiannopoulis, and others

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Half-Staff For Annapolis Attack, NPR (July 3, 2018, 4:44 AM), https://www.npr.org/2018/07/03/625536732/white-house-wont-order-flags-at-half-staff-to-honor-annapolis-newspaper-staff?utm_source=facebook.com&utm_medium=social&utm_campaign=politics&utm_term=nprnews&utm_content=20180703 [https://perma.cc/LZ5J-AJ 4U]; Justin Doom & Meghan Keneally, *Trump orders flags to half-staff for newsroom shooting after White House initially rejected Annapolis mayor's request*, ABC NEWS (July 3, 2018, 10:17 AM), https://abcnews.go.com/US/trump-rejects-request-annapolis-mayor-lower-flagsslain/story?id=56332864 [https://perma.cc/RN3C-78RU].

[3] Davis Richardson, *Milo Yiannopoulos Encourages Vigilantes to Start "Gunning Journalists Down*," OBSERVER (June 26, 2018, 12:32 PM), http://observer.com/2018/06/milo-yiannopoulos-encourages-vigilantes-start-gunning-journalists-down/ [https://perma.cc/69CE-7LBL].

[4] Baynes, *supra* note 2; Max Greenwood, *Milo Yiannopoulos: My Call for Shooting Journalists was Just a "troll"*, THE HILL (June 28, 2018, 5:04 PM), http://thehill.com/homenews/media/394715-milo-yiannopoulos-my-call-for-shooting-journalists-was-just-a-troll [https://perma.cc/7AQD-SEGY].

[5] Greenwood, *supra* note 4.

[6] Chris Cillizza, *The 11 Most Dangerous Things Donald Trump Said in his Montana Speech*, CNN (July 6, 2018, 5:07 PM), https://www.cnn.com/2018/07/06/politics/donald-trump-montana-speech/index.html [https://perma.cc/Y8FR-VGZ4].

[7] Alexandra Silets, *Trump Amps Up Assault on Media, the "Enemy of the People"*, CHI. TONIGHT (Aug. 6, 2018, 6:01 PM), https://news.wttw.com/2018/08/06/trump-amps-assault-media-enemy-people [https://perma.cc/VFW8-KNXR]. On August 16, 2018, 350 newspapers published editorials criticizing Trump's rhetoric against the media. *See* Madison Park et al., *These are the newspapers telling Trump that journalists are not the enemy*, CNN (Aug. 16, 2018, 1:38 PM), https://www.cnn.com/2018/08/16/politics/newspaper-editorials-trump-list/index.html [https://perma.cc/DM7Q-QHMA].

[8] Matt Stevens & Daniel Victor, *Annapolis Shooting Suspect Wanted to "Kill Every Person" in Newsroom, Letter States*, N.Y. TIMES (July 2, 2018), https://www.nytimes.com/2018/07/02/us/annapolis-shooting-woman-harassed.html [https://perma.cc/6ENE-5QVD].

(such as Fox News personality Sean Hannity)[9], which has caused the public to increasingly distrust the media,[10] may have made the shooter more likely to carry out his acts. The question is whether these potential instigators can be held legally responsible, or are their words protected under the First Amendment?

It would be possible to hold these speakers legally responsible notwithstanding any First Amendment protection they may claim if their speech constitutes incitement. Incitement is an exception to First Amendment speech protections that applies, essentially, when a speaker causes others to engage in violence or illegal acts.[11] Incitement has been historically prominent but has mostly languished in the courts since the 1960s and 1970s.[12] All that is changing, however, with the current political climate. From presidential campaign stops that erupt in violence[13] to alt-right rallies that are meticulously planned to violently engage with antifascist groups,[14] incitement has repeatedly been in the news and the courtrooms. Moreover, these violent rallies are continuing,[15] which means that this issue is likely to continue to come up, making a clearer and context-driver definition of incitement essential.

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[9] *Hannity: The Fake News Media Have a New Target*, FOX NEWS (Apr. 17, 2018), http://www.foxnews.com/transcript/2018/04/17/hannity-fake-news-media-have-new-target.html [https://perma.cc/T5LL-R6UH].

[10] Jonathan Easley, *Poll: Majority Says Mainstream Media Publishes Fake News*, THE HILL (May 24, 2017, 10:10 AM), http://thehill.com/homenews/campaign/334897-poll-majority-says-mainstream-media-publishes-fake-news [https://perma.cc/6R3P-29SA].

[11] Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 150 (2011).

[12] Mark Strasser, *Incitement, Threats, and Constitutional Guarantees: First Amendment Protections Pre- and Post-Elonis*, 14 U. N.H. L. REV. 163, 164–71 (2015).

[13] Eliott C. McLaughlin, *It's Plausible Trump Incited Violence, Federal Judge Rules in OK'ing Lawsuit*, CNN (Apr. 3, 2017, 11:50 AM), https://www.cnn.com/2017/04/02/politics/donald-trump-lawsuit-incite-violence-kentucky-rally/index.html [https://perma.cc/GH7R-862Z].

[14] Kevin Roose, *This Was the Alt-Right's Favorite Chat App. Then Came Charlottesville*, N.Y. TIMES (Aug. 15, 2017), https://www.nytimes.com/2017/08/15/technology/discord-chat-app-alt-right.html [https://perma.cc/Q8LB-NWY9].

[15] Tom Embury-Dennis, *Trump supporters filmed hurling sustained abuse at journalists following Make America Great Again rally*, THE INDEPENDENT (Aug. 1, 2018, 10:30 AM), https://www.independent.co.uk/news/world/americas/trump-florida-rally-supporters-cnn-jim-acosta-tampa-maga-a8472436.html [https://perma.cc/7QN2-G8FJ]; Jane Coaston, *One year after Charlottesville, the alt-right is gathering again—in Washington*, VOX (Aug. 9, 2018, 2:14 PM), https://www.vox.com/2018/8/6/17644776/unite-the-right-2-explained [https://perma.cc/NMS3-N3M3].

Recent scholarly articles have analyzed incitement doctrine in the realm of online hate speech[16] or support for terrorism[17] but none have truly conceptually engaged with incitement, which is relevant today than it has been in decades. This article examines the evolution of the incitement doctrine, places it within is historical context and shows that, like the anti-war protests of the 1910s and 1960s, and the civil rights protests (both for and against) of the 1960s, the current political culture has changed public discourse so that incitement has, once again, become a viable basis to reject many speakers' claims that their incendiary speech is protected under the First Amendment.

Part I of this article takes a fresh look at incitement using the recent court cases brought against Donald Trump and the various organizers of the Charlottesville rally, both of which allege incitement. Part II examines the history of incitement and its evolution over time. Part II also analyzes court cases and scholarly articles to provide a working definition of incitement that incorporates the speech's context. Parts III though VI then apply this definition to the Trump rally in Louisville and the Unite the Right rally, both of which resulted in violence towards protestors. Part VII concludes that incitement should evolve to include the context of the speech in question so that, when appropriate, rally organizers will be held accountable for the violent acts of their supporters.

II. BACKGROUND: TRUMP AND CHARLOTTESVILLE

Both Trump and the organizers of the Unite the Right rally are being sued by people who were injured at these rallies.[18] Incitement features prominently in both lawsuits.[19] The Trump lawsuit has been brought by three activists who were injured at Trump's March 1, 2016 Louisville rally and alleges that the activists were punched and shoved by Trump supporters who were acting on Trump's command to "get them outta

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[16] *See, e.g.*, John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006); Laura Leets, *Responses to Internet Hate Sites: Is Speech Too Free in Cyberspace?*, 6 COMM. L. & POLICY 287, 315–16 (2001).

[17] *See, e.g.*, Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651 (2017); Nikolas Abel, *United States v. Mehanna, the First Amendment, and Material Support in the War on Terror*, 54 B.C. L. REV. 711, 711 (2013).

[18] McLaughlin, *supra* note 13; Joe Heim & Ann E. Marimow, *Charlottesville lawsuit seeks restrictions on white nationalist groups*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/local/charlottesville-lawsuit-seeks-restrictions-on-white-nationalist-groups/2017/10/12/4854bbf8-ae03-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.fda24868ffce [https://perma.cc/NC6V-H3Q9].

[19] *Id.*

here."[20] More specifically, Trump has been sued under Kentucky Revised Code section 525.040, which states that "[a] person is guilty of inciting to riot when he incites or urges five (5) or more persons to create or engage in a riot."[21] Trump's lawyers have argued that the case should be dismissed because Trump's speech is protected by the First Amendment.[22] A Kentucky district court judge ruled in favor of the plaintiffs on the incitement issue and an interlocutory appeal of this decision was taken to the Sixth Circuit.[23] The Sixth Circuit ruled in favor of Trump on the incitement issue but the plaintiffs are likely to file for a rehearing en banc and may petition the Supreme Court to hear the case.[24]

The Unite the Right rally began as a protest to the removal of a statue of Confederate General Robert E. Lee from a public park in Charlottesville, Virginia.[25] On August 12, 2017, alt-right and antifa[26] protestors met in a violent confrontation that culminated in the murder of an antifa protestor, Heather Heyer.[27] Heyer was killed when an alt-right

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[20] McLaughlin, *supra* note 13.

[21] KY. REV. STAT. ANN. § 525.040. "Riot" is defined as "a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function." *Id.* § 525.010.

[22] McLaughlin, *supra* note 13.

[23] Jason Riley, *Trump attorneys ask appeals court to dismiss Louisville lawsuit, calling it "political sabotage"*, WDRB.COM (July 24, 2017, 2:50 PM), http://www.wdrb.com/story/35956114/trump-attorneys-ask-appeals-court-to-dismiss-louisville-lawsuit-calling-it-political-sabotage [https://perma.cc/8SGX-NJUQ].

[24] *See* Nwanguma v. Trump, 903 F.3d 604 (6th Cir. 2018); Kevin Koeninger, *Injured Protesters Take on President Trump in Sixth Circuit*, COURTHOUSE NEWS SERV. (June 6, 2018), https://www.courthousenews.com/injured-protesters-take-on-president-trump-in-sixth-circuit/ [https://perma.cc/V5V5-QLSF]. For my thoughts on the Sixth Circuit opinion, *see* JoAnne Sweeny, *Did Trump incite violence at 2016 Louisville campaign Rally? Court says 'no,' I say 'yes'*, LEO WEEKLY (Sep. 26, 2018), https://www.leoweekly.com/leo_author/joanne-sweeny/ [https://perma.cc/NE85-Z2FG].

[25] Sheryl Gay Stolberg & Brian M. Rosenthal, *Man Charged After White Nationalist Rally in Charlottesville Ends in Deadly Violence Video*, N.Y. TIMES (Aug. 12, 2017), https://www.nytimes.com/2017/08/12/us/charlottesville-protest-white-nationalist.html [https://perma.cc/8KD3-7UKJ].

[26] Antifa, is "short for anti-fascist" and it "is the name for loosely affiliated, left-leaning anti-racist groups that monitor and track the activities of local neo-Nazis." *See* Doug Stanglin, *What is antifa and what does the movement want?*, USA TODAY (Aug. 23, 2017, 3:48 PM), https://www.usatoday.com/story/news/2017/08/23/what-antifa-and-what-does-movement-want/593867001/ [https://perma.cc/Z4NJ-NEJM].

[27] Stolberg & Rosenthal, *supra* note 25; Christina Caron, *Heather Heyer, Charlottesville Victim, Is Recalled as a "Strong Woman,"* N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/heather-heyer-charlottesville-victim.html?action=

(*continued*)

supporter deliberately drove into a crowd of protestors.[28] For months prior to the rally, alt-right groups and individuals advertised it and encouraged attendees to bring weapons, armor and other tactical gear.[29] After the rally, these same groups and individuals celebrated the results, including Heyer's murder.[30]

Ten plaintiffs, consisting of "Virginia residents who say they suffered severe physical and emotional injuries" at the Unite the Right rally, filed suit.[31] The plaintiffs brought a lawsuit under Virginia Code § 18.2-408 (conspiracy; incitement, etc., to riot) against a variety of groups and individuals who, they claim, planned the violence in Charlottesville.[32] Section 18.2-408 criminalizes conspiring "with others to cause or produce a riot, or direct[ing], incit[ing], or solicit[ing] other persons who participate in a riot to acts of force or violence."[33] As part of the complaint, the plaintiffs alleged that the various defendants incited the violence in Charlottesville through their meticulous planning of the rally and the violence that occurred there.[34] Almost all of the defendants, some jointly represented, filed motions to dismiss.[35] The complaint was later amended

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click&module=RelatedCoverage&pgtype=Article&region=Footer [https://perma.cc/9BEA-TMAK].

[28] Stolberg & Rosenthal, *supra* note 25.

[29] David Z. Morris, *Leaked Chats Show Charlottesville Marchers Were Planning for Violence*, FORTUNE (Aug. 26, 2017), http://fortune.com/2017/08/26/charlottesville-violence-leaked-chats/ [https://perma.cc/4NQV-A5SJ].

[30] *Id. See also* Matt Novak, *Organizer of Neo-Nazi Rally Tweets That Death of Heather Heyer Was "Payback Time"*, GIZMODO (Aug. 19, 2017, 5:30 AM), https://gizmodo.com/organizer-of-neo-nazi-rally-tweets-that-death-of-heathe-1798041214 [https://perma.cc/9BHS-TVKL].

[31] David Smith, *After Charlottesville: how a slew of lawsuits pin down the far right*, THE GUARDIAN (May 29, 2018, 7:32 AM), https://www.theguardian.com/world/2018/may/29/charlottesville-lawsuits-heather-heyer-richard-spencer-alt-right [https://perma.cc/WVR8-9UNT].

[32] *The Charlottesville Case*, INTEGRITY FIRST FOR AMERICA, https://www.integrityfirstforamerica.org/our-work/case/charlottesville-case [https://perma.cc/8FSM-HRUK]. A similar lawsuit against the city of Charlottesville and its police was recently dismissed. *See Judge dismisses lawsuit over Charlottesville rally, response,* ASSOCIATED PRESS (May 29, 2018, 1:26 PM), https://wtop.com/virginia/2018/05/judge-dismisses-lawsuit-over-charlottesville-rally-response/ [https://perma.cc/76ZM-RH88].

[33] VA. CODE ANN. § 18.2-408 (1950).

[34] First Amended Complaint in Sines v. Kessler, No. 3:17-cv-0072-NKM (W.D. Va. 2018) *at* ¶¶ 4, 6, 21, 25, *available at* https://www.integrityfirstforamerica.org/sites/default/files/First%20Amended%20Complaint%20-%20AS%20FILED.pdf [https://perma.cc/B799-V47Q] (hereinafter "Complaint").

[35] Brett Edkins, *Charlottesville: An Overview of the Legal Case*, INTEGRITY FIRST FOR AMERICA (Apr. 19, 2018), https://www.integrityfirstforamerica.org/newsroom/charlottesville-case-overview-legal-case [https://perma.cc/NK58-83C8].

and new motions to dismiss were filed.[36] Among the claims listed in the multiple motions to dismiss is the argument that the defendants' speech is protected under the First Amendment and the *Brandenburg* incitement standard.[37] The lawsuit is ongoing but on July 9, 2018, the district court denied multiple motions to dismiss the First Amended Complaint and has allowed the lawsuit to proceed.[38]

Neither lawsuit has completed the discovery phase of litigation so no judge has had the opportunity to apply the incitement doctrine to the specific facts of either case. However, it is only a matter of time before courts will have to fully engage with the fact-intensive incitement standard. As alt-right and Trump rallies continue to have disturbingly violent overtones, more cases are likely to follow.[39]

III. DEFINING INCITEMENT

Incitement remains one of the few existing exceptions to First Amendment protection that has been consistently upheld by the Supreme Court.[40] As with other freedom of expression exceptions, it has a complicated history, which has led to a rather murky definition. The historical development of incitement is essential to understanding the incitement doctrine's purpose and intent.

A. History

The evolution of the incitement doctrine is inextricably entwined with the history of the United States and its many political movements.[41] Originally, incitement was to overcome First Amendment protections that were alleged by World War I protestors who were being prosecuted under

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[36] Alex Swoyer, *White supremacist groups cite First Amendment rights in battling against Charlottesville lawsuit*, WASH. TIMES (May 20, 2018), https://www.washingtontimes.com/news/2018/may/20/white-supremacist-groups-cite-first-amendment-righ/ [https://perma.cc/V3QX-MQ7Q]; Sines v. Kessler, 324 F. Supp.3d 765 (W.D. Va. 2018).

[37] *Id.*

[38] Edkins, *supra* note 35.

[39] Embury-Dennis, *supra* note 15. *See also* German Lopez, *Unite the Right 2018 was a pathetic failure*, VOX (Aug. 12, 2018, 7:39 PM), https://www.vox.com/identities/2018/8/12/17681444/unite-the-right-rally-dc-charlottesville-failure [https://perma.cc/D9U5-JY5F].

[40] Lidsky, *supra* note 11, at 152.

[41] As First Amendment scholar Frederick Schauer noted, "the coverage of the First Amendment is best understood as the outcome of a competitive struggle among numerous interests for constitutional attention." Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1788 (2004) (internal footnotes omitted).

the Espionage Act.[42] While the war raged on, the police were willing to arrest any "street corner speaker upon the slightest provocation."[43] During this time, the Supreme Court repeatedly held that those protestors whose speech was intended to disrupt the United States' war efforts were a "clear and present danger" and therefore constituted incitement.[44]

The Supreme Court decisions using the clear and present danger test have been criticized for punishing people for making statements that were not actually violent or dangerous.[45] For example, in *Schenk v. United States*, a man was found to have incited his audience because he had published a leaflet that advocated citizens to "exercise their right to assert opposition to the draft," including advocating electing politicians who opposed the draft.[46] A similarly low threshold for incitement was enforced by the Supreme Court in a case where a speaker at a socialist rally merely praised socialism and predicted that it would become more widespread.[47] During this time, the Supreme Court did not delve into what incitement truly meant and gave protestors scant First Amendment protection. This deferential attitude began to change when Justice Holmes, who originally found incitement quite easily in *Schenck v. United States*,[48] wrote a persuasive dissent in *Abrams v. United States*[49] that began to give the clear and present danger test some teeth and, after World War I was over, the Court shied away from the clear and present danger test altogether.[50]

Today, the seminal case on incitement is the 1969 case *Brandenburg v. Ohio*, in which the Supreme Court held that hateful speech is protected by the First Amendment and incitement, though not protected speech, exists only when the speech calls for immediate unlawful action.[51] *Brandenburg*

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[42] Strasser, *supra* note 12, at 164–71.

[43] John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 431 (2002).

[44] Strasser, *supra* note 12, at 164–71.

[45] *Id.* at 169; Alexander Tsesis, *Inflammatory Speech: Offensive versus Incitement*, 97 MINN. L. REV. 1145, 1159 (2013).

[46] Cronan, *supra* note 43, at 432 (citing Schenck v. United States, 249 U.S. 47 (1919)).

[47] Cronan, *supra* note 43, at 432–33 (citing Debs v. United States, 249 U.S. 211 (1919)).

[48] Schenck v. United States, 249 U.S. 47 (1919).

[49] 250 U.S. 616, 627–28 (1919).

[50] Cronan, *supra* note 43, at 433–34. Holmes's shift may have been the result of lobbying by Judge Learned Hand and other constitutional law scholars. *See* Frederick M. Lawrence, *The Collision of Rights in Violence-Conducive Speech*, 19 CARDOZO L. REV. 1333, 1349–50 (1998).

[51] 395 U.S. 447 (1969) (per curiam).

involved a Ku Klux Klan rally that opposed the Civil Rights Movement.[52] In *Brandenburg*, the Ku Klux Klan rally that was open only to members and a single cameraman and a single journalist, was held to not constitute incitement even though the speaker said, "[w]e're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[53] That speech, the Court held, was not incitement because it constituted general threats that were not directed at the immediate audience because everyone in attendance had been invited to the rally.[54] Accordingly, under *Brandenburg*, even speech that advocates unlawful or violent acts is not incitement; the speech must call for imminent action and be likely to produce that action.[55]

The Supreme Court later expanded on *Brandenburg* in the cases of *Hess* and *Claiborne*, both of which took place as part of major social and political movements—the Civil Rights Movement, and the anti-Vietnam War movement, respectively.[56] In *Hess v. Indiana*, the Court overturned Gregory Hess's disorderly conduct conviction, stating that the words he shouted to a crowd during an antiwar demonstration were not incitement.[57] The parties stipulated that the words Hess shouted were "'We'll take the fucking street later,' or 'We'll take the fucking street again.'"[58] According to the Court, Hess's words were not incitement because his words "[were] not directed to any person or group of persons . . . [so] it cannot be said that he was advocating, in the normal sense, any action."[59] In addition, the Court noted that "there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder,"[60] which meant that the words did not constitute incitement.

The final Supreme Court incitement case is *Claiborne Hardware.* In *N.A.A.C.P. v. Claiborne Hardware Company*, Charles Evers, a boycott organizer for the N.A.A.C.P., threatened boycott violators with "discipline" and stated: "If we catch any of you going in any of them racist

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[52] Brandenburg v. Ohio, 395 U.S. 444, 445–46 (1969).
[53] *Id.* at 446.
[54] Tsesis, *supra* note 45, at 1147.
[55] 395 U.S. 447 (1969) (per curiam).
[56] NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Hess v. Indiana, 414 U.S. 105 (1973).
[57] *Hess*, 414 U.S. at 107–09.
[58] *Id.* at 107.
[59] *Id.* at 108–09.
[60] *Id.* at 109.

stores, we're gonna break your damn neck."[61] The Court noted that acts of violence were reported against boycott violators before Evers made his speech but not after, which meant that Evers' words could not have caused or incited that violence.[62] Along with these causation issues, the Court held that Evers' threats, which were part of an "impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them," were not incitement because they were mere "advocacy" of violence.[63]

Since these cases, the Supreme Court has not directly addressed incitement again. Although lower courts have attempted to apply *Brandenburg* to a variety of situations such as online advocacy of violence and support of terrorism, the result of their efforts has been the creation of an inconsistent and somewhat convoluted (and rarely-used) doctrine. The definition of incitement, therefore, is far from clear and in need of clarification, particularly in light of modern technology.

B. General Definition

Incitement is more than offensive speech that angers an audience.[64] It is also more than speech that is violent or approves of violence. Indeed, *Brandenburg*'s incitement test is "designed to protect political speech and the abstract advocacy of violence or revolution."[65] For that reason, mere "dissident political views" will not constitute incitement.[66] Consequently, due to concerns of unduly restricting speech, incitement is a narrow doctrine and it has rarely been successfully used by prosecutors or plaintiffs seeking a judgment based on a defendant's speech.[67]

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[61] 458 U.S. 886, 902 (1982).

[62] *Id*. at 902–03.

[63] *Id.* at 928.

[64] The Supreme Court has repeatedly held that speech that is merely offensive is protected by the First Amendment. *See* Tsesis, *supra* note 45, at 1149.

[65] S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1168 (2000).

[66] *Id.* at 1196–97. *See also* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 116 (1st ed. 1992) ("Because of the expressive value of public ideological solicitations, protecting them is appropriate unless certain stringent conditions are met that establish their dangerousness.").

[67] Ronald D. Rotunda, *A Brief Comment on Politically Incorrect Speech in the Wake of R.A.V.*, 47 SMU L. REV. 9, 12 (1993).

According to scholars, incitement is not protected by the First Amendment, not only because it threatens public safety[68] but also because it does not contribute to the marketplace of ideas.[69] More specifically, the violence caused by incitement prevents any competing speech from occurring, so there can be no reasoned debate on the topic.[70] In other words, incitement is considered low-value speech, not necessarily because of the words used, but because the cost of the speech is so high.[71] Similarly, according to freedom speech scholar Steven Gey, incitement "is outside the scope of First Amendment protection because it operates more like a physical action than a verbal or symbolic communication of ideas or emotions."[72]

Brandenburg itself defined incitement as "directed to inciting or producing imminent lawless action" and "likely to incite or produce such action."[73] *Hess* expanded on *Brandenburg* to hold that, in order to determine incitement, courts should examine both to whom the words were directed, which will show whether there was advocacy of action, and the words themselves, which will show whether there was any evidence or rational inference that the words were intended to produce immediate action.[74] In addition, according to constitutional scholar R. Kent Greenawalt, the intent of the speaker is relevant because the phrase "directed to" "implies that the purpose of the speaker is to produce that result and, perhaps more, that this purpose is evident in the words he uses."[75]

Unfortunately, *Brandenburg* and its progeny have left a lot of questions for others to answer, such as what "imminent" actually means,

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[68] Tsesis *supra* note 45, at 1147; Malloy & Krotoszynski *supra* note 65, at 1213 ("The proscription is not the product of antipathy toward the speaker's ideological motivations, but rather a prudent preventive measure to protect the public from harm.") (quoting Herceg v. Hustler Magazine, 814 F.2d 1017 (1987)).

[69] Rotunda, *supra* note 67, at 12–13. Professor David Crump has argued that incitement speech that does not have "serious literary, artistic, political, or scientific value" or is not speech "on a matter of public concern" should receive less First Amendment protection. David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 67 (1994).

[70] *See* Heidi Kitrosser, *Containing Unprotected Speech*, 57 FLA. L. REV. 843, 853 (2005); Rotunda, *supra* note 67, at 12.

[71] Malloy & Krotoszynski, *supra* note 65, at 1165.

[72] Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 593 (2000).

[73] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[74] Hess v. Indiana, 414 U.S. 105, 107–09 (1973).

[75] GREENAWALT, *supra* note 66, at 207.

the difference between advocacy and incitement,[76] and whether someone can commit indirect incitement. Considering that the Supreme Court has not re-examined the incitement standard since the 1960's and 70s, lower courts and scholars have grappled alone with *Brandenburg*'s ambiguities for decades.

For example, constitutional law scholar Mark Rohr has articulated a four-part definition of incitement, borrowing from two other scholars: (1) "the advocacy must call for immediate law violation;" (2) "the immediate law violation must be likely to occur" (3) there must be an "express advocacy of law violation;" and (4) there must be "intent to incite or produce such action."[77]

Professor David Crump has suggested an eight-part test for courts to apply in incitement cases:

> (1) the express words or symbols uttered; (2) the pattern of the utterance, including any parts of it that the speaker and the audience could be expected to understand in a sense different from the ordinary; (3) the context, including the medium, the audience, and the surrounding communications; (4) the predictability and anticipated seriousness of unlawful results, and whether they actually occurred; (5) the extent of the speaker's knowledge or reckless disregard of the likelihood of violent results; (6) the availability of alternative means of expressing a similar message, without encouragement of violence; (7) the inclusion of disclaimers; and (8) the existence or nonexistence of serious literary, artistic, political, or scientific value.[78]

As with the Rohr definition, these eight parts can be roughly grouped into factors relating to 1) imminence, 2) call to action (as opposed to mere advocacy), and 3) intent.[79]

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[76] *Id*.

[77] Mark Rohr, *Grand Illusion? The* Brandenburg *Test and Speech That Encourages or Facilitates Criminal Acts,* 38 WILLAMETTE L. REV. 1, 14 (2002) (quoting Bernard Schwartz, *Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 237, 256 (1994) (internal quotation marks and citations omitted)).

[78] Crump, *supra* note 69, at 51 (footnote omitted).

[79] The final factor, whether the speech has "serious literary, artistic, political, or scientific value" or is "on a matter of public concern" is an exception; it fits most easily into the rationale for not protecting incitement at all, which is discussed above. Crump, *supra* note 69, at 67–68.

As shown below, these three parts of the definition of incitement are often inconsistently defined and, because incitement cases are intensely fact-specific, each part of the definition is highly dependent on the context of the speech. Moreover, because incitement has been used sparingly since the 1970s, the traditional *Brandenburg* standard leaves courts ill-equipped to deal with the modern manifestations of the angry riot. The examples of the Trump and Unite the Right rallies are therefore a useful tool to further explore incitement and what it means today in the era of social media and 24-hour news networks that appear to thrive on and amplify conflict.

IV. IMMINENCE

Imminence is a unique and indispensable requirement for incitement. In order to qualify as incitement, the speech must call for violence or illegal acts to happen immediately, not at a later time or upon the satisfaction of a condition.[80] Indeed, the incitement standard "demands that the speech cause an individual to act without rational thought," or "time . . . to digest" any information that would cause them to refrain from violence or illegal activity.[81] This time element also "ensures that the danger is in fact not speculative and that the government's interest in preventing the violence is not pretextual."[82]

Despite the importance of this requirement, courts have not fully defined it. Neither *Hess* nor *Brandenburg* set a time-frame on what makes something imminent, a deficiency lamented by constitutional law scholar Erwin Chemerinsky.[83] Several other scholars have attempted to define imminence. Professors Rohr and Redish have argued that imminence

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[80] A recent example of conditional speech is the Walking Dead fan-created slogan: "If Darryl dies, we riot." *See* Henry Hanks, *'Walking Dead' finale: If Daryl dies, we riot*, CNN (Dec. 1, 2013), https://www.cnn.com/2013/11/29/showbiz/walking-dead-norman-reedus/index.html [https://perma.cc/EC8C-4BWJ].

[81] Malloy & Krotoszynski, *supra* note 65, at 1169.

[82] *Id.* at 1196–97. Similarly, the Supreme Court has been willing to allow an increased sentence for "hate crimes," which essentially increase crime's sentence based on the defendant's concomitant bigoted speech because the assault the defendant committed is not expressive conduct protected by the First Amendment and the speech he uttered was not itself made illegal; it was just a factor a judge could consider at sentencing. *See* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (contrasting the hate crime law with the "fighting words" law in R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992), which did make the words themselves illegal). Accordingly, when words are accompanied by violence, the Supreme Court has permitted states to attach some form of punishment to that speech.

[83] Clay Calvert, *Reconsidering Incitement,* Tinker *and the Heckler's Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. U. L. REV. ONLINE 109, 121 (2018) (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1049 (5th ed. 2015)).

"seems intended to connote closeness in time between the offending speech and the intended responsive action,"[84] but the evidence for this requirement is not conclusive or fully defined by courts. For example, in *Hess*, the Court noted that Hess's "later" comment likely meant that the violence would happen later that day and held that his statements therefore did not advocate for imminent lawlessness, which indicates that even a few hours in the future does not satisfy the imminence requirement.[85] However, the Court did not actually specify a timeframe for imminence; it merely stated that incitement does not exist where there is a call for "illegal action at some indefinite future time."[86]

Likewise, *Claiborne* only noted that the alleged incitement must happen *before* the violence or unlawful acts.[87] Moreover, the decision in *Claiborne* initially used the phrase "within a reasonable period" instead of "imminent," which indicated a temporal dimension for the word.[88] Since *Claiborne*, lower courts have likewise refused to set a time frame for imminence. For example, the Ninth Circuit held that a defendant's advice to aspiring gang members was unlikely to be acted upon imminently because the advice was "interspersed at a barbeque and a social party, while [gang] members were drinking, chatting and listening to music," which indicated to the court that any actions by the gang members were not likely to happen quickly.[89] However, the Court did not set a strict timeframe for when "imminence" must occur. Similarly, in *People v. Rubin*, a California court of appeals defined imminence as "a function of time, [which] refers to an event which threatens to happen momentarily, is about to happen, or is at the point of happening" but also noted that "time is a relative dimension and imminence a relative term, and the imminence of an event is related to its nature."[90]

When looking at the Trump rally in Louisville, imminence seems apparent due to the immediacy of the crowd's response to Trump's words. In fact, Trump's words themselves show that immediate action was called for. His command to "get 'em outta here" contains no conditional

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[84] Rohr, *supra* note 77, at 17 (citing MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 190 (1984)).

[85] *Id.* at 11–12.

[86] Hess v. Indiana, 414 U.S. 105, 108–09 (1973).

[87] NAACP v. Claiborne Hardware Co. et al., 458 U.S. 886, 927 (1982).

[88] Rohr, *supra* note 77, at 13.

[89] McCoy v. Stewart, 282 F.3d 626, 631–32 (9th Cir. 2002).

[90] People v. Rubin, 158 Cal. Rptr. 488, 492 (Cal. App. 2d Dist. 1979).

language or reference to some future time.[91] He did not tell his audience to "get 'em out" if something specific happened, nor did he say to "get 'em out" later or after some future event had taken place.[92] His words called for immediate action, the word "now," though not stated, was certainly implied, particularly because, as video of the rally shows, he did not stop repeating his command until the protestors began to be forced out of the venue.[93] Indeed, the almost immediate reaction of the crowd to Trump's words show the time element of imminence was clearly satisfied. The scene involved the quintessential angry mob envisioned by *Brandenburg* and imminence seems to be easily satisfied using those facts.

On the other hand, imminence is a particularly difficult requirement for the Unite the Right rally. The speech at issue in that case is the repeated instructions and comments made by organizers that both encouraged violence and specifically instructed attendees on how to carry it out.[94] This speech is problematic under an imminence analysis because, as with most internet communications, the words were "heard" long after they were "spoken,"[95] depending on when the reader went online and read the various posts from the Unite the Right organizers. Indeed, there is really no way of knowing when those comments were read and by whom; when and who responded to the organizers' posts cannot possibly capture everyone who read them. Consequently, *Brandenburg*'s sparse definition of incitement is ill-suited to this asynchronous manner of speech.

Brandenburg was decided long before the internet was created and is based on a gathering of people in a physical space.[96] In such spaces, there is a direct interaction of the speaker and the audience; each can see each other's reactions and more easily anticipate when and if violence or illegal acts will occur at that gathering. Websites and social media posts do not fit this model. The audience is not contained in a room; they come and go and the speaker usually cannot see them or know how many people have even heard them.

However, the lag between the message and the audience receiving it is arguably not the real problem with imminence in the context of the Charlottesville rally because incitement is concerned with an audience who

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[91] *Protester pushed at Trump rally*, CNN, https://www.cnn.com/videos/politics/2017/04/02/protester-pushed-trump-rally-louisville-kashiya-nwanguma-sot.wlky [https://perma.cc/5PRA-Q3TS].

[92] *Id.*

[93] *Id.*

[94] *See generally* Roose, *supra* note 14.

[95] Cronan, *supra* note 43, at 428.

[96] Lidsky, *supra* note 11, at 150.

reacts to speech before "good speech" can prevent them from doing so. Someone who reads a message long after it was written but reacts immediately arguably still fulfils even the strict timeframe interpretation of imminence. Case law supports this argument. For example, *Paladin Enterprises* found that *Hit Man*, a book that gave instructions regarding how to commit murder-for-hire without being caught by police, could incite violence even though the book was written long before it was fatefully read by an aspiring hitman.[97] However, the Unite the Right rally organizers' speech was acted upon long after it was read and commented on by readers. There was plenty of time for cooler heads to prevail. Accordingly, in order to find that organizers' speech leading up to the Unite the Right rally meets the definition of imminence, the plaintiffs will have to rely upon a different interpretation of imminence.

Fortunately for the plaintiffs in the Unite the Right case, there is some case law and legal scholarship that indicates that imminence may be determined by factors other than the passage of time. For example, Crump has argued that imminence actually refers to the "predictability of the result" and argued that the likelihood of violence is likely a holdover from the clear and present danger test, which provided Justice Holmes and Brandeis the opportunity to argue for the importance of the immediacy of the illegal acts.[98] Indeed, *Brandenburg* itself requires that speech must be "likely to incite or produce [violent or illegal] action."[99]

While *Brandenburg* appears to treat likelihood of violence as a separate requirement, other courts have applied the likelihood element to the imminence requirement. More specifically, when examining the imminence requirement in *Rubin*, the California Court of Appeals, in addition to the timing of the statement, also specifically considered the "likelihood of producing action" or "the practicality and feasibility of the solicitation [and whether it] was . . . likely to incite or produce violence."[100] According to the court, if threats relate to a political assassination at a demonstration that had already received national attention, imminence is satisfied even if the event is to take place several weeks in the future.[101]

Other legal scholars have looked at similar factors when discussing imminence. Greenawalt has recommended a test using the requirement

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[97] Rice v. Paladin Enterprises, Inc., 128 F.3d 233, 264–65 (4th Cir. 1997).
[98] Crump, *supra* note 69, at 59.
[99] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).
[100] People v. Rubin, 158 Cal. Rptr. 488, 493 (Cal. App. 2d Dist. 1979).
[101] *Id.* at 492–93.

that the unlawful action happen in the "very near future.[102] According to Greenawalt, "'Very near future' is meant to have a modest degree of flexibility, account being taken of the seriousness of the crime, opportunities for intervening speech, and the likelihood that the audience will have opportunity for critical reflection before the crime is to be committed."[103] Looking at these various sources, imminence appears to rely on both timing and likelihood of violence. The context of the speech, such as whether the speech relates to a specific event in the future, can therefore replace the immediacy element historically imposed on incitement's imminence requirement.

The likelihood of a violent response to a speaker's written remarks on the internet will necessarily require inquiry into the context of the speech, particularly whether the speech is likely to be taken seriously or seen as a joke.[104] The internet is a collection of distinct communication models that carry both benefits and risks to would-be inciters. As noted by one scholar, social media platforms have "unique features . . . such as the sense of immediacy they foster, the polarization that they encourage, [and] the disinhibiting effect of anonymity."[105]

For that reason, Professor Lyrissa Barnett Lidsky has advocated a modified imminence standard for internet speech that includes several factors that focus on the foreseeability of the violence, including "the likely make-up of the target audience, whether there was a prior history of violence by members of that audience . . . [and] whether the violence took place with little delay upon receiving the inciting speech."[106] The final factor, the lack of delay between reading the speech and acting upon it, should be further modified to allow for situations where the inciter has included a specific date for action in her instructions. With such instructions, it would be unreasonable to require that the audience disregard the inciter's orders and act sooner. When looking at the likely make-up of the audience, courts will have to be sophisticated in their understanding of the internet and how groups can hide their speech from the public while making it available to like-minded individuals with

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[102] GREENAWALT, *supra* note 66, at 267.

[103] *Id.*

[104] *See* Cronan, *supra* note 43, at 457; *Rubin*, 158 Cal. Rptr. at 493 (noting that the speech was "not made in a jesting or conditional manner, nor was it the outcome of an improvised piece of braggadocio.").

[105] Lidsky, *supra* note 11, at 161.

[106] *Id.* at 162 (Lydsky also includes an inquiry into how detailed the instructions are regarding the violence, which is more closely connected to whether the speech is incitement or just advocacy, is discussed in full in that part of this article).

dangerous intentions. In addition, whether an audience is likely to be violent may also depend on the issue being discussed; some issues are more controversial and more likely to raise passions, particularly among certain groups.[107]

These factors certainly apply to the Unite the Right rally. The organizers reached out to like-minded individuals using various internet websites and social media platforms including the Daily Stormer,[108] Twitter, Facebook, YouTube, Reddit, 4Chan,[109] and affiliated chatrooms and chat apps like Discord.[110] These sites and apps were highly restricted to keep out objectors using a variety of techniques, including proof of the applicant's skin color.[111] The alt-right has been effective in the past in creating alternatives to popular social media platforms so that its followers have a secret place to congregate with like-minded individuals.[112] These alternative platforms are often sought out by alt-right members who were ejected from mainstream social media platforms for violating their terms of service.[113] Alt-right members also made conscious use of the anonymity provided by these platforms, using false names and hiding their identities.[114] With regard to the planning of the Unite the Right rally, these factors created an echo chamber of like-minded individuals that approved of violence, making it nearly impossible for other points of view to be discussed and prevent the violence from occurring. Simply put, there was no way for "good speech" to correct the volumes of "bad speech" that were being discussed in these secretive and exclusive forums and which later caused the violence that occurred at the Unite the Right rally.

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[107] Cronan, *supra* note 43, at 462

[108] Patrick Strickland, *Lawsuits present challenge for neo-Nazi Daily Stormer site*, AL JAZEERA (May 5, 2018), https://www.aljazeera.com/news/2018/05/lawsuits-present-challenge-neo-nazi-daily-stormer-site-180504132619786.html [https://perma.cc/V8AG-Q5BY].

[109] Roose, *supra* note 14.

[110] *Id.*

[111] *Id.*

[112] Matt Reynolds, *The wheels are falling off the alt-right's version of the internet*, WIRED (July 23, 2018), https://www.wired.co.uk/article/alt-right-internet-is-a-ghost-town-gab-voat-wrongthink [https://perma.cc/AH3P-7YGZ].

[113] *Id.*

[114] Roose, *supra* note 14. The District Court in the Charlottesville rally case has recently ruled that Discord must release the identity of one organizer. *See* Camila Domonoske, *Judge: App User Accused In Planning Charlottesville Rally Can't Keep Identity Hidden*, NPR (Aug. 7, 2018, 1:18 PM), https://www.npr.org/2018/08/07/636308294/judge-app-cant-hide-identity-of-woman-accused-in-planning-charlottesville-rally [https://perma.cc/J99G-27RA].

Imminence should also be found because the alt-right is known for its violent protests. In the wake of Trump's campaign and eventual election, anti-Semitic, anti-Islam and violence against people of color has drastically increased and the Traditionalist Worker, Ku Klux Klan, neo-Nazi, alt-right[115] movements have gained traction.[116] The massacre at a Black church in Charleston, and the subsequent call to remove Confederate flags from government buildings, also spurred a backlash from these white supremacist groups.[117] Unite the Right was the first major rally to protest the removal of a Confederate statue but it was just the next step in a growing trend of violent alt-right rallies in support of Trump or to protect the Confederate flag.[118] In 2015 and 2016, several of these rallies ended in violence.[119] For example, a Traditionalist Worker rally in support of presidential candidate Trump ended in several people being stabbed as the alt-right and antifa clashed.[120] The messages written in anticipation of the

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[115] For simplicity, this article will use "alt-right" as a catchall for white supremacist groups that share similar ideals.

[116] Mark Potok, *The Year in Hate and Extremism*, SOUTHERN POVERTY L. CTR. (Feb. 17, 2016), https://www.splcenter.org/fighting-hate/intelligence-report/2016/year-hate-and-extremism [https://perma.cc/8KU5-JHLA].

[117] Christopher Ingraham, *All 173 Confederate flag rallies since the Charleston massacre, mapped*, WASH. POST (Aug. 17, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/08/17/all-173-confederate-flag-rallies-since-the-charleston-massacre-mapped/?utm_term=.92b6b15bb37c [https://perma.cc/J67N-VXDG].

[118] *Id*. *See also* Jacey Fortin, *The Statue at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html [https://perma.cc/Q7S6-2YR4].

[119] *See* Ingraham, *supra* note 117; James Queally, *Ku Klux Klan Rally in Anaheim erupts in violence; 3 are stabbed and 13 arrested*, L.A. TIMES (Feb 29, 2016, 5:28 PM), http://www.latimes.com/local/lanow/la-me-ln-klan-rally-in-anaheim-erupts-in-violence-one-man-stabbed-20160227-story.html [https://perma.cc/2P5H-5R8X].

[120] Stephen Magagnini et al., *At least 10 hurt at chaotic, bloody neo-Nazi Rally at Capitol*, SACRAMENTO BEE (June 28, 2016, 1:52 PM), https://www.sacbee.com/news/local/crime/article86099332.html [https://perma.cc/V48E-Z4HC]. Donald Trump, who was running for president at the time, notably initially refused to condemn the KKK and only weakly remonstrated violent demonstrators after facing political pressure. *See* Camila Domonoske, *Trump Fails to Condemn KKK on Television, Turns to Twitter to Clarify*, NPR (Feb. 28, 2016, 10:31 AM), https://www.npr.org/sections/thetwo-way/2016/02/28/468455028/trump-wont-condemn-kkk-says-he-knows-nothing-about-white-supremacists [https://perma.cc/ST5P-HBDA]; Dan Merica, *Trump says both sides to says both sides to blame amid Charlottesville backlash*, CNN (Aug. 16, 2017, 1:14 AM), https://www.cnn.com/2017/08/15/politics/trump-charlottesville-delay/index.html [https://perma.cc/7HW2-3XXL]; Scott Malone & Jeff Mason, *Trump yields to pressure, calls neopressure, calls neo-Nazis and KKK criminals*, REUTERS (Aug. 14, 2017, 5:11 AM), https://www.reuters.com/article/us-virginia-protests/trump-yields-to-pressure-calls-neo-nazis-and-kkk-criminals-idUSKCN1AU0TW [https://perma.cc/6S5N-ENVK].

Unite the Right rally also provide ample evidence that the organizers' audience was prone to violence.[121]

Finally, the specific dates of the Charlottesville rally created a likelihood that violence would occur on those days.[122] Although many of the organizers' communications to their followers happened months before the rally,[123] the fact that they had organized the rally around a specific date and encouraged violence on that date makes the violence almost certain and, therefore, imminent. Moreover, the organizers kept in touch with their followers during the rally, providing immediate instructions and organizing the rally participants' movements so that some of the organizers' speech was, in fact, taking place immediately before the violence occurred.[124] More specifically, one organizer hosted a live feed that streamed contemporaneously with the rally's events as they transpired that weekend.[125] Consequently, imminence is evident for the Unite the Right rally, both using the timeline and the likelihood interpretation of that requirement.

V. CALL TO ACTION

The next key requirement for incitement is that the speaker must do more than merely advocate for violence or illegal acts. Rohr has argued that incitement implies "some principled, ideological basis for illegal action in contrast to the usual grounds of private gain or revenge."[126] Advocacy, in this way, is contrasted from solicitation which is defined as enticing some to act "for personal benefit or gain."[127] In his eight-part test, Crump has argued that courts should consider whether the speaker's message could be conveyed through other means such as more general statements of approval of violence or unlawfulness instead of a call to violence.[128]

Others have argued that the "speech itself [must] create[] a palpable danger" by convincing the audience to commit an unlawful act or engage

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[121] Complaint, *supra* note 34, at 34 ¶ 97.

[122] *See id.* at 29.

[123] Dahlia Lithwick, *Lawyers vs. White Supremacists*, SLATE (Oct. 12, 2017, 5:49 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/two_new_lawsuits_against_the_organizers_of_charlottesville_s_unite_the_right.html [https://perma.cc/C8Z5-8F6N].

[124] Complaint, *supra* note 34, at 28 ¶ 80.

[125] *See id*. at 10 ¶ 25.

[126] Rohr, *supra* note 77, at 16–17 (quoting GREENAWALT, *supra* note 66, at 207–08).

[127] *Id*. at 27 (citing District of Columbia v. Garcia, 335 A.2d 217, 224 (D.C. App. 1975)).

[128] *See* Crump, *supra* note 69, at 63.

in violence when they would not have done so absent the incitement.[129] In other words, "*Brandenburg* requires explicit action words; incitement cannot be implied."[130] According to Judge Learned Hand in 1917, the persuasive force of the words used is key in determining incitement: "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."[131] Other early cases drew similar distinctions: "advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action" to constitute incitement.[132]

Brandenburg continued the distinction between advocacy and incitement. More specifically, the Supreme Court held that the speech in *Brandenburg* was not actually inciting violence because it used conditional language: "revengance" was "possible" and "might" be needed.[133] Similarly, in *Hess*, the speech was not incitement because it was found to be merely "an emotional exclamation rather than a potentially effective exhortation to action directed specifically at a particular group of persons . . . ."[134]

Subsequent federal appeals court cases have also echoed these sentiments. According to the Eighth Circuit, to qualify for incitement, a statement must go beyond "mere advocacy."[135] The Fourth Circuit has limited incitement to situations where the speech that "prepared" and

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[129] Malloy & Krotoszynski, *supra* note 65, at 1197. "Brandenburg addresses speech activity designed to persuade someone to commit an unlawful act, not speech designed to facilitate the commission of an unlawful act by a person who has already decided to act." *Id.* at 1169.

[130] Cronan, *supra* note 43, at 457 (citing HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 121 (Jamie Kalven ed., 1988)).

[131] Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D. N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

[132] Noto v. United States, 367 U.S. 290, 297 (1961) (quoting Yates v. United States, 354 U.S. 298, 321–22 (1957)). *See also* Dennis v. United States, 341 U.S. 494, 545 (1950) (drawing a "distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."); Yates v. United States, 354 U.S. 298, 321 (1957) (limiting incitement to "indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action for the accomplishment' of forcible overthrow, to violence as 'a rule or principle of action,' and employing 'language of incitement . . . .'"), *overruled by* Burks v. United States, 437 U.S. 1 (1978).

[133] Calvert, *supra* note 83, at 120.

[134] Malloy & Krotoszynski, *supra* note 65, at 1194.

[135] United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978).

"steeled the audience to action" and was not "part and parcel of political and social discourse . . . ."[136]

As stated by the California Court of Appeals in *People v. Rubin*, incitement is distinguished from "abstract advocacy of indeterminate measures" and instead constitutes a "concrete solicitation of specific and determinate acts."[137] The Court found incitement where "there was sufficient likelihood of his solicitation being interpreted as a call to arms, as a preparation and steelment of his group to violent action, as a systematic promotion of future bloodshed in the streets, rather than as a communication of ideas through reasoned public discussion."[138]

For that reason, words that merely encourage or assist someone in committing violence do not constitute incitement; the words need to make "susceptible" people change their behavior.[139] For example, a man's advocacy of future gang violence was deemed to be "very general" and "abstract" because his advice was "not aimed at any particular person or any particular time."[140] Similarly, a group's petitioning that urged civil disobedience,[141] and a demonstrator's harsh criticism of the police[142] were protected by the First Amendment as not sufficiently advocating violence. Both movies[143] and songs[144] that describe or depict violence have also been found to not be incitement because they did not "order or command anyone to any concrete action at any specific time, much less immediately."[145]

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[136] Rice v. Paladin Enters., Enterprises, Inc., 128 F.3d 233, 264–65 (4th Cir. 1997).

[137] People v. Rubin, 96 Cal. App.3d 968, 975 (1979).

> In past years free speech cases have presented two contrasting images—one, the classroom professor lecturing his students on the need to resort to terrorism to overthrow an oppressive government (constitutionally protected speech). . . . [T]he other, the street demonstrator in the town square urging a mob to burn down city hall and lynch the chief of police (unprotected criminal incitement to violence) (internal citations omitted).

Id.

[138] *Id.* at 980 (incitement found where demonstrator held up $500 and offered it as a reward for injuring a member of the American Nazi party, saying the offer was "deadly serious.") *Id.* at 972.

[139] Malloy & Krotoszynski, *supra* note 65, at 1191.

[140] McCoy v. Stewart, 282 F.3d 626, 631–32 (9th Cir. 2002).

[141] White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000).

[142] Resek v. City of Huntington Beach, No. 01-56029, 2002 WL 1418270, at *2 (9th Cir. July 1, 2002).

[143] Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989).

[144] McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 194 (App. 1988) (footnote omitted).

[145] *Id.* at 193.

With regard to a violent movie, the Massachusetts Supreme Court explained: "Although the film is rife with violent scenes, it does not at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers."[146] With regard to song lyrics, the California Court of Appeals described the requisite call to action as limited by the music's unique context:

> [M]usical lyrics and poetry cannot be construed to contain the requisite "call to action" for the elementary reason that they simply are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory. Reasonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are. No rational person would or could believe otherwise nor would they mistake musical lyrics and poetry for literal commands or directives to immediate action. To do so would indulge a fiction which neither common sense nor the First Amendment will permit.[147]

According to these cases, merely approving of illegal or violent acts is insufficient for incitement. The words must include a "call to action." In *People v. Bohmer*, another California Court of Appeals gave a memorable example of the difference between mere approval of unlawful acts and incitement to commit them:

> The man who advocates death for all rapists may do so. However, when he stands before a crowd that holds a like view and also holds a confessed rapist prisoner and he shouts, 'Let's lynch him,' he will not be shielded by the First Amendment if the prisoner is then and there lynched.[148]

Although courts are quire proficient at determining what is not a "call to action," they have been largely silent as to what is. Looking at the case law and legal scholarship, two areas emerge that shed some light on this requirement: detailed instructions and indirect incitement.

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[146] *Yakubowicz*, 536 N.E.2d at 1071.
[147] *McCollum*, 249 Cal. Rptr. at 194 (footnote omitted).
[148] People v. Bohmer, 46 Cal. App.3d 185, 198 (1975).

A. Detailed Instructions

In contrast to mere encouragement, giving specific instructions to an audience is also likely to be found to be incitement. For example, a California court of appeals found incitement when a demonstrator used a megaphone and "called people down" to illegally block railroad tracks and "ma[de] sure everybody was on the tracks."[149] Likewise, giving specific advice of how to break tax laws[150] or commit murder[151] was found to be incitement when it resulted in individuals breaking the law exactly how they were advised to do. However, in *Herceg v. Hustler Magazine*, an article that explained how to engage in autoerotic asphyxiation (with several disclaimers) was not incitement because merely describing harmful conduct does not amount to incitement.[152]

The Fourth Circuit case *Rice v. Paladin Enterprises, Inc.* provides the most in-depth analysis of what kind of instructions will lead to a finding of incitement. The Court emphasized that the specific instructions contained in the book *Hit Man* could constitute incitement because there was "not so much as a hint of the theoretical advocacy of principles divorced from action that is the hallmark of protected speech."[153] Instead, the Court noted that the defendant publisher had stipulated that its intent in publishing the book was to instruct readers on how to commit murder-for-hire and noted that that stipulation

> coupled with the extraordinary comprehensiveness, detail, and clarity of *Hit Man's* instructions for criminal activity and murder in particular, the boldness of its palpable exhortation to murder, the alarming power and effectiveness of its peculiar form of instruction, the notable absence from its text of the kind of ideas for the protection of which the First Amendment exists, and the book's evident lack of any even arguably legitimate purpose beyond the promotion and teaching of murder, render this case unique in the law.[154]

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[149] *Id.* at 196.

[150] United States v. Buttorff, 572 F.2d 619, 622–23 (8th Cir. 1978).

[151] Rice v. Paladin Enters., Enterprises, Inc., 128 F.3d 233, 242–43 (4th Cir. 1997).

[152] Herceg v. Hustler Mag., 814 F.2d 1017, 1023–24 (5th Cir. 1987).

[153] *Paladin*, 128 F.3d at 267.

[154] *Id.* at 266–67 (The publisher also stipulated that he intended for readers to become successful contract killers from reading the book).

The Unite the Right rally most closely resembles this kind of "call to action." In addition to encouraging violence at Charlottesville and hosting violent discussions in anticipation of the rally, the Unite the Right rally organizers gave specific instructions to their followers.[155] There were multiple meetings among the various groups that were going to be participating at the rally where strategies were discussed and coordinated.[156] In the weeks and days before the rally, the organizers told their followers who to attack and gave specific advice regarding bringing weapons and wearing armor.[157] For example, one organizer posted on Discord that attendees should bring "as much gear and weaponry as you can within the confines of the law. I'm serious. . . . You still have a few days to get some protection from Home Depot and bring any guns you have."[158] He later posted a photo of himself in tactical gear and with a rifle and admonished his followers: "I wasn't kidding when I made an announcement to bring as much weaponry as legally feasible. . . . This was discussed with the organizers."[159] Another defendant told users: "I recommend you bring picket sign post, shields and other self-defense implements which can be turned from a free speech tool to a self-defense weapon should things turn ugly."[160]

Defendant Mosley posted "General Orders" for "Operation Unite the Right Charlottesville 2.0."[161] These orders show an intense eye for detail and planning; everything from recommendations for weapons and armor to anticipated weather to bathroom locations was addressed.[162] For example, under the heading "helmets," participants were advised the following: "[w]e recommend you bring or wear something to protect your head. DO NOT include a helmet with a facemask or anything that can be grabbed onto by others."[163] The General Orders combined with other instructions gave followers a specific blueprint for where to go, how to behave, and

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[155] *LEAKED: The Planning Meetings that Led Up to Neo-Nazi Terrorism in Charlottesville*, UNICORN RIOT (Aug. 16, 2017), https://unicornriot.ninja/2017/leaked-planning-meetings-led-neo-nazi-terrorism-charlottesville/ [https://perma.cc/VM7B-ZD4B].

[156] *Id.*

[157] First Amended Complaint, ¶¶ 98–100, 106, Sines v. Kessler, No. 3:17-cv-00072-NKM (N.D. Cal. Jan. 5, 2018).

[158] Complaint, *supra* note 34, ¶ 108.

[159] *Id.*

[160] *Id.* ¶ 112.

[161] *Id.* ¶ 75.

[162] *Operation Unite the Right Charlottesville 2.0*, (Aug. 10, 2017), https://www.unicornriot.ninja/wp-content/uploads/2017/08/OpOrd3_General.pdf [https://perma.cc/S64N-PSUL].

[163] *Id.* at 5.

what to wear. For example, Vanguard America instructed its members "to arrive at the rally in matching khaki pants and white polos."[164]

Organizers also gave specific advice and instructions regarding how to avoid getting in trouble with the law.[165] There was an entire online channel set up to discuss relevant Virginia law.[166] In a strange echo of Trump's words, organizers also promised to pay legal fees of those who did run afoul of the law.[167] Unlike Trump, however, there is evidence that the organizers actually mobilized to fulfil their promises: Richard Spencer used his website, altright.com, to post a call for attorneys.[168]

The instructions continued during the rally. Followers were instructed to download Discord, an app that allows users to use voice chat in real time,[169] so they could receive instructions during the rally.[170] Different groups were deployed as needed with almost military precision.[171] Clearly, the organizers did not take a passive role in planning the rally. They did more than just plan logistics of a meeting of like-minded people; they planned for a fight and ensured their people were there to take part in it.

More importantly, the Unite the Right rally organizers did more than advocate for a political position; they orchestrated a violent confrontation. The level of detail in their instructions, the repeated meetings and coordination of efforts through social media and the Discord app made them active participants in the violence that took place in Charlottesville. More than just giving advice, many of the communications from the organizers took the form of commands, some of which took place on the day of the rally. This behavior, like the publisher in *Paladin Enterprises*, reaches the level of a "call to action."

B. Indirect Incitement

Indirect incitement has been analyzed most often in connection with anti-terrorism laws and hate speech.[172] In addition to those more narrow

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[164] Complaint, *supra* note 34, ¶ 115 (One of Vanguard America's members noted that this was "a good fighting uniform.").

[165] *Id.* ¶ 120.

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *See* DISCORD, https://discordapp.com/ [https://perma.cc/QNT9-UREY].

[170] *Leaked: The Planning Meetings*, *supra* note 155.

[171] Complaint, *supra* note 34, ¶¶ 135, 195–98, 207, 212.

[172] *See* Knechtle, *supra* note 16, at 539; Joseph Jaconelli, *Incitement: A Study in Language Crime*, 12 CRIM. L. & PHIL. 245, 248 (2017); Gregory S. Gordon, *Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law*, 50 SANTA CLARA L. REV. 607, 623–24 (2010); Neha Bhat, *'My Name Is Khan' and I Am Not A*

(*continued*)

areas, scholars have also wrestled with the concept of "advocacy" in a way that can pave the way for indirect incitement. According to Greenawalt, the speech must have a "reasonable likelihood" of encouraging the "commission of the crime" and this requirement "is also meant to be moderately flexible in relation to the seriousness of the crime."[173]

Greenawalt's proposed test for public ideological encouragement goes into greater detail as to what this "encouragement" must include: it "requires that the speaker urge commission of a specific crime, specificity being judged in terms of whether members of the audience, without further instruction, would know in what behavior to engage."[174] Greenawalt's focus on the understanding of the audience opens incitement up to indirect pleas and even coded language. Using this definition, incitement must include an inquiry into what effect the words (spoken, written, or otherwise) are likely to have on their audience.[175]

Historically, courts have disagreed as to whether indirect incitement could be punished under the First Amendment.[176] Learned Hand famously conceded in a 1917 case that incitement could include indirect instructions to violate the law:

> One may not counsel or advise others to violate the law as it stands. Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state. . . . To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. While, of course, this may be accomplished as well by indirection as

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Terrorist: Intersections of Counter Terrorism Measures and the International Framework for Refugee Protection, 15 SAN DIEGO INTL. L.J. 299, 311–12 (2014).

[173] GREENAWALT, *supra* note 66, at 267–68.

[174] *Id.* at 267.

[175] Cronan, *supra* note 43, at 457.

[176] *See* David G. Barnum, *The Clear and Present Danger Test in Anglo-American and European Law*, 7 SAN DIEGO INTL. L.J. 263, 268 (2006); Michael Vitiello, *What Marc Antony, Lady Macbeth, and Iago Teach Us About the First Amendment*, 2 NEV. L.J. 631, 644–45 (2002). A similar historical example is Henry II's statement "will no one rid me of this meddlesome priest," which caused his nobles to assassinate Thomas Beckett, the priest in question. *See* Eric Bradner, *Comey goes medieval: 'Will no one rid me of this meddlesome priest?'*, CNN (June 8, 2017), https://edition.cnn.com/2017/06/08/politics/will-no-one-rid-me-of-this-meddlesome-priest/index.html [https://perma.cc/B97K-E3TR].

> expressly, since words carry the meaning that they impart, the definition is exhaustive, I think, and I shall use it.[177]

Scholars have gone much more in depth with their analysis of indirect incitement:

> In incitement, as in attempted crime, there are delicate questions of judgement as to exactly at what point the law should intervene. In the interest of refining that point, a distinction has sometimes been drawn between incitement that is "direct" and incitement that is "indirect" so that the ambit of the relevant law is expanded, or (alternatively) reduced, by reference to its usual scope.[178]

One comparative law scholar has distinguished between direct and indirect incitement thusly:

> The details of what amounts to indirect, as opposed to direct, incitement (or encouragement) will vary as between different legal regimes that employ that distinction, or different provisions within the same regime. But, generally, it may be said that direct incitement is explicitly to urge another person to commit the predicate offence. Indirect incitement is more circumspect, consisting of such forms as to state that committing a particular crime is morally justified or to be applauded, the message possibly being communicated even by the use of metaphor.[179]

Examples of indirect incitement include statements "that committing a particular crime is morally justified or to be applauded" and use of subtle rhetorical devices such as metaphor or code words.[180]

Professor Crump has also emphasized that when courts are too formalistic in their interpretation of words, they "forg[et] the flexibility of language, indeed of communication, and . . . also forg[et] that the context can determine the meaning."[181] Indeed, Crump envisions speech as a

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[177] Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D. N.Y. 1917), *noted in* Vitiello, *supra* note 176 (This conceptualization of incitement was not without its critics, most notably constitutional law scholar Chafee, who wrote to Learned Hand with the Mark Anthony example).

[178] Jaconelli, *supra* note 172, at 247.

[179] *Id*. at 248.

[180] *See id*. at 248; Gordon, *supra* note 172, at 623–24; Leets, *supra* note 16, at 312. Coded language will be discussed more fully under solicitation. *See infra* Section V.C.

[181] Crump, *supra* note 69, at 18.

"continuum from unreadable ambiguity to easily decipherable code" that courts must navigate to reach a correct result under the First Amendment.[182] According to Crump, both *Brandenburg* and *Hess* were overly concerned with the actual words used and not the speech's context that could have constituted what Crump calls "camouflaged incitement."[183]

In contrast to Crump, other scholars have advocated a cautious approach towards defining indirect or camouflaged incitement.[184] Constitutional law scholar Martin Redesh has advised that only when words are "sufficiently likely to cause immediate harm" and when "listeners' reactions are easily predictable" should courts uphold the "suppression of a statement which does not on its face urge unlawful conduct."[185] According to Redesh, a classic example of indirect incitement is when someone shouts "'the man in that jail tortured and killed my mother' in front of an unruly mob outside a jail."[186] Another classic example is "the indirect but purposeful incitement of Marc Anthony's oration over the body of Caesar."[187] Both these examples rely not just on rhetoric but on the context of the speech, especially what the audience would understand the speech to mean. Accordingly, under indirect incitement, the court must

> objectively look at what inferences the hearer would rationally make from the utterance. An utterance has an indirect, directive illocutionary force if, given the circumstances under which the speaker made the utterance, the hearer would rationally infer from the words

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[182] *Id.* at 23–25.

[183] *Id.* at 18.

[184] Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1178 (1982).

> [C]ourts should uphold punishment for indirect advocacy only in the most extreme circumstances. In other words, a court should be more willing to allow suppression of a statement that on its face urges another to commit a crime ("Let's overthrow the government"; "you should kill that cop") than of statements that on their face urge no illegal act but which are assertions of fact or opinion that might lead another to commit a crime ("this government represses minorities"; "that cop harassed me yesterday"). . . .

Id.

[185] *Id.* at 1179.

[186] *Id.*

[187] Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 729 (1975).

> used that the speaker is urging her to engage in lawless action.[188]

With his eight-part test, Crump goes beyond the actual words spoken to look at what the words likely meant, relying heavily on context. For example, Crump looks at the "pattern of the utterance" and code words that may have a different meaning to the speaker and their audience.[189] To find such coded meanings, Crump suggests that courts can look at the other words spoken by the same speaker or even rely on experts familiar with the code.[190] Crump also emphasizes that the plaintiff must provide evidence that the audience actually understands the same code as the speaker and there was no misunderstanding between them.[191] The medium, audience and surrounding communications are also part of understanding the true meaning of the contested speech.[192] Shouting to an audience who is already engaged in violating the law, as in *Hess*, is a clearer case of incitement than if the words are written for a scholarly journal.[193]

Greenwalt has also argued that context is essential in an incitement analysis when trying to understand the meaning of the disputed words, their likely effects, and the intent of the speaker. "Often words are ambiguous, leaving doubt whether the speaker actually urges the commission of criminal acts. When the words are plain on their face, it may still be unclear whether they are intended literally or to make some rhetorical point."[194] For that reason, Greenawalt argues using context in certain circumstances, particularly looking at the crowd and their susceptibility to react violently in response to the speaker's words: "This narrow exception to taking the words on their face or as they would be understood by the audience recognizes the power of spoken words that fall short of incitement to provoke emotionally charged audiences into immediate action."[195] According to Greenawalt, "[t]he exception could make a speaker liable for general advocacy of criminal action . . . other expressions of value . . . and statements of fact . . . when he relies on the power of his words to move his audience to immediate and grave criminal

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[188] Bradley J. Pew, *Comment, How to Incite Crime with Words: Clarifying Brandenburg's Incitement Test with Speech Act Theory*, 2015 B.Y.U. L. REV. 1087, 1098 (2015).

[189] Crump, *supra* note 69, at 5555.

[190] *Id*. at 55.

[191] *Id*. at 56.

[192] *Id*.

[193] *Id*.

[194] GREENAWALT, *supra* note 66, at 111.

[195] *Id*. at 274.

action."[196] The Trump rally appears to constitute indirect incitement. First, as noted above, Trump's statements were not mere advocacy of future acts and contained no conditional language. Although Trump certainly was using impassioned speech at a political event, the words Trump used—"get 'em out of here" are phrased as a command, a literal call to action.[197] However, these words do not explicitly call for illegal action or violence. He did not command that the crowd hurt the protestors or become violent; he merely demanded that the protestors be taken from the building. Trump's lawyers have consequently argued that Trump did not call for illegal or violent action and therefore cannot have incited a crowd to riot.[198]

In addition, there is some factual dispute in the lawsuit regarding whether Trump was speaking to the crowd or to security but the complaint alleges that Trump was speaking to the crowd and that allegation should stand at the motion to dismiss stage.

Moreover, there is substantial contextual evidence that Trump was intending to speak to the crowd or, at the very least, knew that the crowd was likely to respond to his command. Prior rallies show that Trump often used protestors to rile up his crowd.[199] He also often insulted protestors and received cheers and chanting in response.[200] Consequently, even if his words were spoken to security to actually escort the protestors out, that does not mean he was not also signaling his audience to react violently towards the protestors while security officers did their jobs.

Similarly, context can provide the evidence that audience correctly understood the meaning of Trump's words. Trump used the phrase "get him out of here" in several rallies both before and after the Louisville rally. A variant of that phrase was used in Miami on October 23, 2015,[201]

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[196] *Id* However, artistic expressions that specifically approve of violence, such as rap music or violent video games, should not be subject to indirect incitement claims due the artistic medium's unique context as an expression of ideas and entertainment. *See* McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 194 (App. 1988). Moreover, as discussed more fully below, these kinds of expressions should also not be subject to indirect incitement claims unless the author intends their audience to react with violence or illegal action.

[197] McLaughlin, *supra* note 13.

[198] *Id*.

[199] *Id*.

[200] Kate Sommers-Dawes, *All the times Trump has called for violence at his rallies*, MASHABLE (Mar. 12, 2016), https://mashable.com/2016/03/12/trump-rally-incite-violence/#7psFjVVIriqR12 [https://perma.cc/X2HT-HPK7].

[201] Jenna Johnson & Mary Jordan, *Trump on rally protester: "Maybe he should have been roughed up"*, WASH. POST (Nov. 22, 2015), https://www.washingtonpost.com/ (*continued*)

Birmingham, Alabama on November 21, 2015,[202] Iowa City, Iowa on January 26, 2016,[203] Warren, Michigan on March 4, 2016,[204] Fayetteville, North Carolina on March 9, 2016,[205] and Kansas City, Missouri on March 12, 2016.[206] This phrase did not always lead to violence,[207] but it often did.[208]

Most notably, the Birmingham rally, which took place months before the Louisville rally, involved similar violence against a protestor after Trump said to "get him outta here."[209] Trump later defended the crowd's violence on Fox News by insulting the protestor and saying "maybe he should have been roughed up."[210] Trump's words were heavily publicized.[211] It is reasonable to assume that future rally audiences would

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news/post-politics/wp/2015/11/22/black-activist-punched-at-donald-trump-rally-in-birmingham/?noredirect=on&utm_term=.7fb2066f63e7 [https://perma.cc/XN4C-X223].

[202] *Id.*

[203] Sopan Deb, *Tomato-thrower at Donald Trump rally charged with disorderly conduct*, CBS NEWS (Jan. 27, 2016, 5:18 PM), https://www.cbsnews.com/news/tomato-thrower-at-donald-trump-rally-slapped-with-disorderly-conduct-charge/ [https://perma.cc/9V8N-YS2E].

[204] Emily Cahn, *If you get rough with a protester at a Trump rally, The Donald has your back*, MASHABLE (Mar. 04, 2016), https://mashable.com/2016/03/04/donald-trump-protesters-court/#MYE39DDW8mqy [https://perma.cc/Y2GQ-2WQ5].

[205] Sommers-Dawes, *supra* note 200.

[206] Scott Canon et al., *Trump takes on protesters again in Kansas City as police pepper-spray crowds outside*, KAN. CITY STAR (Mar. 13, 2016, 12:49 AM), https://www.kansascity.com/news/politics-government/article65740747.html [https://perma .cc/65EP-P6XQ].

[207] *See* Deb, *supra* note 203; Sommers-Dawes, *supra* note 200.

[208] *See* Ben Mathis-Lilley, *A Continually Growing List of Violent Incidents at Trump Events*, SLATE (Apr. 25, 2016), http://www.slate.com/blogs/the_slatest/2016/03/02/a_list_of_violent_incidents_at_donald_trump_rallies_and_events.html [https://perma.cc/Y93R-VQR3]; Rebecca Savransky, *Trump supporter punches protester in face at rally*, THE HILL (Mar. 10, 2016, 11:47 AM), http://thehill.com/blogs/ballot-box/presidential-races/272525-trump-supporter-punches-protestor-in-face-at-rally [https://perma.cc/AB9Z-RCF8]; Canon et al., *supra* note 206.

[209] Mathis-Lilley, *supra* note 208; Savransky, *supra* note 211.

[210] Johnson & Jordan, *supra* note 201.

[211] *See, e.g.*, Jeremy Diamond, *Trump on protester: "Maybe he should have been roughed up"*, CNN (Nov. 23, 2015, 9:09 AM), https://www.cnn.com/2015/11/22/politics/donald-trump-black-lives-matter-protester-confrontation/index.html [https://perma.cc/W5LV-WMUX]; Erin Edgemon, *Donald Trump says maybe Birmingham protester "should have been roughed up"*, AL.COM (Nov. 22, 2015), https://www.al.com/news/index.ssf/2015/11/donald_trump_says_maybe_birmin.html [https://perma.cc/559D-7VX2]; Ryu Spaeth, NEW REPUBLIC: MINUTES, https://newrepublic.com/minutes/124336/maybe-shouldve-roughed-up-said-donald-trump-black-protester-kicked-punched-rally [https://perma.cc/2GA9-YNEQ]; Colin Campbell, *Donald Trump on his Black Lives Matter heckler: "Maybe he should have been roughed up"*, BUS. INSIDER (Nov. 22, 2015, 9:10 AM),

(*continued*)

have been aware of the prior violence and Trump's approval of that violence. Consequently, Trump's prior statements advocating violence against protestors at his rallies, including statements that he wanted to fight protestors[212] and saying that anyone who did not fight was weak,[213] provides context for all of Trump's words regarding protestors at his rallies.

Similarly, Trump's rhetoric towards journalists shows his willingness to rile up his crowds and even put people in danger. In addition to calling the New York Times "a true enemy of the people,"[214] his repeated attacks against Katy Tur, an MSNBC journalist, at his rallies—even calling her out by name and insulting her while she was in full view of the crowd[215]—shows how willing Trump is to parade his "enemies" before his raucous supporters.[216] Trump's approval of violence towards protestors and journalists implies that he wanted them treated violently at future rallies and any command he gave with regard to protestors therefore arguably included an instruction to treat the protestors violently.

At the very least, Trump knew that the audience might read his words that way and that violence could occur in response to his commands because it had in the past. The fact that he kept using the same rhetoric despite past violence shows that there was no misunderstanding as to what his words meant.[217] Accordingly, there is plenty of contextual evidence to show that Trump's words were a call to violence and were properly understood by his audience as such. In fact, both Trump and the Unite the

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https://www.businessinsider.com/donald-trump-protester-roughed-up-2015-11 [https://perma.cc/46KZ-9HYH].

[212] Sommers-Dawes, *supra* note 200 ("I'd like to punch him in the face").

[213] Eric Bradner, *Trump: Sanders "showed such weakness" with #BlackLivesMatter protesters*, CNN (Aug. 12, 2015, 8:33 AM), https://www.cnn.com/2015/08/11/politics/donald-trump-2016/index.html [https://perma.cc/UJ7Y-WSQU].

[214] Brett Samuels, *Trump Declares New York Times 'enemy of the people'*, THE HILL (Feb. 20, 2019), https://thehill.com/homenews/administration/430716-trump-declares-new-york-times-enemy-of-the-people [https://perma.cc/R862-ETCV].

[215] Katy Tur, *'Come here, Katy': how Donald Trump turned me into a target,* THE GUARDIAN (Oct. 11, 2017), https://www.theguardian.com/us-news/2017/oct/11/donald-trump-katy-tur-election-book-extract [https://perma.cc/9CYF-TWC3].

[216] Trump's recent attacks on Congressional Representative Ilhan Omar have likewise been accused of potentially inciting violence. *See* Eli Rosenburg & Kayla Epstein, *President Trump targets Rep. Ilhan Omar with a video of Twin Towers burning*, WASHINGTON POST (Apr. 13, 2019, 10:04 AM), *available at* https://www.washingtonpost.com/gdpr-consent/?destination=%2fpolitics%2f2019%2f04%2f13%2fpresident-trump-targets-rep-ilhan-omar-with-video-twin-towers-burning%2f%3f&utm_term=.993ef6f80209.

[217] Trump's knowledge and intent will be discussed more fully below. *See infra* Section VI.

Right rally organizers' words can be seen as coded speech, which, as seen in solicitation cases, can provide even more context for the words used at these rallies.

C. Solicitation

A related area where courts have examined context is in solicitation cases. Solicitation and incitement have a complex, often convoluted relationship. Solicitation is treated as a crime by the Model Penal Code, defined as follows:

> A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.[218]

"Incitement to riot" is also a crime in several jurisdictions. Under the United States Code, inciting a riot

> includes, but is not limited to, urging or instigating other persons to riot, but shall not be deemed to mean the mere oral or written (1) advocacy of ideas or (2) expression of belief, not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts.[219]

The overlap between these two crimes is obvious and even the crime of incitement differs substantially from the requirements of *Brandenburg*. It is therefore no wonder that courts have struggled with examining solicitation under the First Amendment and differentiating it from incitement.[220] To create a distinction, some scholars remove solicitation from the First Amendment's incitement standards by treating solicitation

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[218] MODEL PENAL CODE § 5.02 (2011).

[219] 18 U.S.C. § 2102(b) (2018).

[220] Indeed, *Brandenburg* itself dealt not with an incitement or solicitation criminal statute, but a "criminal syndicalism" statute that prohibited 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 doctrines of criminal syndicalism." Brandenburg v. Ohio, 395 U.S. 444, 444–45 (1969) (internal quotation omitted).

as an act, rather than speech. For example, Greenawalt has argued that "urgings to action," if sufficiently "situation-altering," are more than just words: they are "efforts to *do* things" and therefore not covered by the First Amendment.[221] Several other crimes can also fit this description: threats, harassment, and assault all treat words as actions that are beyond the protection of the First Amendment and none of them rely on *Brandenburg*.[222]

Another scholar, Thomas Healy, has differentiated between incitement and solicitation by focusing on the kinds of words used for each, stating that, in contrast to advocacy of unlawful action, solicitation is a related category of speech to which *Brandenburg* does not apply.[223] More specifically, Healy has limited solicitation to "commanding" that a crime be committed whereas incitement includes "inducing or persuading."[224] According to Healy, if there is no evidence of a command to commit a crime, *Brandenburg* should apply.[225]

Constitutional scholar Eugene Volokh has contrasted solicitation ("urging someone to kill a specific person") with protected speech of "urging killing in the abstract," typically limited to certain groups and not individual people.[226] Indeed, the targeting of a specific person, for example, through doxing, may turn the expression of "an abstract political idea" into "the solicitation of a crime."[227]

However, courts often treat solicitation and incitement as synonymous, particularly if the facts of the case involve only verbal encouragement to commit a crime.[228] For example, Learned Hand concluded that solicitation

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[221] GREENAWALT, *supra* note 66, at 113 (Greenawalt focuses on "situation-altering" words because they "often change the normative situation to a degree by providing a reason to act somewhat stronger than a known but unexpressed wish.").

[222] *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1774, 1783 (2004); Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 Va. L. Rev. 1225 (2006).

[223] Thomas Healy, *Brandenburg in A Time of Terror*, 84 NOTRE DAME L. REV. 655, 669 (2009).

[224] *Id.* at 671.

[225] *Id.*

[226] Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 993–94 (2016).

[227] Malloy & Krotoszynski, *supra* note 65, at 1166.

[228] *See* Bruce Braun et al., *www.commercial_terrorism.com: A Proposed Federal Criminal Statute Addressing the Solicitation of Commercial Terrorism Through the Internet*, 37 HARV. J. ON LEGIS. 159, 179–80 (2000). This conflation may come from the history of incitement law; courts used solicitation to justify their use of the "clear and present danger" test. *See* Volokh, *supra* note 226, at 989.

requires express advocacy of criminal conduct.[229] More recently, in *United States v. White*, the Seventh Circuit held that criminal solicitations are not protected by the First Amendment and quoted *Chaplinsky v. New Hampshire*, which discusses incitement, not solicitation.[230] Similarly, the Louisiana Supreme Court failed to make a doctrinal distinction between incitement and solicitation, instead giving lip service to *Brandenburg* and then finding that the solicitation statute easily meets it requirements.[231]

Other courts treat incitement and solicitation as different kinds of unlawful speech or unlawful speech-acts, both of which are not covered by the First Amendment.[232] According to a California Court of Appeals, for example, "[t]he facts and circumstances which differentiate advocacy of crime from solicitation of crime are those which differentiate advocacy of abstract doctrine from advocacy of incitement to unlawful action."[233] The Ninth Circuit has similarly held that solicitation is not protected by the First Amendment "where speech becomes an integral part of the crime . . . even if the prosecution rests on words alone."[234]

According to the Seventh Circuit in *White*, it is the intent that turns solicitation into an act that is not protected by the First Amendment; if the defendant had the intent that his audience would harm another, then solicitation has occurred and "[n]o act needed to follow, and no harm needed to befall" the potential victim.[235] Therefore, according to the Seventh Circuit, for criminal solicitation, no acts need to be committed other than the speech itself because the speech becomes an act that is not covered by *Brandenburg* or the First Amendment.[236]

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[229] Geoffrey R. Stone *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 430–31 (2002).

[230] United States v. White, 698 F.3d 1005, 1016 (7th Cir. 2012). As discussed below, *White* deals with a purely verbal criminal solicitation case. *See* People v. Rubin, 158 Cal. Rptr. 488, 491 (Cal. App. 2d Dist. 1979) (combining incitement and solicitation cases); Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996).

[231] Rohr, *supra* note 77, at 27–29 (citing City of Baton Rouge v. Ross, 654 So.2d 1311 (La. 1995)).

[232] Rice v. Paladin Enters., Enterprises, Inc., 128 F.3d 233, 244 (4th Cir. 1997); Gomez v. Giurbino, SACV040035JVSFMO, 2007 WL 9706770, at *2 (C.D. Cal. Mar. 21, 2007), *aff'd,* 405 Fed. Appx. 245 (9th Cir. 2010) (unpublished).

[233] *Rubin*, 158 Cal. Rptr. at 492.

[234] United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985) ("the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself.").

[235] *White*, 610 F.3d at 960–62.

[236] *Id.* (citing United States v. Sattar, 272 F. Supp.2d 348, 373–74 (S.D.N.Y. 2003)).

The Third Circuit has also held that criminal solicitation constitutes an unlawful "speech-act" to which *Brandenburg* does not apply.[237] Likewise, a district court in Michigan found that speech that "goes beyond mere advocacy and constitutes an actual conspiracy to use force" is not covered by *Brandenburg*.[238]

Other courts have differentiated between solicitation and advocacy by reference to whether the speech has a political or ideological motivation:

> Advocacy is the act of "pleading for, supporting, or recommending; active espousal" and, as an act of public expression, is not readily disassociated from the arena of ideas and causes, whether political or academic. Solicitation, on the other hand, implies no ideological motivation but rather is the act of enticing or importuning on a personal basis for personal benefit or gain.[239]

Similarly, according to the Seventh Circuit, *Brandenburg* does not apply to criminal solicitation; it applies to politically "impassioned" speech that, while perhaps containing some references to violence or unlawful acts, does not contain threats or authorizations to commit violence.[240] Therefore, the Seventh Circuit found that as long as words go beyond "mere advocacy," they do not receive First Amendment protection.[241] This distinction is identical to that in incitement cases.

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[237] United States v. Bell, 414 F.3d 474, 482 (3d Cir. 2005). For this reason, according to a district court in Texas, criminal solicitation is "simply not protected by the First Amendment, even if the only acts committed were communications with others." Ballard v. United States, CR 13-00067-01, 2016 WL 7439350, at *2 (N.D. Tex. Dec. 22, 2016). *See also* Daniel Hoffman, *Online Terrorism Advocacy: How Aedpa and Inchoate Crime Statutes Can Simultaneously Protect America's Safety and Free Speech*, 2 NAT'L SEC. L.J. 200, 211–12 (2014) (Contrasting "inchoate crimes such as conspiracy, attempt, and solicitation," which do not have to satisfy *Brandenburg*, from speech "advocating crime without some level of political or social promotion," which will not meet *Brandenburg*'s requirements for First Amendment protection).

[238] United States v. Stone, No. 2:10-CR-20123, 2011 WL 795104, at *7–8 (E.D. Mich. Jan. 12, 2011), *report and recommendation adopted,* 10-20123, 2011 WL 795164 (E.D. Mich. Mar. 1, 2011).

[239] Rohr, *supra* note 77, at 27–29. *See also* City of Baton Rouge v. Ross, 654 So.2d 1311, 1337 (La. 1995) ("The Supreme Court has also addressed itself to the criminalization of political speech advocating unlawful conduct, a manner of speech which, when deprived of its political character, is indistinguishable from criminal solicitation.").

[240] *White*, 610 F.3d at 960–62.

[241] *Id.* at 962.

White is also notable because it emphasized that context is important because the solicitation could be made using implicit or coded speech.[242] In criminal solicitation cases, the jury is permitted to look at the defendant's words and infer his meaning even if he did not request criminal activity outright.[243] In such a situation, a defendant's other statements that appear to indicate that he did not want to engage in criminal activity are left for the jury to interpret and do not diminish the potential character of his incriminating statements.[244] For example, in *United States v. Stewart*, the Second Circuit found that a "spiritual" leader of al-Gama'a, an Egyptian Sunni Islamist movement, incited his followers to violence by withdrawing his support of a cease-fire in Egypt.[245] The Second Circuit looked beyond the words spoken by the defendant, which appeared, on the surface, to merely express a political opinion.[246] According to the Second Circuit, because his "comments were made in direct response to solicitations of his views from other al-Gama' members who were seeking to effect an end to the cease-fire and to resume violence," the defendant's withdrawal of support was "not materially different in substance from a crime boss making decisions about his criminal enterprise from prison and ordering a 'hit.'"[247]

Crump provides an accessible example of coded words with his description of a crime boss's statement to his enforcer that "I don't like Tony Bananas. Why don't you go 'visit' with him?"[248] Despite the actual words used, the context of the statement, not to mention the relationship between the crime boss and his enforcer, gives the words a clear meaning: solicitation of murder.[249] According to Crump, ignoring the coded messages and allowing this kind of speech would encourage organized criminals to continue their operations.[250] Instead, according to Crump, if the threat is communicated "in a code that the court can crack . . . the court should not ignore the real message."[251]

Greenawalt has likewise indicated that context in solicitation cases matters. According to Greenawalt, the power balance between the speaker

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[242] *Id.* at 960–62.
[243] *Id.* (citing United States v. Hale, 448 F.3d 971, 979 (7th Cir. 2006)).
[244] *Id.*
[245] United States v. Stewart, 590 F.3d 93, 115–16 (2d Cir. 2009).
[246] *Id.*
[247] *Id.*
[248] Crump, *supra* note 69, at 23–25.
[249] *Id.*
[250] *Id.*
[251] *Id.* at 55.

and the audience should be considered because "in circumstances when the person soliciting is the more dominant personality, it would be unfair to convict the perpetrator and let the person who effectively controls him go free."[252] Accordingly, although not identical,[253] solicitation cases provide valuable examples of how context and coded messages can be examined in incitement cases.

Both Trump and the Unite the Right rally organizers arguably used coded messages to instruct their audiences. As noted above, Trump had used the phrase "get 'em outta here" at a prior rally where violence had occurred.[254] That phrase could be reasonably interpreted by his audience to mean that they should use force when ejecting the protestors in Louisville. The organizers of the Unite the Right rally also used inside jokes, memes and coded references to instruct their followers and push for a violent confrontation.[255] They even had code phrases—Plan Green, Plan Yellow, and Plan Red—for the different tactics that they would use depending on their success at obtaining the permits they wanted.[256] The organizers were very aware of the likely media presence at the rally and advised their followers to "refrain from roman salutes" because of the cameras.[257] Both Trump and the alt-right's coded language present further evidence that the exact words they used must be placed in a broader context to know what their audience actually heard and understood.

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[252] GREENAWALT, *supra* note 66, at 1111.

[253] For example, solicitation does not rely on any reaction from the intended audience; even purely verbal solicitation is complete as soon as the request is made, even if the audience rejects the request. *See* Gomez v. Giurbino, 2007 WL 9706770, at *2 (Mar. 21, 2007), *aff'd,* 405 Fed. Appx. 245 (9th Cir. 2010) (unpublished) (quoting People v. Wilson, 36 Cal.4th 309, 328 (2005), *cert. denied*, 126 S. Ct. 1617 (2006)). Solicitation also does not have an imminence requirement. *See* Volokh, *supra* note 226, at 995.

[254] Tina Nguyen, *Trump's Violent Campaign Rallies Come Back to Haunt Him*, VANITY FAIR (May 2, 2017, 5:41 PM), https://www.vanityfair.com/news/2017/05/donald-trump-campaign-rally-lawsuits-incitement [https://perma.cc/A2DW-S8CP].

[255] The alt-right is notorious for its use of code words and insider slang. *See* Vanessa Romo, *"Ghost Skins" And Masculinity: Alt-Right Terms, Defined*, NPR (Sep. 6, 2017, 3:31 PM), https://www.npr.org/2017/09/06/548858850/-ghost-skins-and-masculinity-alt-right-terms-defined [https://perma.cc/M77N-7XFZ]; Nikhil Sonnad, et al., *The alt-right is creating its own dialect. Here's the dictionary*, QUARTZ (Oct. 30, 2017), https://qz.com/1092037/the-alt-right-is-creating-its-own-dialect-heres-a-complete-guide/ [https://perma.cc/3JZG-5CYK]; Justin Caffier, *Get to Know the Memes of the Alt-Right and Never Miss a Dog-Whistle Again*, VICE (Jan. 25 2017, 2:11 PM), https://www.vice.com/en_us/article/ezagwm/get-to-know-the-memes-of-the-alt-right-and-never-miss-a-dog-whistle-again [https://perma.cc/YX7H-TBMS].

[256] *Operation Unite the Right Charlottesville 2.0*, *supra* note 162, at 6–7.

[257] *Id*. at 5.

VI. INTENT

The final requirement for incitement is intent. As with imminence and advocacy, both courts and scholars have grappled with what intent is actually required to create incitement.

A. General Definition

According to the Supreme Court of California, "incited violence . . . must be a specifically intended consequence of the speaker's plea and not a result of unreasonable reactions by hostile onlookers or overly zealous supporters."[258] Otherwise, the unruliness of the audience may silence speech merely because the speaker is discussing controversial issues, resulting in the so-called "hecklers veto."[259] However, the failure to name a specific victim is not fatal to an incitement claim.[260]

In his eight-factor test, Crump has identified two aspects of intent: knowledge and disclaimers.[261] Crump likens "knowledge" to the "actual malice" standard in defamation cases—intent is shown from knowledge or reckless disregard.[262] To that end, according to Crump, the inclusion of disclaimers should work against a finding of intent, presuming that those disclaimers are genuine.[263] As with the incitement language itself, courts should examine the wording and context of the disclaimers to discern whether they were said with a wink, like Mark Anthony's speech.[264]

Courts have also generally taken a broad view of intent in incitement cases. A California court of appeals defined intent as speech that "(1) was *directed and intended* toward the goal of producing imminent lawless conduct *and* (2) was *likely* to produce such a result."[265] In *Rubin*, another California court of appeal has emphasized looking at the emotional state of the crowd, holding that when a speaker urges political assassination in front of a large unruly crowd, the "the threat to civil order" is great despite the speaker's actual intent.[266] The Court in *Rubin* emphasized that the

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[258] Braxton v. Mun. Ct., 514 P.2d 697, 703 (Cal. 1973).

[259] Calvert, *supra* note 83, at 124; Bill v. Super. Ct., 187 Cal. Rptr. 625, 629 (Cal. App. 1st Dist. 1982).

[260] People v. Rubin, 158 Cal. Rptr. 488, 488, 493 (Cal. App. 2d Dist. 1979).

[261] Crump, *supra* note 69, at 63.

[262] *Id*.

[263] *Id*. at 66.

[264] *Id*. at 66–67.

[265] McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193 (App. 1988) (emphasis added). This article has taken the "likelihood" aspect of this definition and applied it to the imminence requirement.

[266] People v. Rubin, 158 Cal. Rptr. 488, 490–91 (Cal. App. 2d Dist. 1979).

"words and circumstances" of the speech are essential to determine the speaker's intent, particularly if the speech was "not made in a jesting or conditional manner, nor was it the outcome of an improvised piece of braggadocio."[267] Positive reference to prior acts of violence likewise can show a speaker's intent to incite a crowd.[268]

Using a very broad interpretation of the intent requirement, in *Weirum v. RKO General Inc*., a Georgia court found that a radio station was found to have committed incitement with its dangerous radio contest because it "intentionally created the dangerous circumstances" even though there was no evidence that the station wanted anyone to be harmed, and certainly did not single out a target for harm.[269]

Greenawalt likewise emphasizes context in relation to whether violence is likely to erupt:

> Sometimes a serious intent would be evident from the circumstances of the communication and its content. If a speaker urges young men to turn in their draft cards at a meeting called for that purpose, the inference is irresistible that he seriously intends his listeners to do just that. In other circumstances, if words used by the speaker yield the natural interpretation that he is urging commission of a specific crime, external evidence may demonstrate the speaker's serious intent.[270]

The case Greenawalt is referring to, *United States v. Spock*, emphasized that the speakers' "soft sell" of the illegal burning of draft cards was not just an expression of "sympathy and support," in part because they were speaking to "a large number of young men, perhaps impressionable, and in any event oriented in defendants' direction by natural self-interest."[271] Greenawalt has therefore argued that evidence of intent should include external evidence of prior statements from the speaker that indicate they intended to stir up a crowd, as well as the amount of the speaker's influence over the crowd.[272]

Using those factors, it is clear that Trump's prior statements are essential to understanding his meaning during the Louisville rally, as is the

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[267] *Id*. at 493.

[268] *Id*.

[269] Crump, *supra* note 69, at 41–42 (citing Weirum v. RKO General, Inc., 539 P.2d 36 (1975)).

[270] GREENAWALT, *supra* note 66, at 266–67.

[271] United States v. Spock, 416 F.2d 165, 171–72 (1st Cir. 1969).

[272] GREENAWALT, *supra* note 66, at 274.

general atmosphere of those rallies. Violence at Trump rallies during his presidential campaign was commonplace and well-documented by the media, often using video taken by audience members. Audience violence towards protestors at Trump rallies began as early as October 2015 at a Richmond, Virginia rally where audience members ripped a signs out of a protestors' hands and one audience member spat in a protestor's face.[273] Violence towards protestors became more frequent and commonplace over time.[274]

Although at first Trump told his supporters to not harm protestors,[275] beginning in about November 2015, Trump began to encourage and support violence at his rallies. A Black Lives Matter protestor at a November 21, 2015 rally in Birmingham, Alabama was punched and choked after Trump said, "get him the hell out of here."[276] The protestor was removed by security and Trump later defended the crowd's violence on Fox News, saying that "maybe he should have been roughed up because it was absolutely disgusting what he was doing."[277]

Before the Louisville rally, Trump made several other statements that indicated his support of audience members using violence against protestors at his rallies, including "I don't know if I'll do the fighting myself or if other people will,"[278] "If you see somebody with a tomato, knock the crap out of them,"[279] and "I'd like to punch him in the face."[280] After the Louisville rally, Trump's rhetoric became a little more moderate but not much: "Try not to hurt him. If you do, I'll defend you in court, don't worry about it,"[281] "Can't we have a little more action than this? . . . See, in the good old days this didn't use to happen, because they

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[273] Mathis-Lilley, *supra* note 208.

[274] *Id.*

[275] Johnson & Jordan, *supra* note 201.

[276] Mathis-Lilley, *supra* note 208.

[277] Johnson & Jordan, *supra* note 201.

[278] Sommers-Dawes, *supra* note 212.

[279] Daniel White, *Donald Trump Tells Crowd to "Knock the Crap Out Of" Hecklers*, TIME (Feb. 1, 2016), http://time.com/4203094/donald-trump-hecklers/ [https://perma.cc/7JV2-ZK2E] (The tomato thrown at the Iowa City rally seems to have been a turning point for Trump, leading him to be more explicit in his encouragement of violence; by also offering to "pay for any legal fees that supporters incurred stopping a tomato-thrower.").

[280] Jeremy Diamond, *Donald Trump on protester: "I'd like to punch him in the face"*, CNN (Feb. 23, 2016, 11:59 AM), https://www.cnn.com/2016/02/23/politics/donald-trump-nevada-rally-punch/index.html [https://perma.cc/JJU6-PRSB].

[281] Cahn, *supra* note 204.

used to treat them very rough. . . . We've become very weak."[282] "These are people that are destroying our country. . . . You know part of the problem and part of the reason it takes so long is no one wants to hurt each other anymore and they're being politically correct the way they take them out so it takes a little longer,"[283] and, regarding an earlier statement where he said he wanted to fight a protestor behind the gym in high school: "I'd love that."[284]

Moreover, although he probably did not like being interrupted by protestors, Trump seemed to enjoy the disruptions at his rallies because they riled up the crowds. In fact, Trump repeatedly insulted protestors for being "weak" and not resisting being ejected.[285] At a rally in Bridgeport, Connecticut in April 2016, Trump talked about protestors' disruptions positively: "[t]hey waste our time, but they make it interesting . . . . 'What's more fun than a Trump rally?'"[286] He said this while the protestor was placed in a chokehold by a police officer.[287] Trump further encouraged violence by not only saying he would like to fight protestors but also repeatedly promising to pay audience members' legal fees if they hurt a protestor. At least two Trump audience members were charged with assault for physically attacking protestors.[288] Moreover, Trump has occasionally called out people individually, either by gesturing

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[282] David A. Graham, *The Lurking Menace of a Trump Rally*, THE ATLANTIC (Mar. 10, 2016), https://www.theatlantic.com/politics/archive/2016/03/donald-trump-fayetteville/473169/ [https://perma.cc/VKH9-P4BJ].

[283] Candace Smith, *Clashes Erupt Outside Donald Trump's Missouri Rally*, ABC NEWS (Mar. 11, 2016, 7:23 PM), https://abcnews.go.com/Politics/donald-trumps-missouri-rally-interrupted-minutes-protesters/story?id=37584726 [https://perma.cc/SGW2-F52Y].

[284] Ali Vitali, *Donald Trump Says He'd 'Love' to Fight 'Mr. Tough Guy' Joe Biden*, NBC NEWS (Oct. 25, 2016, 9:04 PM), https://www.nbcnews.com/politics/2016-election/donald-trump-says-he-d-love-fight-mr-tough-guy-n672871 [https://perma.cc/27YP-85ZB].

[285] Jackson, *supra* note 200.

[286] Dennis Slattery, *Anti-Trump protester put in chokehold by cop, dragged from Connecticut rally*, N.Y. DAILY NEWS (Apr. 23, 2016, 2:23 PM), http://www.nydailynews.com/news/election/anti-trump-protester-choked-yanked-connecticut-rally-article-1.2612160 [https://perma.cc/S26A-N2Z9].

[287] *Id.*

[288] *Id.* There is no evidence that Trump has actually paid their legal fees and ample evidence that he is unlikely to. *See,* Steve Reilly, *Hundreds allege Donald Trump doesn't pay his bills*, USA TODAY (Apr. 25, 2018, 1:42 PM), https://www.usatoday.com/story/news/politics/elections/2016/06/09/donald-trump-unpaid-bills-republican-president-laswuits/85297274/ [https://perma.cc/228Q-GJXL] (discussing Trump's failure to pay legal fees to law firms who have represented him in the past).

to them[289] or using their names[290] while they were in the midst of his crowd of supporters, making it much easier to target them specifically.

Even without violence, Trump rallies were typically loud and boisterous, with audience members chanting and shouting in support for Trump and against Trump's popular targets such as Hillary Clinton.[291] Trump appears to have reveled in these outbursts, and he even commanded the crowd to raise their hands and say a pledge that they would vote for him.[292] He promised them that "bad things happen" if they did not follow through with their pledge.[293] Trump's command over his audience shows that he knew that they would follow his orders.

However, Trump's reaction to protestors was also inconsistent; during this same time period he appeared to be kinder to protestors and specifically stated that he did not want them hurt.[294] Trump's attorneys appear to be making a disclaimer argument by arguing that Trump's statements to not hurt the protestors, which he also made at the Louisville rally, should be evidence that Trump did not intend there to be violence at his rallies.[295]

Trump did say not to hurt protestors at several rallies.[296] However, he also complained that not hurting protestors made their ejection take

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[289] Gina Martinez, *The Inside Story of a Trump Volunteer Blocking a Photographer at a Rally*, TIME (Aug. 31, 2018 4:33 PM), http://time.com/5384111/trump-volunteer-blocks-camera-photo/ [https://perma.cc/DSX6-ZEGR].

[290] Tur, *supra* note 215.

[291] Ashley Parker et al., *Voices From Donald Trump's Rallies, Uncensored*, N.Y. TIMES (Aug. 3, 2016), https://www.nytimes.com/2016/08/04/us/politics/donald-trump-supporters.html [https://perma.cc/UG7P-G5MY]; Peter W. Stevenson, *A brief history of the 'Lock her up!' chant by Trump supporters against Clinton*, WASH. POST (Nov. 22, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/22/a-brief-history-of-the-lock-her-up-chant-as-it-looks-like-trump-might-not-even-try/?utm_term=.8331fc301421 [https://perma.cc/J9M2-FSL6].

[292] Jeremy Diamond & Eugene Scott, *Trump asks backers to swear their support, vows to broaden torture laws*, CNN (Mar. 5, 2016, 6:43 PM), https://www.cnn.com/2016/03/05/politics/donald-trump-florida-pledge-torture/index.html [https://perma.cc/DX8C-R3V8].

[293] *Id.*

[294] *See id*. (discussing he will bring people together); Emily Shapiro, *Trump Surrounded by Secret Service as Man Tries Rushing Stage*, ABC NEWS (Mar. 12, 2016, 3:20 PM), https://abcnews.go.com/Politics/donald-trump-calls-protests-chicago-rally-planned-attack/story?id=37601079 [https://perma.cc/64E2-3E2H] ("I was ready for him, but it's much easier if the cops do it, don't we agree?"); Canon et al., *supra* note 206 ("we don't want to hurt protestors"); Slattery, *supra* note 286 ("They waste our time, but they make it interesting.").

[295] McLaughlin, *supra* note 13.

[296] *See* Cahn, *supra* note 204; Canon et al., *supra* note 206; Emily Flitter, *Young Protesters heckle Trump during Michigan speech*, REUTERS (Dec. 22, 2015, 12:02 AM), (*continued*)

longer,[297] insulted protestors for not fighting more when they were being ejected,[298] offered to pay the legal fees of those who did hurt protestors,[299] and lamented "the old days" where protestors would be roughed up[300] and "carried out on stretchers."[301] Trump also told one crowd that he tells security not to hurt protestors "for the benefit of the media."[302] This statement combined with his offers to pay legal fees, indicates that Trump was well aware of the consequences of violence at his rallies and may have given his disclaimer with a wink, negating its value for purposes of determining intent. Taking all of Trump's statements, the repeated violence at his rallies, and the general mob-like atmosphere he encouraged, it is likely that these contextual clues will be sufficient to show Trump's intent to incite the crowd.

As with imminence, the intent of the Unite the Right rally organizers is a little more difficult to discern because they made their communications over the internet, which can sometimes cloud a speaker's actual meaning.[303] However, by looking at the context of the organizers' statements, their intent becomes very clear. The true threats doctrine provides several examples of how context can be used to determine a speaker's intent even over the internet.

B. True Threats

The "true threats" doctrine is a useful point of comparison to incitement cases because it has been used as an alternative to incitement to overcome First Amendment protections. The concept of "true threats," although used by courts for decades,[304] was finally defined by the Supreme Court in 2003 in *Virginia v. Black*. According to *Black*, true threats "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a

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https://www.reuters.com/article/us-usa-election-trump-idUSKBN0U50D020151222 [https://perma.cc/8D8W-G5B2].

[297] Smith, *supra* note 283.

[298] Jackson, *supra* note 200.

[299] Cahn, *supra* note 204.

[300] *Id.*

[301] Diamond, *supra* note 280.

[302] Jackson, *supra* note 200.

[303] Sara Peters, *Why is sarcasm so difficult to detect in texts and emails?* THE CONVERSATION (Mar. 8, 2018, 6:43 AM), http://theconversation.com/why-is-sarcasm-so-difficult-to-detect-in-texts-and-emails-91892 [https://perma.cc/A489-X7E3].

[304] For a history of the "true threats" doctrine, *see* Paul T. Crane, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225 (2006).

particular individual or group of individuals."[305] In order to be a true threat, a speaker must "direct[] a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death" but the "speaker need not actually intend to carry out the threat."[306]

The rationale for the true threat doctrine is similar to that for incitement: true threats do not contribute to the marketplace of ideas and prohibiting them protects the public.[307] True threats are not like typical speech that conveys ideas or opinions that enrich public discourse. Instead, like incitement and solicitation, they "operate[] more like a physical action"[308] and cause fear and disruption.[309] Indeed, according to scholar Steven Gey, a statement is a true threat, and therefore deserves no First Amendment protection, if it is "clear from the context that the communication effectively operates, and is intended to operate, as something other than an attempt to engage in the exchange of ideas, thoughts, attitudes, or emotions."[310] But the threat does need to be more than "political hyperbole."[311] As noted by Volokh, "[t]he Court has said that, to be punishable, a threat of illegal conduct must be a 'true threat,' rather than obvious hyperbole or humor, but that is more just a reminder that threats must indeed be threatening."[312]

For example, in *United States v. Watts*, a Vietnam War protestor's statement that "[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B. J" was not a "true threat" despite its threatening tone because it was considered to be political hyperbole.[313] As with incitement in *Brandenburg,* the statement in Watts was conditional: violence will occur *if* a condition is met.

As with solicitation, courts seem willing to use true threats and incitement somewhat interchangeably, applying one where, factually, the other seems to be more apt. For example, *Claiborne* was not analyzed under a true threats framework even though Evers appeared to be speaking his threatening language directly to those he intended to intimidate.[314]

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[305] Virginia v. Black, 538 U.S. 343, 359 (2003).
[306] *Id*. at 360.
[307] Crane, *supra* note 304, at 1230–31.
[308] Gey, *supra* note 72, at 565–98.
[309] Crane, *supra* note 304, at 1230–31.
[310] Gey, *supra* note 72, at 594.
[311] Strasser, *supra* note 12, at 177 (quoting United States v. Watts, 394 U.S. 705, 706 (1969)).
[312] Volokh, *supra* note 226, at 1005–06.
[313] Watts v. United States, 394 U.S. 705, 706 (1969).
[314] *See* Rohr, *supra* note 77, at 23–24; Volokh, *supra* note 226, at 1005–06.

Similarly, the true threats doctrine has been applied to speech that appears to be more akin to incitement because it was directed towards others, not the speaker's actual target. More specifically, in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, a Ninth Circuit en banc panel used the true threats doctrine to examine an anti-abortion group's tactics of circulating "GUILTY" posters of the plaintiff doctors with their names, addresses and photographs, as well as the "Nuremburg Files" website, which compiled names of doctors that the anti-abortion group "anticipated one day might be put on trial for crimes against humanity."[315] Previously, this group had circulated posters with the titles "WANTED" and "unWANTED," the latter group referring to abortion doctors who had been murdered.[316]

In its decision, the Ninth Circuit briefly mentioned incitement, indicating that the speech at issue differed from merely advocating violence, but then turned its attention directly to true threats, using a federal threats statute.[317] According to the Ninth Circuit, although the posters were publicly distributed, and were arguably calling for others to commit violence against their targets, the website and other tactics were "true threats" because they targeted the specific plaintiffs and the defendants knew the plaintiffs would be put in fear, which they were.[318] Indeed, the naming of specific people as targets rather than larger groups seems to be key in true threats cases. Although threats against an entire race, for example, are certainly offensive, the diffuse nature of targets makes the members of the group much less likely to be actually or reasonably afraid.

Similar to *Planned Parenthood*, the Seventh Circuit in *United States v. Turner* eschewed an incitement analysis in favor of the true threats doctrine.[319] Turner's statements were a series of blog posts threatening violence against the three Seventh Circuit judges who upheld a Chicago gun ban.[320] Some of Turner's more violent statements included "[l]et me be the first to say this plainly: These Judges deserve to be killed. Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions," and "[t]hese Judges deserve to be made such an

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[315] Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists, 290 F.3d 1058, 1062 (9th Cir. 2002).

[316] *Id.*

[317] *Id.* at 1072 ("If ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.").

[318] *Id.* at 1085–86.

[319] United States v. Turner, 720 F.3d 411, 425 (2d Cir. 2013).

[320] *Id.* at 414.

example of as to send a message to the entire judiciary: Obey the Constitution or die."[321] Turner's blog also contained threats against other government officials: "I intend to incite revenge . . . Vicious, brutal, savage, revenge with malice aforethought."[322]

Finally, Turner stated his intent for his blog posts: "[w]hile I can't legally undertake killing, I may—just MAY—be able to say enough of the right things, to enough of the right people, to make it happen."[323] Turner sent emails to officials with similar sentiments.[324] The Seventh Circuit found Turner's statements to be threats under the same federal statute used in *Planned Parenthood* because he referenced prior acts of violence against judges and implied a causal connection between those acts and his calls for the target's death.[325]

Turner's doxing[326] of the judges also made his words a threat, as did his stated intent to make them change their stance in response to his threats.[327] Finally, Turner's effort to characterize the case as incitement rather than a true threat because his words were directed at the public (and potential assassins) rather than the judges themselves did not persuade the Seventh Circuit because the public nature of his blog posts were likely to put the judges in greater fear:

> It is hard to see how Turner's threat became less threatening, however, because publicly issued—particularly given Turner's own boasting that public dissemination of address information is "an effective way" to instill fear, "to cause otherwise immune public servants to seriously rethink how they use the power lent to them by We The People."[328]

The Third Circuit case *United States v. Fullmer*, adopted a similar analysis to *Planned Parenthood* and *Turner*. An animal rights group used a website to advocate for protests against animal testing facilities, whether

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[321] *Id*. at 415.
[322] *Id*. at 416.
[323] *Id*. at 417.
[324] *Id*.
[325] *Id*. at 422.
[326] Jasmine McNealy, *Commentary: What is doxxing, and why is it so scary?*, CHI. TRIB. (May 21, 2018, 5:00 AM), http://www.chicagotribune.com/news/opinion/commentary/ct-perspec-doxxing-web-site-internet-facebook-private-information-emails-comments-private-data-0521-story.html [https://perma.cc/A5HU-XYLC].
[327] *Turner*, 720 F.3d at 422.
[328] *Id*. at 423.

the protests were legal or not.[329] The website also targeted specific employees by providing their names and addresses along with the word "target" with words encouraging contacting those employees to protest and included an article entitled "Top 20 Terror Tactics" that listed ways to harass others and included physical assault and damaging their property.[330] As in *Planned Parenthood*, the Third Circuit used the true threats doctrine to analyze the tactics used by the defendants.[331] In particular, the doxxing of the employees, like the doxxing in *Planned Parenthood* was a true threat because it was combined with references to past acts of violence against the group's targets.[332]

However, the Third Circuit also applied the incitement doctrine. The Third Circuit found that the defendant's webpages did not constitute incitement because

> merely posting information on unlawful acts that have already occurred, in the past, does not incite future, imminent unlawful conduct . . . [and] the publication of the "Top Twenty Terror Tactics," without more, is also protected, because although it lists illegal conduct, there is no suggestion that [the defendant] planned to imminently implement these tactics. . . .[333]

But, unlike in *Planned Parenthood* or *Turner*, *Fullmer* did find incitement in the website's instructions on how to carry out virtual sit-ins, even though the defendants knew that electronic civil disobedience is unlawful.[334] More importantly, an email from the group to its supporters urging them to "participate in electronic civil disobedience at a specified time . . . encouraged and compelled an imminent, unlawful act that was not only likely to occur, but provided the schedule by which the unlawful act was to occur."[335]

Upon examining these three cases, it is understandable that the true threats doctrine has been used more successfully by prosecutors than incitement; its requirements are easier to satisfy. As a result of these easier requirements, cases that appear to be incitement have repeatedly been

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[329] United States v. Fullmer, 584 F.3d 132, 156 (3d Cir. 2009).
[330] *Id.* at 163.
[331] *Id.*
[332] *Id.*
[333] *Id.* at 155.
[334] *Id.*
[335] *Id.* (The specific time set for the protest is also applicable to the imminence standard for incitement).

analyzed under the true threats doctrine so that even communications that are directed towards third parties to commit violence, which seems like quintessential incitement, are instead treated like communications—threats—towards the victims.[336]

The largest difference between incitement and true threats, and the one that makes true threats easier to apply, is that true threats have no imminence requirement. For example, in *Planned Parenthood*, the Ninth Circuit did not examine the timing of the issuance of the posters or the Nuremburg website. Similarly, Turner's blog posts did not discuss any timeframe for his threats.[337] However, other courts have imputed an imminence requirement into true threats by requiring that the threat be "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."[338] This imminence standard further muddies the distinction between true threats and incitement.

Indeed, the Tenth Circuit has explicitly refused to make a firm distinction between true threats and incitement, stating that "no court has suggested that the categories of unprotected speech are completely distinct from one another."[339] Therefore, according to the Tenth Circuit, even if someone's statements are clearly made intending to incite others to commit violence on the speaker's behalf, the statements can also be true threats and therefore not subject to *Brandenburg*'s requirements.[340] Marc Rohr has encouraged the overlap of incitement of threatening words, arguing that "threat" should not be interpreted so "woodenly" so that someone must merely make their threats sound like exhortations in order to have their threats protected by *Brandenburg*.[341]

The true threats standard also does not dictate how the defendant's intent or knowledge should be determined. More specifically, the Supreme Court has continued to fail to provide an intent standard for true threats,

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[336] Pew, *supra* note 188, at 1094–95.

[337] United States v. Turner, 720 F.3d 411, 421–22 (2d Cir. 2013).

[338] Volokh, *supra* note 226, at 1005–06 (However, Volokh argues that "presumably a threat to do something specific at some time in the future (e.g., 'if you vote to form a union, we'll fire you,' even when the vote won't be for some months) would still be punishable.").

[339] United States v. Wheeler, 776 F.3d 736, 745 (10th Cir. 2015).

[340] *Id*. at 744–45

[341] Marc Rohr, *"Threatening" Speech: The Thin Line Between Implicit Threats, Solicitation, and Advocacy of Crime*, 13 RUTGERS J.L. & PUB. POL'Y 150, 166–67 (2015).

and Circuit courts have struggled with whether true threats require an objective or subjective intent standard.[342]

The Supreme Court's most recent true threats case, *Elonis v. United States*, did little to clarify the intent requirements for threats.[343] *Elonis* involved a man cyber-stalking and threatening a co-worker and his estranged wife (through her sister's Facebook page), leading to his conviction under a federal threats statute.[344] The Supreme Court refused to address the case's First Amendment issues, instead reversing Elonis' conviction on the grounds that the statute impermissibly failed to specify a *mens rea* requirement for criminal threats.[345] Consequently, all *Elonis* has done is create a requirement for some kind of intent but no guidance on what that intent should be or whether it should be subjective or objectively determined. Indeed, the Supreme Court has not stated whether actual intent or knowledge is sufficient.[346]

In the absence of such guidance, some courts have placed an objective standard on the true threats doctrine: "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault."[347] Scholars have argued that the objective standard is most appropriate because it focuses on the target and whether they were reasonably afraid, regardless of what the speaker subjectively intended.[348]

However, Justice O'Connor's definition of true threats in *Virginia v. Black* appears to require a subjective intent: "True threats . . . encompass 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. The speaker need not actually intend to carry out the threat."[349] Since *Black*, several courts have used a subjective standard or "actual intent" standard: whether "the speaker or author intended the speech as a threat of bodily harm."[350]

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[342] Jessica L. Opila, *How Elonis Failed to Clarify the Analysis of "True Threats" in Social Media Cases and the Subsequent Need for Congressional Response*, 24 MICH. TELECOMM. & TECH. L. REV. 95, 103–04 (2017).

[343] Elonis v. United States, 135 S. Ct. 2001, 2012 (2015).

[344] *Id.*

[345] *Id.*

[346] Volokh, *supra* note 226, at 1005.

[347] D.C. v. R.R., 182 Cal. App.4th 1190, 1213, *as modified* (Apr. 8, 2010) (quoting State v. DeLoreto, 827 A.2d 671, 679–681 (2003)).

[348] Rohr, *supra* note 341, at 153–54.

[349] *Id.*

[350] *D.C.*, 182 Cal. App.4th at 1213 (citing Fogel v. Collins, 531 F.3d 824, 831–833 (2008); United States v. Parr, 545 F.3d 491, 498–502 (2008)).

To determine subjective intent, courts look at context, what the target "knew about the defendant. . . . especially aspects of a defendant's background that have a bearing on whether his statements might reasonably be interpreted as a threat."[351] Indeed, context arguably matters no matter which kind of intent is used. According to Marc Rohr, true threats "need not be explicit."[352] Moreover, if true threats are essentially interchangeable with incitement, then the context factors used by courts in true threats cases should apply to incitement cases as well.

The true threats doctrine presents a useful tool for understanding the intent of the organizers of the Unite the Right rally. First, many of the true threat cases involved webpages that advocated for violence against a group of people and provide an analogy for the web activity that took place before the Unite the Rights rally. Although the organizers did not doxx specific targets, they did explicitly encourage violence against anticipated protestors.[353] Second, the organizers also created a general us vs. them mentality by placing the rally in the context of a larger war against other races and religion, which also elevated the perceived importance of the upcoming "battle."[354] Finally, using the subjective standard, considering the well-documented history of violence at white supremacist rallies, a rational person would have taken the rally discussions as a threat.

Moreover, using an objective standard, the actual intent of the organizers is evident in the violence they encouraged through their various messages to their followers. As the General Orders show, the organizers anticipated a fight at the rally and intended to be prepared to push back against protestors.[355] Several comments posted in the days leading to the rally indicate that followers were excited to beat up protestors and people of color.[356] Some even talked about running over protestors.[357] The organizers' intent is even more obvious in their celebration of the violence that occurred, including the murder of Heather Heyer.[358] No matter which

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[351] *D.C.*, 182 Cal. App.4th at 1213.

[352] Rohr, *supra* note 341, at 155.

[353] Complaint, *supra* note 34, ¶¶ 96, 98. However, there is some evidence that the Charlottesville organizers did have a "hit list" of local police and politicians. *See It's Going Down, What You Need to Know About the Nazi Rally in Charlottesville, VA*, IT'S GOING DOWN (Aug. 4, 2017), https://itsgoingdown.org/need-know-nazi-rally-charlottesville-va/ [https://perma.cc/KGY4-R5GK].

[354] Complaint, *supra* note 34, ¶ 98.

[355] *Operation Unite the Right Charlottesville 2.0*, *supra* note 162.

[356] Complaint, *supra* note 34, ¶¶ 111–12, 115.

[357] *Id*. ¶ 239.

[358] *Id*. ¶¶ 264, 266–69, 271–72.

standard is used, the context surrounding the organization of the Charlottesville rally shows that the organizers intended to incite their followers to commit violence.

VII. CONCLUSION

Although today's modern "mob" differs immensely from its historical counterparts in terms of organization and technology, the incendiary atmosphere that was the focus of *Brandenburg* and the Court's corresponding fear of imminent violence has not changed since the days of the Civil Rights Movement. Trump and Unite the Right are not anomalies, divorced from the past; they are the natural evolution of modern-day mobs and are just as (if not more) dangerous. The First Amendment does protect offensive speech and unpopular political opinions but it does not overcome the need for protecting public safety. Although largely dormant for some time, violent rallies have recently become more commonplace and the doctrine of incitement should therefore be revitalized and modernized for rallies that take place in the era of 24-hour media coverage and social media echo chambers.

Brandenburg's definition of incitement, though left largely untouched for the past several decades, has left too many uncertainties as to what incitement means and has allowed courts to view incendiary speech too narrowly and with too little a focus on the speech's context. Focusing on imminence, call to action, and intent, this article shows that courts can be flexible when looking at *Brandenburg*'s requirements. More specifically, the speaker's words matter but to truly understand them, the circumstances surrounding their utterance must be fully considered. Failure to do so will only give a shield to those who seek to gain publicity and notoriety through violence of their followers. The First Amendment was never intended to protect such behavior.