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PLANNED PARENTHOOD v. ACLA

Are the Nuremberg Files and "Wanted" Posters Protected Advocacy or Unprotected Threat?

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After three abortion doctors who appeared on "Wanted"-style posters issued by antiabortion activists were murdered, other abortion doctors were subsequently identified in similar posters and on the "Nuremberg Files" website. In addition to including each doctor's name and address, the posters and website urged that the doctors be persuaded not to perform abortions or that they be prosecuted for "war crimes" at some future time when abortion would be against the law.

In *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, the newly depicted doctors brought suit against the antiabortion advocates who issued the posters and created the website's content. The doctors claimed that, in the context of the prior murders and other violence against abortion providers, the new posters and the website were threats against their lives. A Portland, Oregon, jury agreed. Concluding that "a reasonable person would foresee" that the posters and website "would be interpreted . . . as a serious expression of intent to harm or assault,"[1] the jury awarded $107 million to the plaintiffs in February 1999. Shortly thereafter, U.S. District Judge Robert E. Jones reached a similar conclusion and entered a permanent injunction prohibiting the defendants from disseminating (or even possessing) portions of the website and the posters.[2]

In March 2001, in an opinion by Judge Alex Kozinski, a Ninth Circuit panel reversed, directing the district court to enter judgment for the defendants.[3] Then, on May 16, 2002, a sharply divided en banc panel of eleven Ninth Circuit judges reversed the panel's decision in a six-to-five vote.[4] The majority of the limited en banc panel agreed with the district court that the posters and certain portions of the website constituted "true threats" that could, without offending the First Amendment, both support an award of civil damages and be the subject of an injunction prohibiting future threats.[5] Apparently concerned by the magnitude of the damages award, however, the court remanded the punitive damages portion of the judgment to the district court for further consideration of whether an award of that size offended "due process."[6]

A motion for the full Ninth Circuit to rehear the case en banc was denied on July 10, 2002.[7] That order also includes amendments by Judge Kozinski to his earlier opinion, further refining his dissent from the limited en banc panel majority ruling.[8] A petition to the Supreme Court is expected.

Although other cases have considered threats in the form of posters depicting persons identified as being "Wanted for Crimes Against Humanity"[9] or have otherwise addressed threats issued publicly,[10] this case presents a particularly thorny set of issues. The majority opinion and the three dissenting opinions offer more than 100 pages of passionate debate about the proper framework for analysis.

Is it a case about threats, or is it properly measured by the Supreme Court's jurisprudence on incitement to lawless action? Does the category of "true threats" that are unprotected by the First Amendment include threats that unnamed, and possibly unknown, third parties may commit future acts of violence? Can context strip expression that is, on its face, core political speech from First Amendment protection? Does it make a difference in the constitutional calculus that a purported threat is made in public, for everyone, including law enforcement officers, to hear as part of a presumptively protected political debate? Finally, how do other areas of First Amendment jurisprudence properly inform the constitutional inquiry at hand?

In the end, just as the labor, civil

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rights, and antiwar movements challenged courts to apply the First Amendment to strident advocacy concerning highly controversial social issues, resulting in some of our most cherished First Amendment decisions,[11] this case illustrates how the intense public controversy over legalized abortion continues to test the limits of First Amendment jurisprudence and to press the boundaries of permissible forms of expression.[12]

Background and Context

Because both the majority and dissenters agreed that the context in which challenged speech is disseminated is properly considered, the background is discussed here in some detail. In early 1993, antiabortion advocates published a "Wanted"-style poster, which included Dr. David Gunn's name, photograph, address, and other personal information.[13] On March 10, 1993, Michael Griffin shot and killed Dr. Gunn as he entered an abortion clinic.[14] On August 21, 1993, Dr. George Patterson, whose name and office location had earlier been published on a "Wanted"-style poster, was also shot to death.[15] In July 1994, Dr. John Bayard Britton was murdered by Paul Hill after being named on a "Wanted"-style poster that Hill helped to prepare.[16] Dr. Britton's volunteer escort, James Barrett, was also killed, and Barrett's wife was injured.[17] Hill was convicted for the murders of Britton and Barrett and the injury to Barrett's wife.[18] Despite these crimes, Judge Kozinski emphasized in his amended dissent that "for years, hundreds of other posters circulated, condemning particular doctors with no violence ensuing."[19]

The text of the "Wanted" posters contained no language overtly threatening to the murdered doctors and no language overtly imploring anyone to murder or harm them. And, as Judge Kozinski observed, "there is no allegation that any of the posters in this case disclosed private information improperly obtained."[20] The poster denouncing Dr. Gunn's practice of performing abortions described him "as an abortionist" and called for action "by prayer and fasting, by writing and calling him and sharing a willingness to help him leave his profession, and by asking him to stop doing abortions."[21] It described him as "armed and very dangerous" to "defenseless unborn babies."[22] The posters concerning Dr. Britton charged him with "crimes against humanity," asserted that he is "considered armed and extremely dangerous to women and children," and urged supporters to "[p]ray that he is soon apprehended by the love of Jesus!!!"[23]

Frustrated with Operation Rescue's condemnation of violence against the three murdered physicians and others, the individual defendants, "who espoused a 'pro-force' point of view, split off to form" the American Coalition of Life Activists (ACLA) and have publicly advocated violence against abortion providers ever since.[24] After the murders of at least two of the doctors, a group of the defendants issued a statement urging the acquittal of the men charged with the crime on a "justifiable homicide theory."[25] One of the defendants, Advocates for Life Ministries, publishes a magazine that "advocates the use of force to oppose the delivery of abortion services" and published a book by another individual defendant entitled *A Time to Kill* that it described as "show[ing] the connection between the [justifiable homicide] position and clinic destruction."[26]

When ACLA and another individual defendant prepared a "Contract on the Abortion Industry," the en banc Ninth Circuit found that they had "deliberately chosen that language to allude to mafia hit contracts."[27] In a televised interview, one of the defendants said that "[t]here are times when there is justified killing. We hear of terminating pregnancies. . . . If we are going to speak of terminating pregnancies, we can speak of terminating abortionists."[28] Another defendant stated that it would be "justifiable to kill the president and the Justices on the U.S. Supreme Court who support abortion rights" and that it "is acceptable to shoot a pregnant abortion provider because 'if you have to sacrifice an innocent to save many, it would be alright.' "[29]

Several of the defendants not only advocated violence, but have themselves been convicted of or enjoined from violent or threatening acts against abortion providers. Defendant Bray "had been convicted and served four years in federal prison for conspiracy to bomb seven abortion facilities."[30] During a protest at a clinic where two of the plaintiffs worked, defendant Burnett had attempted "to grab the ankles and trip" one of the clinic's directors, who was, at the time, "seven months pregnant."[31] He was subsequently videotaped violating an order enjoining him to stay away from a clinic.[32] Defendant Foreman was found by a federal judge to have "shoved, and slashed or pushed" a doctor who performs abortions in California.[33] Defendant McMillan was previously found to have made threats of violence toward abortion clinic workers,[34] and, in the *Planned Parenthood* case, "invoked the Fifth Amendment when asked if he had ever damaged an abortion clinic."[35]

Such conduct was undertaken in a context of a larger campaign of threats and violence against abortion providers that led to the passage of the statute under which plaintiffs brought suit, the Freedom of Access to Clinic Entrances Act of 1994 (FACE).[36] In enacting the legislation, which prohibits any "threat of force [that] intimidates or interferes with or attempts [to] intimidate or interfere with . . . obtaining or providing reproductive health services,"[37] Congress found "that abortion opponents had committed at least 36 bombings, 81 arsons, 131 death threats, 84 assaults, 2 kidnappings, 327 clinic invasions, 71 chemical attacks, and [one] murder."[38]

As an example of this broader context of violence against abortion providers, Shelley Shannon, described as "a close friend and associate of the defendants," shot and wounded Dr. George Tiller two days before the murder of Dr. Patterson, and also "pleaded guilty to arson and butyric acid attacks on eight abortion facilities."[39]

The Alleged Threats

In January 1995, ACLA presented another "Wanted"-style poster, this time with the word "Guilty" at the top. The poster identified thirteen doctors, including three who were individual plaintiffs in *Planned Parenthood.* Describing these thirteen doctors as the "Deadly Dozen," the poster offered a $5,000 reward "for information leading to arrest, conviction and revocation of [their] license to practice medicine."[40] The next day, the FBI offered protection to the doctors identified on the poster, advising them to wear bulletproof vests and to take other security precautions for themselves and their families.[41] A similar poster featuring Dr. Robert Crist, the fourth individual plaintiff, was issued in August 1995 at a public ACLA event in St. Louis; it offered a $500 reward to "any ACLA organiza-

tion that successfully persuades Crist to turn from his child killing through activities within ACLA guidelines."[42]

In January 1996, ACLA unveiled the Nuremberg Files, which were later posted on the Internet. The website lists doctors who perform abortions and, in separate sections, others who are "abortion rights supporters."[43] The Nuremberg Files' list of those against whom justice would later be sought in "war crimes"-style tribunals included six current members of the Supreme Court, Bill Clinton, Al Gore, Janet Reno, Jack Kevorkian, C. Everett Koop, Mary Tyler Moore, Whoopi Goldberg, and, despite the fact that he had dissented in *Roe v. Wade*, the late Justice Byron White.[44] The four individual doctor-plaintiffs are listed in the "abortionists" section of the website. Doctors depicted in this section are, according to the legend, listed in black if they are "working," gray if they are "wounded," and with their names stricken through if they are a "fatality."[45] The names of Gunn, Patterson, and Britton are struck through.[46] Shortly after the October 1998 murder of Dr. Bernard Slepian, a doctor who performed abortions, his name appeared struck through on the Nuremberg Files website.[47]

Both the trial and appellate courts recited evidence of the defendants' awareness that, in light of the prior murders following the display of posters and the general context of violence, the issuance of subsequent posters caused doctors to be fearful of continuing to perform abortions. Defendant Advocates for Life Ministries publicly contended that the Gunn murder had "sent shock waves of fear through the ranks of abortion providers across the country" and that "many . . . doctors quit out of fear for their lives."[48] The trial court found that several other doctors, who were the subject of "Wanted"- or "Guilty"-style posters, stopped performing abortions because they "feared for [their] personal security and that of [their] famil[ies]."[49] One of the individual defendants stated that the two things abortion providers fear most are "being sued for malpractice and having their picture put on a poster."[50] Another defendant testified, "if I was an abortionist, I would be afraid."[51] Indeed, one of the defendants was once himself the subject of a "Wanted"-style poster and maintains it in a file labeled "death threat."[52]

The Ninth Circuit Decision

In a lengthy opinion by Judge Pamela Rymer, six of the eleven members of the en banc panel concluded that, in the context of murders of doctors who had been identified on similar posters and a pattern of violence against abortion providers, the posters at issue and the portions of the website identifying the doctors constituted "true threats" that were both unprotected by the First Amendment and properly redressed under the FACE statute.[53] FACE affords a private right of action against someone who:

> by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.[54]

FACE defines "reproductive health services" as any "medical, surgical, counseling, or referral services relating to the human reproductive system," and expressly includes services related to either "pregnancy *or* the termination of a pregnancy."[55] Accordingly, the statute has repeatedly withstood facial challenges to its constitutionality on the grounds that it improperly penalizes only one side in the debate over legalized abortion.[56]

FACE expressly provides that "[n]othing in this section shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution."[57] Although FACE does not define what constitutes a "threat," it provides that the "term 'intimidate' means to place a person in reasonable apprehension of bodily harm to him- or herself or to another."[58] In applying this statute, therefore, the Ninth Circuit was required as a matter of both constitutional law and statutory interpretation to evaluate whether the defendants' speech constituted a "true threat."

The en banc majority concluded that "the poster format itself had acquired currency as a death threat for abortion providers," a message that "goes well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too."[59] Applying an objective standard, the majority found that "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."[60] Here, the majority held, the "posters are a true threat, because, like Ryder trucks [a reference to another threat against abortion providers that had invoked the Oklahoma City bombing][61] or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message."[62] Thus, "no one putting" these doctors on this type of poster "could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed."[63] Although the court recognized that ACLA is otherwise entitled to "stak[e] out a position for debate," the issuance of the posters meant that these doctors "can no longer participate in the debate."[64] In this context, therefore, "ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head."[65]

Judge Kozinski filed a dissenting opinion, joined by four other judges, in which he returned to many of the themes that had animated his initial panel decision. Specifically, to protect against a speaker being punished for using strong language in the context of a political movement that has included some elements of violence, and applying the Supreme Court's incitement jurisprudence to speech that in his view was simply urging *others* to act, Judge Kozinski would have required proof, which he did not find here, that the posters and website threatened harm by the speakers themselves or someone within their control.

Judge Martha Berzon also dissented, joined in part by the other dissenting judges, primarily on the additional ground that she would have required a showing that the defendants acted with the subjective intent to threaten the plaintiffs (in addition to the objective test applied by the majority) and that the threat itself be "unequivocal."

Judge Reinhardt also filed a brief dissent emphasizing that he believed that the political and public nature of the statements at issue placed them in a different category than privately communicated threats and, as a result, warranted heightened scrutiny.

Decision May Chill Protected Speech

This article argues that the en banc majority properly analyzed this case as a threats case (rather than as one involving incitement) and properly remanded the punitive damages award, but concludes that its opinion is not sufficiently cognizant of the protections afforded by the First Amendment in several key respects. Specifically, the majority's refusal to require, as Judge Berzon would have, proof that the defendant subjectively intended to threaten the plaintiff (in addition to the objective test the majority endorsed) will both chill protected speech and result in punishment for speech that should be protected—particularly in circumstances where, as here, the alleged message is supplied by context rather than from the express language of the speech.

Against this backdrop, the *Planned Parenthood* action is properly analyzed principally as a threats case.

By the same token, this article also argues that the limitation that Judge Kozinski and the other dissenters would impose—i.e., that speech is an unprotected threat only when it threatens harm by the speaker or someone in his or her control—results from a flawed interpretation of the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*[66] and is in any event unnecessary so long as the plaintiff is required to prove that the defendant both objectively *and* subjectively intended to threaten the plaintiff.

Threats or Incitement?

Both sides of the debate, and commentators on the case, have struggled over how to categorize it, recognizing a tension between true threats, on the one hand, and advocacy that is protected unless it incites imminent lawless action, on the other. For some, this case is about threats purportedly made to the doctors by virulent foes of abortion, while for others it is viewed through the prism of the incitement cases because the violence allegedly threatened is by unknown third parties ostensibly urged into action by the posters and website.[67]

A return to first principles informs the proper application of these competing models, as well as many of the other debated legal issues addressed in the court's four opinions. In *Brandenburg v. Ohio*,[68] the U.S. Supreme Court held that speech advocating violence—there, a Ku Klux Klan member's statement "there might have to be some revengence taken"—was constitutionally protected unless it was directed to and likely to incite imminent lawless action.

In those narrow circumstances where speech leading to violence falls outside the First Amendment, it is because we seek to prevent speech so harmful that it *causes* the listener to commit actual violence against a third party. As a result, the "imminence" requirement is the cornerstone of the constitutional protection: Substantially more exacting than proof of causation required by the tort law, the "imminence" requirement proceeds from the premise that listeners can and should engage in sober, independent reflection about expression they receive and that they have the free will to make a considered judgment about whether to act based on the merits of the position advocated.[69] Only where the speech is disseminated in a context and under circumstances that overcome the listener's rational thought processes and produces a reflexive, visceral, and knee-jerk response can the speaker be punished or held liable for speech exhorting violence or other lawless action consistent with the First Amendment.

Thus, when a listener has an opportunity for independent reflection about speech that teaches or advocates violence and then makes a reasoned decision to follow that exhortation and commit a violent act, it is the listener who controls his actions, not the speaker. In her *Planned Parenthood* dissent, Judge Berzon eloquently explains this conclusion and the reason why "imminence" is required to prove incitement, but not to establish a threat. There "is a difference for speech-protective purposes" between a threat of violence

> and a statement encouraging or advocating that someone else do it. The latter will result in harmful action only if someone else is persuaded by the advocacy. If there is adequate time for that person to reflect, any harm will be due to another's considered act.[70]

In the last analysis, *Brandenburg* and its progeny[71] reflect a deep skepticism toward the notion that speech can cause a listener to act lawlessly toward a third party and, as such, honors not only freedom of speech, but also freedom of thought by autonomous listeners.[72]

While the incitement doctrine is concerned with speech that causes a listener to commit actual violence against third parties, "threats" jurisprudence is not principally concerned with actual violence at all. Rather, the prohibition against threats primarily seeks to prevent fear—the reasonable apprehension of violence—separate and apart from any actual violence.[73] In addition, even if the speaker has no intention of actually carrying out a violent act, a true threat may be constitutionally restricted or punished because it can reasonably disrupt the recipient's activities or cause the recipient to take additional steps to protect himself.[74]

The threat must be more than a political statement, as illustrated by *Watts v. United States*,[75] in which the Supreme Court overturned the conviction of an antiwar protester who stated at a rally that "[i]f they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." The Court found that Watts had engaged in a "very crude offensive method of stating a political opposition to the President," but had not uttered a "true threat."[76]

Just as the incitement doctrine honors the independent thought of the listener and only comes into play when a visceral, reflexive response is substituted for a considered course of action vis-à-vis a third party, the threats doctrine reflects the notion that a threat, by virtue of placing the recipient in fear, may inhibit the listener's capacity for fully autonomous decision making based on the merits of a particular position. Because the threat is completed once it is communicated to the recipient, without regard to whether it is likely to *cause* the listener to take any action, imminence is not a requirement. Indeed, a credible threat—for example, "If you ever come on my property again, I'll kill you"—may legitimately place a listener in fear as much today as it does a year from now. As a result, with the exception of an early Second Circuit decision (*United States v. Kelner*[77]), no other circuit has required imminence to establish a true threat.

Against this backdrop, the *Planned Parenthood* action is properly analyzed principally as a threats case, although, as discussed below, the teachings of *Brandenburg* also have a place in the analysis. The focus of the plaintiffs' claims is the fear they contend the defendants inflicted upon them. It is not a case in which the plaintiffs or the court are attempting to assess whether the challenged speech (the two posters and the website) actually led to violence in a manner that can constitutionally be punished, as in the incitement cases. As the majority explained, if "ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected"; however, "while advocating violence is protected, threatening a person with violence is not."[78]

Indeed, if the posters and website ultimately were to lead to violence against an abortion doctor, his or her survivors could prosecute a wrongful death action against these defendants only if they demonstrated that the murder resulted from an "imminent" reflexive, knee-jerk reaction of the kind contemplated by the incitement cases. However, under a threats theory, the abortion doctors need only to have been placed in reasonable fear that they would be the victim of violence, no matter how imminent.

The Analogy to *NAACP v. Claiborne Hardware Co.*

Illustrating this tension between threats and incitement is the Supreme Court's decision in *NAACP v. Claiborne Hardware Co.*,[79] which both the majority and the dissent in *Planned Parenthood* claim in support of their respective conclusions. In *Claiborne Hardware*, a group of white merchants in Claiborne County, Mississippi, sued for damages allegedly caused by African-American residents who boycotted their businesses to protest inferior treatment by both white merchants and governmental officials. In a unanimous ruling, the Supreme Court reversed the trial court's entry of an award of monetary damages and issuance of an injunction, both of which had been affirmed by the Mississippi Supreme Court. In so holding, the Court reaffirmed that boycotts, as concerted action, coupled with peaceful picketing, leafleting, and the like are unequivocally protected by the First Amendment.[80]

But the plaintiffs in *Claiborne Hardware* also alleged that the black citizens of the county had honored the boycott because the field secretary for the Mississippi chapter of the NAACP, Charles Evers, instructed his subordinates to monitor their compliance, disseminated the names of those not participating in the boycott at NAACP meetings and in a newsletter, and included threatening statements in his speeches about what would happen to those who continued to trade with white-owned businesses. Evers was alleged, for example, to have stated in one speech that "any 'Uncle Toms' who broke the boycott would 'have their necks broken' by their own people."[81] While emphasizing that "[t]he First Amendment does not protect violence," and that "[n]o federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and *by threats of violence*," the Court applied the exacting standards of *Brandenburg* and *Hess v. Indiana* to conclude that Evers's speeches, viewed in their entirety and in context, had not incited imminent lawless action.[82]

As he had in his opinion for the initial panel, Judge Kozinski's dissent in *Planned Parenthood* would have found *Claiborne Hardware* dispositive of this action.[83] As he explained in that earlier opinion, because many political movements "have had their violent fringes," and "much of what was said even by nonviolent participants in these movements acquired a tinge of menace," it is improper for the

> defendants' statements [to be] infused with a violent meaning, at least in part, because of the actions of others. If this were a permissible inference, it could have a highly chilling effect on public debate on any cause where somebody, somewhere has committed a violent act in connection with that cause. A party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment.[84]

As a result, Judge Kozinski would have held that, "in order for [a] statement to be a threat, it must send the message that the speakers themselves, or individuals acting in concert with them, will engage in physical violence."[85] As he explained:

> From the point of view of the victims, it makes little difference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger. But it makes a difference for the purpose of the First Amendment.[86]

In a similar vein, importing a requirement from the Second Circuit's decision in *United States v. Kelner*,[87] Judge Berzon would have found that no true threat had been made in *Planned Parenthood* because the prior murders were not committed by any of *these* defendants or because *these* defendants had not "put out the earlier posters."[88] For its part, however, the majority disagreed that *Claiborne Hardware* "is closely analogous," even while conceding that, unlike the speeches by Evers, the posters and website at issue here "contain no language that is a threat."[89]

Although the dissenters are justifiably concerned that associational rights not be infringed by holding everyone in a group responsible for the misconduct of a few, their reliance on *Claiborne Hardware* otherwise has the quality of trying to fit a square peg in a round hole. As an initial matter, the Supreme Court, while enumerating ten unlawful acts over a six-year period, ranging in degree from firing shots into a house and beating a man to damaging property (tire slashing and windshield smashing) to making a threatening phone call and trampling a flower garden,[90] appears to have concluded that Evers's statements did not rise to the level of true threats or incitement in part because the overall context of the boycott was decidedly nonviolent.

While conceding that "there is no question that acts of violence occurred," the Court acknowledged that "the extent and significance of the violence in this case are vigorously disputed by the parties."[91] Characterizing them as "isolated acts of violence" that took place as much as six years before some of the business losses claimed by the merchants, the Court appears to have discounted what it described as "the ephemeral consequences of relatively few violent acts"[92] in assessing the seriousness of the handful of threatening statements made by Evers. And, it reached this conclusion even though, as Judge Kozinski points out, Evers continued to make those statements after violent acts had been committed by others.[93]

Thus, it appears that the Court

viewed Evers's statements, taken in the context of a nonviolent protest movement and as extemporaneous speech, not as threats of violence, but as "threats of vilification or social ostracism," that are "constitutionally protected and beyond the reach of a damages award." [94] That conclusion is fortified by the Supreme Court's efforts in *Claiborne Hardware* to distinguish the threats and "isolated" violence before it from the facts presented by *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, in which a more pervasive pattern of violence led the Court to conclude that an "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force."[95] The majority in *Planned Parenthood* similarly read *Claiborne Hardware* in this way:

> [t]o the extent there was any intimidating overtone, Evers' rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. . . . For all that appears, "the break your neck" comments were hyperbolic vernacular, as evidenced by the fact that his comments were uniformly not taken by listeners as a serious threat.[96]

Although not expressly stated, the *Planned Parenthood* majority may well have viewed the nature and extent of prior violence before it as more akin to the facts of *Milk Wagon Drivers Union* than those presented by *Claiborne Hardware*. Moreover, the pattern of threats, violence, and violations of court orders in which the defendants in *Planned Parenthood* have apparently been involved might arguably even satisfy Judge Kozinski's requirement that the threat convey that the maker of the threat, or someone acting in concert with him, will carry out the threatened violence. Nonetheless, while any differences between the nature and extent of violence between *Claiborne Hardware* and *Planned Parenthood* may be a factor in evaluating the context in which a purported threat is communicated and may explain in part the majority's conclusions,[97] such a difference does not squarely address the *Planned Parenthood* dissenters' principal concern that the defendants not be held liable through guilt by association.

In that regard, however, there is another, more fundamental problem with analogizing this case to *Claiborne Hardware*. The plaintiffs in *Claiborne Hardware* were not claiming that they were threatened, even though they were claiming injury that purportedly traced itself back to alleged threats. Rather, *Claiborne Hardware* was brought by third parties claiming economic harm resulting from a boycott. As a result, the Court was focused on actual harm alleged by third parties that resulted from speech, the classic circumstances for incitement (putting aside that incitement cases typically have involved physical injury rather than economic harm). As the *Planned Parenthood* majority observed, *Claiborne Hardware*

> did not arise under a threats statute. The Court had no need to consider whether Evers' statements were true threats of force within the meaning of a threats statute; it held only that his speeches did not incite illegal activity, thus could not have caused business losses and could not be the basis for liability to white merchants.[98]

Had Evers or other civil rights leaders three times singled out members of the African-American community, those statements had been followed by violence against those persons, and Evers similarly identified a fourth person, *that person* might well have a claim that Evers had threatened him. Or, if Evers had thrice singled out specific white business owners, those statements were followed by violence against those business owners or their businesses, and then he similarly identified a fourth business owner, that owner might have a claim that Evers had threatened him. However, when a threat is alleged to *cause* the listener to act *against a third party*, as in the actual facts in *Claiborne Hardware*, while the speaker may be liable to the recipient of the threat for making that threat, the speaker is liable to the third party only if the *Brandenburg* imminence test is satisfied. Absent an imminent, reflexive, visceral reaction, the recipient of a threat is still expected to make a considered judgment not to engage in unlawful conduct against a third party, even if he is legitimately afraid of the consequences if he does not act.

Ultimately, therefore, the *Planned Parenthood* dissenters' logic on this point is flawed. Although liability for violent acts by a few should not be imputed to the whole group, it works no offense to associational rights if an individual *invokes*, either implicitly or explicitly, the prior violence of others, reasonably understanding and intending that as a result his listeners will be placed in fear of serious bodily harm. Whether members of a group can ultimately be held liable for violence or the threat of violence by one of its members is a materially different inquiry than the manner in which a listener is reasonably placed in fear in the first place. Thus, while Judge Kozinski raises a valid concern that "[a] party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment,"[99] the calculus changes if the speaker *intends to invoke* the violence to induce fear in the listener. Thus, if I am able to convince a listener that, unless he does what I want, Tony Soprano and the Jersey mob will harm him, he may reasonably be placed in fear, even if I am in no way acting in concert with Soprano and his crew. In fact, the listener may well experience more substantial apprehension of harm from such a threat than if I threatened to harm him myself. This conclusion is consistent with authorities that recognize that a threat is unprotected speech even if the defendant is unable to carry out his threat, or has no specific intent actually to commit the promised violence.[100]

Similarly, if I receive a letter from an unidentified sender stating, "Seth Berlin, you have three days to live. Put your affairs in order. Kiss your family and loved ones goodbye," and if the context and circumstances reasonably lead me to conclude this is not a joke, it is a threat (assuming that, once the sender is identified, there is proof that he intended this as a threat).[101] This conclusion holds true even where, because the threat is anonymous, it does not express who will carry out the violence. And, if that menacing missive naming me were somehow published anonymously in the newspaper (like, for example, the Unabomber's manifesto) surrounded by protected political rhetoric that might inspire or be taken as urging someone else to harm me, it may still be a threat—even though there is no way to know whether the threat is to be carried out by the sender or someone under his control, or by an unconnected third party. While, to be sure, a threat that violence is to be committed by an anonymous sender or an unaffiliated third party may in certain circumstances make it objectively less reasonable that the listener would be placed in

apprehension of suffering harm or would understand the speaker to be communicating an actual threat, focusing on the person who would carry out the promised violence is, in the last analysis, a dubious method for constitutional line-drawing.

The Real Problem: Subtextual Threats in Protected Expression

Unlike most cases involving threats, the speech at issue in *Planned Parenthood*, on its face, nowhere expressly threatens violence (such as "I'm going to kill you") or even contains speech that is ambiguous on the point ("I'm going to get you"). Even considering that "Wanted"-style posters might imply the message "Wanted: Dead or Alive," and that the Crist poster's encouragement of "activities within ACLA guidelines"[102] might include ACLA's endorsed position of justifiable homicide, the posters are not expressly threatening and their literal content arguably negates such a message.

As Judge Berzon appropriately characterized it, the actual expression at issue here was, "on its face, clearly, indubitably, and quintessentially the kind of communication that is fully protected by the First Amendment."[103] And, as Judge Kozinski observed, even the legend on the "Nuremberg Files" website identifying whether doctors are working, injured, or dead is, while ominous, at most properly viewed as "approval of past violence by others" that "cannot be made illegal consistent with the First Amendment."[104] Nevertheless, this speech, which was on its face core political expression, was also alleged to include a coded message, whether to sympathizers that they should engage in violence against the doctors portrayed or to the doctors that they should be afraid for their safety, or their lives.[105]

This tension between text and subtext is heightened because of the public, politically charged nature of the speech at issue. In that vein, Judge Reinhart would have categorically distinguished between publicly disseminated threats and privately communicated, one-on-one threats, subjecting the former to heightened scrutiny.[106] For him, "[p]olitical speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not."[107]

That the speech was disseminated publicly does not, however, eliminate the real possibility that a threat can be communicated through subtext and context. Apparently for this reason, the *Planned Parenthood* majority found it more significant that the threat was "personally targeted" than that it had been "publicly distributed."[108] In that respect, its analysis proceeds from the same premise as Judge Berzon's apparently does, namely, that even a public statement that is on its face protected expression can communicate a second, more menacing meaning. As the majority explained:

> While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted.[109]

Although the majority appears to understand instinctively that speech can have multiple meanings, it does not begin to address the constitutional dilemma that results. Judge Berzon's is the opinion that comes closest to addressing the core constitutional problem in *Planned Parenthood*, namely, that "one must *disregard* the actual language used and rely on context to *negate* the ordinary meaning of the communication."[110]

Language often acquires layers of meaning and connotation from context and from prior usage. Whether using a fanciful trademark—which can turn Apple or Blackberry from fruits into computer equipment—or a phrase like "Go ahead, make my day"—which now invokes the menace of Dirty Harry—the ability to imbue language with additional meaning generally enhances our ability to communicate and to shade our expression with subtlety and nuance.

In dealing with connotation or other secondary meanings, the First Amendment cautions us to proceed extraordinarily carefully before such speech can constitutionally be punished or restrained. Indeed, as the Supreme Court explained in evaluating the speech at issue in *Claiborne Hardware*, a court faced with a challenge to speech otherwise protected by the First Amendment "must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees."[111]

Coping with layers of meaning is not a First Amendment problem unique to threats. Often, a defamation plaintiff will challenge a publication that contains only true facts, alleging that it nonetheless constitutes libel by implication. Concerned about implied, unintended meaning, courts are increasingly applying a test that asks whether the speaker intended or endorsed the implied meaning, i.e., " 'whether it was reasonably understood by the recipient of the communication to *have been intended* in the defamatory sense.' "[112]

Language often acquires layers of meaning and connotation from context and from prior usage.

Indeed, this test is remarkably similar to the one articulated by the Ninth Circuit for determining whether speech is a true threat: "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."[113]

Although the libel-by-implication test focuses on the listener and the Ninth Circuit's threats test focuses on the speaker, both are objective. As the *Planned Parenthood* majority noted, every circuit now applies an objective standard in the threats context, some based on a "reasonable listener" and others based on the "reasonable speaker." Because both versions "consider context, including the effect of an allegedly threatening statement on the listener," the difference "does not appear to matter much."[114]

But the libel-by-implication paradigm is instructive for additional reasons as well. At least with respect to claims asserted by public officials and public figures, a plaintiff must also demonstrate that the defendants published with "actual malice"—i.e., with the subjective "knowledge that it was false or with reckless disregard of whether it was false or not."[115]

Specifically, as illustrated by cases like *Woods v. Evansville Press Co.*[116] and *Saenz v. Playboy Enterprises*,[117] even where a publication is objectively capable of conveying a defamatory meaning, the speaker will nonetheless be protected by the subjective actual malice requirement where the speaker did not intend the proffered defamatory implication: the publisher cannot have subjective knowledge of probable falsity as to a meaning he did not intend to convey in the first place.

Because even an overt threat may not be intended to be a threat, the subjective intent requirement is worthy of adoption in all threats cases.

As applied to "true threats," a coded threat underlying otherwise constitutionally protected speech similarly should not be subject to liability unless the speaker actually intended it to be a threat. In his concurring opinion in *Rogers v. United States*,[118] Justice Marshall advocated that subjective intent be required for a conviction under the statute criminalizing threats against the president,[119] and a pair of earlier Ninth Circuit cases had read a specific intent requirement into federal statutes criminalizing threats.[120]

Distinguishing the earlier Ninth Circuit authorities,[121] the majority in *Planned Parenthood* expressly rejected such a requirement, which had been advocated by the ACLU Foundation of Oregon, that, in addition to satisfying the objective, speaker-based test, a plaintiff must also demonstrate that the defendants had the subjective intent to "induce fear, intimidation, or terror; namely, that the speaker intended to threaten."[122] Rather, the court held that "[i]t is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat."[123]

In dismissing the concern that would be addressed by also requiring proof of subjective intent, the majority purported to follow prior Ninth Circuit precedent, without giving proper consideration to the fact that its earlier cases involved express threats, or at least ambiguously threatening language, not the type of coded threat at issue here.[124] Although the FACE statute includes a requirement that "the threat of force be made with the intent to intimidate," the majority felt it unnecessary to require a specific intent to threaten violence or commit unlawful acts as a constitutional prerequisite for "true threats" in general because "'an apparently serious threat,'" even if unintended, may cause the fear that the threats doctrine is designed to prevent.[125]

As the libel-by-implication cases illustrate, however, this holding does not afford sufficient protection to speech alleged to be threatening. Because even an overt threat may not be intended to be a threat, the subjective intent requirement is worthy of adoption in all threats cases. It is even more essential, however, where the threat is derived from something other than the literal language of the speech at issue. As Judge Berzon explained, "a purely objective standard for judging the protection accorded such speech would chill speakers from engaging in facially protected public protest speech that some might think, in context, will be understood as a true threat although not intended as such."[126] In addition, because jury determinations concerning a speaker's subjective intent can invite punishment for unpopular speakers, such proof should be by clear and convincing evidence, just as it is in the actual malice context.[127]

While the exacting proof required in First Amendment cases dictates that the *Planned Parenthood* case should have been remanded to require proof by clear and convincing evidence of subjective intent, there is at least a credible argument that such a requirement ultimately would be satisfied. Although the jury was expressly instructed that subjective intent to threaten was not an element in establishing a true threat, it was also instructed that, to violate the FACE statute, the defendants must have acted with the intent to intimidate the plaintiffs.[128] The jury also arguably found an intent to threaten when it awarded substantial punitive damages.[129] In addition, while the trial judge expressly omitted such a subjective intent requirement from his jury charge on what constitutes a "true threat,"[130] when he proceeded to the injunctive relief stage of the proceedings, he held that plaintiffs had satisfied both an objective speaker-based test *and* a subjective intent test in establishing a "true threat."[131]

There is one additional lesson to be gleaned from the libel-by-implication cases. Whether a statement is objectively capable of bearing a defamatory meaning is a threshold issue to be decided by the court; only if it can be is the jury then asked to determine whether the statement in fact conveyed that meaning.[132] So too in a threats case should the judge make a threshold determination of whether a statement can, viewed in its entirety and in the context in which it was disseminated, convey a true threat; only then should the case go to the jury.

The Ninth Circuit's handling of judge-jury issues in *Planned Parenthood* roughly approximates this model, although apparently allowing a little more leeway to send a case to the jury. As the court explained, "[i]f it were clear that neither [the posters or website at issue] was a threat as properly defined, the case should not have gone to the jury"; however, "[i]f there were material facts in dispute or it was not clear that the posters were protected expression instead of true threats, the question of whether the posters and the [website] amount to a 'threat of force' for purposes of the statute was for the trier of fact."[133]

The Remedy

Although the injunction in *Planned Parenthood* is limited to publishing the posters, website, and similar materials with the intent to threaten the plaintiffs, it also impounds all but a single copy (to be kept by counsel) of all these materials. This prohibition on private possession of these materials, which are not true threats unless disseminated, runs afoul of the defendants' separate rights under the First Amendment to determine what they read and what expressive materials they possess.[134]

In addition, Judge Kozinski properly characterizes the magnitude of the jury award as a "crushing liability verdict."[135] While the court vacated the punitive damages award and remanded the issue to the district court to consider whether the award comports with "due process"

as articulated by *BMW of North America, Inc. v. Gore*[136] and *In re Exxon Valdez*,[137] to the extent that the magnitude of the judgment deters the defendants or others from engaging in protected expression, it offends the First Amendment and should be reduced for this reason as well.[138] As Judge Kozinski explained, this "crushing liability verdict" will "have a seriously chilling effect on all manner of speech," including speech by these defendants that is protected by the First Amendment, "and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury."[139]

Conclusion

In sum, the posters and website in *Planned Parenthood* may have constituted true threats if it was both reasonably foreseeable that they would place the listener in apprehension of bodily harm—the objective standard applied by the en banc majority—and subjectively intended to do so. The latter requirement assumes particular importance where, as here, the speech at issue is not on its face threatening, but can only be made so, if at all, by invoking a threatening meaning from the context in which it was disseminated.

This subjective intent requirement properly protects innocent speech uttered in the context of a political movement with a violent fringe, thereby addressing Judge Kozinski's concerns that speakers not be punished through guilt by association, and differentiates that situation from circumstances in which a speaker intends to invoke a context of violence in threatening a listener. Consistent with the First Amendment, moreover, the portion of the injunction prohibiting private possession of these materials must be set aside, and the mammoth punitive damages award should be evaluated in light of the prospect that it will deter protected expression by both these defendants and others.

Endnotes

1. 290 F.3d 1058, 1074 (9th Cir. 2002).
2. 41 F. Supp. 2d 1130 (D. Or. 1999). *See also* 945 F. Supp. 1355 (D. Or. 1996) (denying motions to dismiss); 23 F. Supp. 2d 1182 (D. Or. 1998) (ruling on motions for summary judgment).
3. 244 F.3d 1007 (9th Cir. 2001).
4. *See* Ninth Circuit Rule 35–3.
5. 290 F.3d at 1058.
6. *Id.* at 1086.
7. 2002 WL 1467678 (9th Cir. July 10, 2002).
8. *Id.*
9. United States v. Khorrami, 895 F.2d 1186 (7th Cir. 1990).
10. United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976) (affirming conviction for making a public threat on the life of Yasser Arafat).
11. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Hess v. Indiana, 414 U.S. 105 (1973); Thomas v. Collins, 323 U.S. 516, 530 (1958); Edwards v. South Carolina, 372 U.S. 229 (1963).
12. *See, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000); Schenk v. Pro-Choice Network of Western N.Y., 519 U.S. 357 (1997); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753 (1994); Rust v. Sullivan, 500 U.S. 173 (1991).
13. Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058. 1063 (9th Cir. 2002).
14. *Id.* at 1064.
15. *Id.* In Judge Kozinski's amended dissent, he states that "Dr. Patterson's murder may have been unrelated to abortion: He was killed in what may have been a robbery attempt five months after his poster was issued; the crime is unsolved and plaintiffs' counsel conceded that no evidence ties his murder to any anti-abortion group." 2002 WL 1467678, at *1.
16. 290 F.3d at 1064. Judge Kozinski emphasized in his amended dissent that Dr. Britton was murdered seven months after the poster was issued. 2002 WL 1467678, at *1.
17. 41 F. Supp. 2d 1130, 1135 (D. Or. 1999).
18. *Id. See also* 290 F.3d 1058, 1091 (9th Cir. 2002) (Kozinski, J., dissenting) (Hill "participated in the preparation of the poster depicting a physician, Dr. Britton, and then murdered him"). Prior to the murders, two of the defendants in this case had traveled to Pensacola, Florida, home of the clinic where Dr. Gunn and then Dr. Britton worked, to meet with John Burt, who had prepared the posters of both men, working with Hill on the poster of Dr. Britton. 41 F. Supp. 2d at 1135. *See also* 290 F.3d at 1096 n.8 (Kozinski, J., dissenting) (arguing this is insufficient evidence of concerted action between the defendants and those who carry out violence against abortion doctors).
19. 2002 WL 1467678, at *1.
20. *Id.*
21. 290 F.3d at 1063–64.
22. *Id.* at 1064.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* (alteration in original).
27. *Id.*
28. 41 F. Supp. 2d 1130, 1139 (D. Or. 1999).
29. *Id*. at 1147.
30. *Id.* at 1136.
31. *Id.* at 1140.
32. *Id.*
33. *Id.* at 1145. *See also* United States v. White, 893 F. Supp. 1423 (C.D. Cal. 1995) (discussing actions of Foreman, who was one of White's codefendants and a defendant in *Planned Parenthood*).
34. *See* United States v. McMillan, 946 F. Supp. 1254 (S.D. Miss. 1995).
35. 41 F. Supp. 2d 1130, 1146 (D. Or. 1999).
36. 18 U.S.C. § 248.
37. 18 U.S.C. § 248(a)(1).
38. *McMillan*, 946 F. Supp. at 1261 (citing S. REP. NO. 117, 103d Cong., 1st Sess. 3, 6 (1993); H.R. REP. NO. 306, 103d Cong., 1st Sess. 6–7 (1993)).
39. 41 F. Supp. 2d at 1135. Although Dr. Tiller was included on the Dirty Dozen poster at issue in *Planned Parenthood* (discussed *infra*), he had been murdered long before that poster was issued. *See* 290 F.3d at 1096 n.10 (Kozinski, J., dissenting) (arguing that this sequence of events militates against finding that poster-murder pattern was sufficient context to convert poster into threat).
40. 290 F.3d 1058, 1065 (9th Cir. 2002).
41. *Id.*
42. *Id.*
43. *Id.*
44. 244 F.3d 1007, 1013 n.2 (9th Cir. 2001) .
45. 290 F.3d at 1065.
46. *Id.*
47. *See, e.g.*, Horsley v. Rivera, 292 F.3d 695, 697 (11th Cir. 2002).
48. 290 F.3d 1058, 1065 (9th Cir. 2002).
49. 41 F. Supp. 2d 1130, 1143 (D. Or. 1999).
50. 290 F.3d at 1065; *see also* 41 F. Supp. 2d at 1151.
51. 290 F.3d at 1065–66.
52. 41 F. Supp. 2d at 1143.
53. 18 U.S.C. § 248. The plaintiffs also sued for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962, and conspiracy to violate both FACE and RICO.
54. 18 U.S.C. § 248(a)(1).
55. 18 U.S.C. § 248(e)(5) (emphasis added).
56. *See, e.g.*, United States v. Weslin, 156 F.3d 292 (2d Cir. 1998); American Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995); United States v. Wilson, 154 F.3d 658 (7th Cir. 1998); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995). *See also* 945 F. Supp. 1355 (D. Or. 1996) (district court reached same conclusion in *Planned Parenthood*).
57. 18 U.S.C. § 248(d)(1).
58. 18 U.S.C. § 248(e)(3).

59. 290 F.3d 1058, 1079–80 (9th Cir. 2002).

60. *Id.* at 1074.

61. *See, e.g.*, *id.* at 1078 (citing as a "strikingly similar" example the facts of United States v. Hart, 212 F.3d 1067 (8th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001), in which an antiabortion activist was convicted of violating FACE for parking two Ryder trucks in the driveways of an abortion clinic).

62. *Id.* at 1085.

63. *Id.* at 1078.

64. *Id.*

65. *Id.*

66. 458 U.S. 886 (1982).

67. *See, e.g.*, 290 F.3d at 1092 (Kozinski, J., dissenting) (the "posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs").

68. 395 U.S. 444 (1969) (per curiam).

69. *See, e.g.*, Am. Communications Ass'n v. Douds, 339 U.S. 382, 395 (1950) ("Only, therefore, when force is very likely to follow an utterance before there is a chance for counter-argument to have effect may that utterance be punished or prevented."); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

70. 290 F.3d at 1106. *See also* Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J. L. PUB. POL'Y 283, 321 (2001) ("Even though the Supreme Court has used an imminence requirement to evaluate incitement, the use of such a requirement is not warranted when evaluating threats.").

71. *See, e.g.*, Hess v. Indiana, 414 U.S. 105 (1973) (statement that "We'll take the f—cking street later" is protected speech not incitement to imminent lawless action).

72. *See generally* KENT GREENAWALT, SPEECH, CRIME AND THE USES OF LANGUAGE (1989).

73. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (threats are outside of the First Amendment's ambit because they "protect[ ] individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur").

74. *See, e.g.*, Rogers v. United States, 422 U.S. 35, 46–47 (1975) (Marshall, J., concurring) (threat on president may be prohibited not because it places the president in fear but because, even if there is no intention to carry out the threat, it may "restrict the [p]resident's movements and require a reaction from those charged with protecting" him).

75. 394 U.S. 705, 706 (1969) (per curiam).

76. *Id.* at 708. *Accord* Rankin v. McPherson, 483 U.S. 378 (1987) (upholding government employee's right to say, after failed assassination attempt on President Reagan, " 'if they go for him again, I hope they get him' ").

77. 534 F.2d 1020, 1027 (2d Cir. 1976) (requiring that, to be punished, a threat must be "so unequivocal, unconditional, *immediate* and specific as to the person threatened, as to convey a gravity of purpose and *imminent* prospect of execution") (emphasis added).

78. 290 F.3d 1058, 1072 (9th Cir. 2002).

79. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

80. *Id.* at 907–12.

81. *Id.* at 900 n.28. *See also id.* at 902 ("Evers stated that boycott violators would be 'disciplined' by their own people and warned that the Sheriff could not sleep with boycott violators at night."); *id.* ("Evers stated: 'If we catch any of you going in any of them racist stores, we're gonna break your damn neck.' ").

82. *Id.* at 916, 927–28 (emphasis added). *See also* 290 F.3d at 1095 (Kozinski, J., dissenting) (even when speech "*expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals").

83. *Id.* at 1092 (the court's holding "contradicts the central holding of *Claiborne Hardware*").

84. 244 F.3d 1007, 1014, 1018 (9th Cir. 2001). *See also Claiborne Hardware*, 458 U.S. at 918–19 (the First Amendment "restricts the ability of the State to impose liability on an individual solely because of his association with another"); *id.* at 925–26 ("mere association with [a] group—absent a specific intent to further an unlawful aim embraced by that group—is an insufficient predicate for liability"); Scales v. United States, 367 U.S. 203, 229 (1961) (a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired"); Noto v. United States, 367 U.S. 290, 299–300 (1961) (if specific intent to "resort to violence" is not established, "there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutional protected purposes, because of other and unprotected purposes which he does not necessarily share").

85. 290 F.3d 1058, 1091 (9th Cir. 2002).

86. *Id.* at 1092.

87. *Id.* at 1106–07 (citing United States v. Kelner, 534 F.2d 1020 (2d Cir. 1976)).

88. *Id.* at 1110.

89. *Id.* at 1072.

90. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 904–06 (1982).

91. *Id.* at 916.

92. *Id.* at 923, 933.

93. 290 F.3d 1058, 1108 & n.9 (9th Cir. 2002) (citing *Claiborne Hardware*, 458 U.S. at 900 n.28, 902).

94. 458 U.S. at 926. *See also id.* at 921 (to the extent that the judgment below "rests on the ground that 'many' black citizens were 'intimidated' by 'threats' of 'social ostracism, vilification, and traduction,' it is flatly inconsistent with the First Amendment").

95. 312 U.S. 287, 293 (1941).

96. 290 F.3d at 1073–74.

97. *See, e.g.*, *id.*

98. *Id.* at 1073.

99. 244 F.3d 1007, 1018 (9th Cir. 2001).

100. *See, e.g.*, United States v. Kelner, 534 F.2d 1020, 1023 (2d Cir. 1976) (threat to assassinate Yasser Arafat on visit to United Nations still a threat despite lack of intent or ability to carry out threatened action); United States v. Orozco-Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990) (threatening statement to INS agent while defendant was handcuffed still held to be a true threat).

101. *See, e.g.*, United States v. Viefhaus, 168 F.3d 392 (10th Cir. 1999) (hotline message from an unnamed person that violent acts, bombings in fifteen preselected major cities, would be executed against unnamed persons); United States v. Khorrami, 895 F.2d 1186 (7th Cir. 1990) (telephone calls and wanted posters sent to Jewish National Fund did not identify sender nor indicate that he would be the one to implement the threat); United States v. Bellrichard, 994 F.2d 1318 (8th Cir. 1993) (letters warned that God or unnamed parties would kill the addressees).

102. 290 F.3d 1058, 1065 (9th Cir. 2002).

103. *Id.* at 1101.

104. *Id.* at 1091 (citations omitted).

105. *See also* Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 773 (1994) (a "display of signs that could be interpreted as threats or veiled threats" could be prohibited).

106. 290 F.3d at 1088–89.

107. *Id.* at 1089.

108. *Id.* at 1086.

109. *Id.* at 1076 (public nature of a threat is merely a factor that goes "to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm"). *See also, e.g.*, *Kelner*, 534 F.2d at 1020, (JDL press conference in which life of Yasser Arafat was threatened); United States v. Hart, 212 F.3d 1067, 1072 (8th Cir. 2000) (public protest against abortion providers, including placing a Ryder truck in driveway of clinic, may constitute a threat).

110. 290 F.3d 1058, 1110 (9th Cir. 2002).

111. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 934 (1982).

112. *See, e.g.*, White v. Fraternal Order of Police, 909 F.2d 512, 519 (D.C. Cir. 1990) (quoting F. HARPER & F. JAMES, THE LAW OF TORTS § 5.4 (1986)). *See generally* C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of* New York Times Co. v. Sullivan, 78 IOWA L. REV. 237 (1993); Thomas B. Kelley & Steven D. Zansberg, *Libel By Implication*, 20 COMM. LAW. 3 (2001).

113. 290 F.3d at 1074.

114. *Id.* at 1075 n.7. *See also* Rothman, *supra* note 70, at 303 ("Both tests are essen-

tially a reasonable listener test, because . . . [t]he only way a jury can evaluate whether the speaker would 'have reasonably foreseen that [his statement] would be taken as a threat' by the listener is by considering how a listener would view that statement. To foresee how a *listener* would react to a threat, the only frame of reference a reasonable speaker would have is how the *speaker* would react if he had *heard* the statement directed toward himself—that is, if he were himself a *listener*. Thus, a reasonable speaker's assessment will boil down to how a reasonable listener would react.").

115. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). *See also* St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (actual malice requires showing that speaker "*in fact* entertained serious doubts as to the truth" of the challenged statements) (emphasis added).

116. 791 F.2d 480, 486 (7th Cir. 1986) (plaintiff could not establish "actual malice because the record is lacking in any evidence that [defendant] intended or understood the column to contain the plaintiff's inferences and, nevertheless published it believing the implications to be false").

117. 841 F.2d 1309, 1318 (7th Cir. 1988) (if plaintiff must demonstrate that defendants published with actual malice, "it follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.").

118. Rogers v. United States, 422 U.S. 35, 44–48 (1975).

119. 18 U.S.C. § 871.

120. United States v. Twine, 853 F.2d 676 (9th Cir. 1988); United States v. King, 122 F.3d 808 (9th Cir. 1997).

121. 290 F.3d 1058, 1076 n.9 (9th Cir. 2002) (concluding that these earlier cases were expressly not defining the constitutional requirements for establishing a "true threat").

122. *Id.* at 1075.

123. *Id.*

124. Although *United States v. Gilbert*, 884 F.2d 454 (9th Cir. 1989), involved veiled threats, they were specifically mailed by the defendant to Susan Smith, his target. The court explained that, "[w]hile the mailings may not have said 'we're going to hurt you, Susan Smith,' they certainly said 'we don't like what you're doing, and we hurt people who do things we don't like.'" *Id.* at 457.

125. 290 F.3d at 1074–76 (citation omitted). *See also id.* at 1080 ("we decline to read into FACE . . . a specific intent to threaten violence or to commit unlawful acts in addition to the threat to intimidate which the statute itself requires").

126. *Id.* at 1108.

127. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964) (actual malice must be proven with "convincing clarity").

128. *See, e.g.*, 290 F.3d 1058, 1066 (9th Cir. 2002).

129. *See, e.g., id.* at 1066 n.4.

130. *See, e.g., id.* at 1080.

131. *See* 41 F. Supp. 2d 1130, 1155 n.1 (D. Or. 1999).

132. *See, e.g.*, White v. Fraternal Order of Police, 909 F.2d 512, 518 (D.C. Cir. 1990).

133. 290 F.3d at 1070.

134. *See, e.g., id.* at 1109 (Berzon, J., dissenting) (citing Stanley v. Georgia, 394 U.S. 557, 565 (1969)).

135. *Id.* at 1100.

136. 517 U.S. 559 (1996).

137. 270 F.3d 1215, 1241 (9th Cir. 2001).

138. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (unfettered discretion for jury to "assess punitive damages in wholly unpredictable amounts" permits them "to use their discretion selectively to punish expressions of unpopular views" and "unnecessarily exacerbates the danger of . . . self-censorship").

139. 290 F.3d 1058, 1100 (9th Cir. 2002).