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Incendiary Speech and Social Media

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INCENDIARY SPEECH AND SOCIAL MEDIA

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I. INTRODUCTION

For at least a decade, commentators have contended that courts should adapt existing First Amendment doctrines to address "dangerous speech" conveyed online.[1] Today, incidents illustrating the incendiary capacity of social media have rekindled concerns about the "mismatch" between existing doctrinal categories and new types of dangerous speech. This Essay examines two such incidents, one in which an offensive tweet and YouTube video led a hostile audience to riot and murder (the Terry Jones incident), and the other in which a blogger urged his nameless, faceless audience to murder federal judges (the Hal Turner incident). One incident

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1. *See, e.g.*, John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 428 (2002); William Funk, *Intimidation and the Internet*, 110 PENN ST. L. REV. 579, 580 (2006) (contending that current First Amendment doctrines addressing intimidating speech must take account of the fact that "the Internet is special; it is not 'like' any other traditional media"); Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, ¶¶ 3-4 (2002); Thomas E. Crocco, Comment, *Inciting Terrorism on the Internet: An Application of* Brandenburg *to Terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451, 457-58 (2004); Scott Hammack, Note, *The Internet Loophole: Why Threatening Speech On-line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 67 (2002) (contending that "[t]he unique characteristics of the Internet blur the distinction between threats and incitement" and that courts should modify the threats doctrine to focus "on both the listener's objective fear and the speaker's subjective intent"); Amy E. McCann, Comment, *Are Courts Taking Internet Threats Seriously Enough? An Analysis of True Threats Transmitted Over the Internet, as Interpreted in* United States v. Carmichael, 26 PACE L. REV. 523, 524-25 (2006) (contending that "a more subjective analysis of true threats in the context of the Internet is necessary"); Robert S. Tanenbaum, Comment, *Preaching Terror: Free Speech or Wartime Incitement?*, 55 AM. U. L. REV. 785, 790 (2006).

resulted in liability for the speaker, though no violence occurred; the other did not lead to speaker liability even though at least thirty died as a result of the speech.[2] An examination of both incidents reveals potential problems with existing First Amendment doctrines. In particular, this examination raises questions about whether underlying assumptions concerning how audiences respond to incitement, threats, or fighting words, are confounded by the new reality social media create.

II. THE INCENDIARY CAPACITY OF SOCIAL MEDIA: POSSIBLE FACTORS[3]

A number of factors potentially contribute to the incendiary capacity of social media speech. Even in traditional media, speech that is offensive but "harmless" in its original context—whether geographic or temporal—can spur violent reactions when conveyed outside that context.[4] The Internet in general and social media in particular amplify the potential for speech to cause violence simply by magnifying the opportunities for contextual dislocation; by design, social media have global reach, which makes geographical dislocations ubiquitous.[5] Social media also allow for

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2. *Afghanistan: Death Toll in Two Days of Violence Rise to 30*, NEWS 24 (PAK.), http://www.news24.pk/detail.php?nid=1283 (last visited Oct. 31, 2011).

3. My intent here is to summarize possible factors that contribute to the incendiary capacity of social media, keeping in mind, however, that "[i]t is . . . easy to exaggerate the harm that can come from a new means of communication such as the internet" and that "it is critical that we not succumb to the temptation to weaken our protections of speech based on concerns about terrorists and hatemongers and their use of the internet." Judge Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of* Brandenburg, 4 HARV. L. & POL'Y REV. 361, 362-63 (2010). I have consciously chosen to use a "metaphor of combustibility" to refer to the speech I discuss in this Essay because, as noted by scholar Peter Margulies, this metaphor emphasizes that the potential for violence often depends upon the "susceptib[ility]" of the audiences to respond to "extreme speech." Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH. 4, 15-16 (2004).

4. For example, Indian-British author Salman Rushdie's novel *The Satanic Verses*, which was written in English, triggered demonstrations in predominantly Muslim countries when it was published. *See* Sheila Rule, *Iranians Protest Over Banned Book*, N.Y. TIMES, Feb. 16, 1989, at A6, *available at* http://www.nytimes.com/1989/02/16/world/iranians-protest-over-banned-book.html?src=pm. The Ayatollah Khomeini of Iran issued a fatwa calling for Rushdie to be killed for publishing the allegedly blasphemous novel. Philip Webster et al., *Ayatollah Revives the Death Fatwa on Salman Rushdie*, THE TIMES & THE SUNDAY TIMES (London) (Jan. 20, 2005) (on file with author). Historian Milton Mayer coined the term "contextomy" to refer to the practice of selectively taking words from their original context to distort their intended meaning. *See* Matthew S. McGlone, *Deception by Selective Quotation*, *in* THE INTERPLAY OF TRUTH AND DECEPTION: NEW AGENDAS IN COMMUNICATION 54, 55-56 (Matthew S. McGlone & Mark L. Knapp eds., 2010) (attributing the coinage to Mayer).

5. *See* Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 215 (2000) ("The Internet allows people to communicate quickly, across the globe, and at extremely low cost."). Many of the arguments summarized here apply to the Internet prior to the advent of social media. The rise of social media makes it easier for individuals around the world to use and access Internet communications tools. *See id.* The rise of Facebook is nothing short of astonishing. Facebook is the dominant social networking platform in the United States and has over 800 million active users worldwide. *Statistics*, FACEBOOK, http://www.facebook.com/press/info.php?statistics (last visited Oct. 29, 2011).

temporal dislocations, because speech in social media often can be heard, read, or viewed long after the speaker blogged, tweeted, or posted.

The unmediated character of social media speech also increases its potential for sparking violence. Social media increase the number of individuals who can engage in unmediated communication, which inherently increases the probability of incendiary speech. Moreover, the sheer size of prospective audiences also increases the potential for violent audience reactions. Audience size matters: the bigger the audience, the greater the chance at least one audience member will respond with violence to speech that is offensive or advocates violence.[6] The prospect for violence may even be heightened by the technology of search; for example, the individual who conducts an Internet search for "white supremacy" will often be searching for confirmation of his own prejudices and may be seeking support for his own violent plans or projects. By the same token, the individual who believes Quran burning justifies a violent response may conduct a search for instances of Quran burning as an excuse to engage in riot or murder.

Even the "community-building" capacity of social media can be put to violent ends. Though the role of social media in fostering community[7] and organizing like-minded individuals for group action is well known, social media may also aid in the formation of subcommunities of hate,[8] and interactions within these subcommunities may serve to foster group violence[9] or to "normalize" individual violence.

Moreover, the actual or practical anonymity of many social media communications also fosters a sense of disinhibition in those contemplating violence, and the speed of communications allows incendiary speech to reach individual audience members at the point when they are most vulnerable to engaging in violent action.[10]

A final aspect of social media is worth highlighting, though it cuts both ways with regard to speech that provokes violence: A social media audience member is truly part of a lonely crowd.[11] Whereas the physical

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6. *See generally* Cronan, *supra* note 1, at 426 ("Groups presenting hateful messages now possess a new forum for discourse that reaches a more vast, and often more impressionable, audience.").

7. *See* Janna Quitney Anderson & Lee Rainie, *The Future of Social Relations*, PEW RESEARCH CTR'S INTERNET & AM. LIFE PROJECT 17 (July 2, 2010), *available at* http://www.pewinternet.org/Reports/2010/The-future-of-social-relations.aspx (noting that social media "bring[] people together" and help build community).

8. *See* Margulies, *supra* note 3, at 33 ("The absence of mediation on the Internet can promote polarization and permit consumers to avoid the unexpected teachable moment.").

9. *Id.* ("Lack of mediation is a key ingredient in the production of polarization and concerted violence against innocents to achieve political, cultural, or social aims.").

10. *See* Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1575 (2007) (discussing disinhibiting effect of computer mediated communication).

11. *See* Janet Morahan-Martin & Phyllis Schumacher, *Loneliness and Social Uses of the Internet*, 19 COMPUTERS IN HUM. BEHAV. 659, 660 (2003).

connections between crowds in "real space" potentially exert a restraining influence on the individual who is spurred to violent actions by the words of a fiery speaker, the same is not true of "crowds" connected by social media. This argument would hold particularly true of social media that foster one-to-many communications, such as Twitter or YouTube,[12] as opposed to many-to-many communications. On the other hand, audiences in real space are occasionally subject to a mob mentality, in which passions raised by a fiery orator can lead to immediate violence; indeed, the law of incitement is designed for just this situation. The fact remains, however, that audiences in real space very rarely react with immediate violence to impassioned rhetoric, which sends a mitigating signal to those individuals who would undertake violence if left to their own devices.[13] It is difficult for the crowd dynamics to impose a similar moderating influence online, which provides another argument for why social media may have inflammatory capacity beyond that of traditional mass media. Of course, this argument is based on speculation, and a convincing refutation is that those social media that permit one-to-many communications are no different than books, movies, television, or radio—media in which speakers are rarely held liable for provoking violence because time for reflection is built into the medium itself.

III. QURAN BURNING IN SOCIAL MEDIA: TERRY JONES

The violence that erupted when Terry Jones, the pastor of a fifty-person congregation in Gainesville, Florida, leveraged social media to spread his anti-Islamic speech around the world is a good example of how offensive speech in one location can become deadly when transmitted to another.[14] Pastor Jones's fifteen minutes of fame began when he issued a tweet declaring September 11, 2010, "Int[ernational] Burn a Koran Day."[15] Jones's announcement, via social media, generated frenzied coverage of the planned Quran burning in the traditional media.[16] American leaders responded to the public outcry against Jones's planned Quran burning and attempted to persuade him to desist. General David Petraeus, for example, said burning the Quran could endanger U.S. troops in Afghanistan,[17]

12. Although some of these allow for comments.

13. *See infra* notes 57-61 and accompanying text.

14. Emily Rand, *Terry Jones, The Man Behind "Burn a Quran Day,"* CBS EVENING NEWS (Sept. 7, 2010, 6:49 PM), http://www.cbsnews.com/8301-31727_162-20015763-10391695.html.

15. Ann Gerhart & Ernesto London, *Fla. Pastor's Koran-Burning Threat Started with a Tweet*, WASH. POST, Sept. 11, 2010, at A6, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/09/10/AR2010091007033.html.

16. *See id.*

17. Valerie Bauerlein & Farnaz Fassihi, *Pastor, Despite Protests, Still Plans Quran Burning*, WALL ST. J.: ASIA (Sept. 8, 2010), http://online.wsj.com/article/SB10001424052748703453804575479573649222094.html.

Secretary of State Hillary Clinton called the planned burning "disgraceful,"[18] and President Barack Obama predicted "serious violence" would result if Jones carried out his plan.[19] Bowing to public pressure at that time, Jones did not burn a Quran on September 11, 2010,[20] but instead waited until the media spotlight had subsided. Six months later, Jones and his congregation posted on Facebook a video of Jones's fellow pastor Wayne Sapp soaking a Quran in kerosene and setting it alight.[21] Social media enabled the Quran burning in Florida to ignite deadly violence half-a-world away.[22] Protests in Afghanistan consumed the lives of at least thirty people—some were United Nations workers murdered in retaliation for Jones's acts and others were protesters fired upon by Afghan security forces.[23] This violent reaction was completely foreseeable and, indeed, Jones recklessly disregarded the probability of violence engendered by his actions.[24]

First Amendment law nonetheless makes it almost impossible to hold Jones legally responsible for the violent response of his audience.[25] Jones's speech[26] defies attempts to place it in traditional First Amendment categories of "unprotected" speech.[27] The Supreme Court has excluded certain categories of incendiary speech from full First Amendment protection on grounds that they are especially likely to provoke imminent

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18. *Id.*

19. Suzan Clarke & Rich McHugh, *Exclusive: President Obama Says Terry Jones' Plan to Burn Korans is a "Destructive Act,"* GOOD MORNING AMERICA (ABC NEWS) (Sept. 9, 2010), http://abcnews.go.com/GMA/president-obama-terry-jones-koran-burning-plan-destructive/story?id=11589122.

20. *See infra* notes 22-23.

21. *See infra* notes 22-23.

22. *See* Paul Harris & Paul Gallagher, *Terry Jones Defiant Despite Murders in Afghanistan Over Qur'an Burning*, GUARDIAN (Apr. 2, 2011), http://www.guardian.co.uk/world/2011/apr/02/pastor-terry-jones-burning-koran; Nick Schifrin et al., *U.N. Staffers Killed in Afghanistan Over Terry Jones Koran Burning, Police Say*, ABC EVENING NEWS (Apr. 1, 2011), http://abcnews.go.com/Blotter/staffers-killed-terry-jones-stunt/story?id=13275234.

23. *See* Schifrin et al., *supra* note 22; *Afghanistan: Death Toll in Two Days of Violence Rise to 30*, *supra* note 2.

24. *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 19 cmt. F (Proposed Final Draft No. 1, 2005) (discussing the foreseeable likelihood of criminal and harm-causing conduct as a result of defendant's own conduct).

25. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."); *see* Cohen v. California, 403 U.S. 15, 23 (1971) (holding that the state cannot suppress offensive speech based solely on "undifferentiated fear or apprehension of disturbance." (quoting Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 508 (1969))).

26. Burning the Quran is expressive conduct that receives the same First Amendment protection as speech. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 418-20 (1989) (holding that burning the American flag was protected under the First Amendment).

27. Even speech within the unprotected categories receives some measure of First Amendment protection. *See, e.g.*, R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382-89 (1992) (holding that viewpoint discrimination is constitutionally suspect even within "proscribable" categories of speech, such as fighting words or obscenity).

violence and disorder[28] Existing categories of unprotected incendiary speech include "true threats," fighting words, and incitement.[29] Even though Jones's speech was especially likely to and actually did provoke a violent reaction in his intended audience, it does not meet the criteria of any of these categories. Jones's speech was not a true threat to do violence to another[30] because he never communicated any intent whatsoever to commit a violent act against another; nor did he urge others to commit violence on his behalf.[31]

Jones's speech also cannot be labeled "fighting words" under the constitutional definition of the term. The Supreme Court's seminal fighting words decision, *Chaplinsky v. New Hampshire*, defined fighting words as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[32] Although Jones's speech might be loosely construed as words that "by their very utterance inflict injury,"[33] there is a "strong body of law expressly limiting the fighting words doctrine to face-to-face confrontations likely to provoke immediate violence."[34]

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28. Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (holding that fighting words are unprotected speech).

29. *See id.*

30. *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003). *See generally* Hess v. Indiana, 414 U.S. 105, 107 (1973) (per curiam) (finding no threat where a speaker at an anti-war rally said, "We'll take the fucking streets later" at some unspecified future time); Watts v. United States, 394 U.S. 705, 709 (1969) (finding no threat where a speaker engaged in political hyperbole in stating that if he were drafted, the first person he would put in his rifle sights would be the President).

31. *See Black*, 538 U.S. at 359 (defining a true threat as a "statement[] 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"). *Virginia v. Black*, the Supreme Court's most recent case on true threats, leaves many questions unanswered, including what type of intent the speaker must have, whether the threatened violence must be imminent, and whether the threat must be specific to justify imposing liability. *See* Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1227-29 (2006) (noting that these matters are unresolved).

32. *Chaplinsky*, 315 U.S. at 572.

33. *Id.* Since *Chaplinsky* was decided, the Supreme Court has never upheld a conviction for the utterance of fighting words. *See* Burton Caine, *The Trouble With "Fighting Words":* Chaplinsky v. New Hampshire *Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 445 (2004). In *Street v. New York*, the Supreme Court reversed a conviction for malicious mischief, noting that the conviction could not be sustained based on "the possible tendency of appellant's words to provoke violent retaliation," and even if appellant's words were fighting words, the statute at issue had not been narrowly drawn to punish only fighting words. Street v. New York, 394 U.S. 576, 592 (1969). In *Cohen v. California*, the Supreme Court stated that the fighting words doctrine is "a narrowly-tailored device designed to address the problem of responsive violence by the recipient of insulting language." Michael J. Mannheimer, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1528 (1993). In *R.A.V. v. City of St. Paul, Minnesota*, the Supreme Court struck down an ordinance that applied only to fighting words that provoked violence "on the basis of race, color, creed, religion or gender." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 380 (1992).

34. Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 350 (2009); *see also* Citizen Publ'g Co. v. Miller, 115 P.3d 107, 113 (Ariz. 2005) (observing that "[t]he fighting words doctrine has generally been limited to 'face-to-face' interactions"); State v. Poe, 88 P.3d 704, 714 (Idaho 2004) (observing that fighting words must be "spoken face-to-face"). *But see* Caine,

Although Jones communicated by Facebook, he did not communicate face-to-face in a manner calculated to trigger violence in his audience.

Finally, Jones's speech does not constitute an incitement, nor even advocacy of violence.[35] It was incendiary because of its foreseeable effect on a hostile audience separated from the speaker by both time and distance, which is simply not a scenario contemplated by incitement doctrine. Incitement is present only where speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[36] Although Jones's speech was *likely* to produce lawless action, that did not appear to be his intent. Moreover, there was no indication that an "imminent" violent response was likely given that his initial statement was posted on a Twitter feed, and the Quran burning was uploaded to YouTube.[37] There was in fact a significant lag time between the posting and the violent reaction.[38] Speech may not be punished merely "because it increases the chance an unlawful act will be committed 'at some indefinite future time.'"[39]

The line of First Amendment cases most directly relevant to the Quran-burning incident are the so-called "hostile audience" cases.[40] "[T]he ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker,"[41] but a speaker may be punished for speech "likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[42] Where a "speaker passes the bounds of argument or persuasion and undertakes incitement to riot," thereby making disorder "imminent," he forfeits his First Amendment protection.[43] This speech is simply too dangerous to tolerate.

While these principles might seem to have ready application to the Quran-burning incident, the Supreme Court has indicated that a speaker cannot be punished for provoking a hostile audience unless a violent

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supra note 33, at 445 (contending state courts have "stretched" the definition of fighting words to cover cases in which citizens merely criticize the police).

35. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

36. *Id.*

37. *See supra* notes 15, 22 and accompanying text.

38. *See supra* notes 21-22 and accompanying text.

39. Ashcroft v. Free Speech Coal., 535 U.S. 234, 253-54 (2002) (quoting Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam)).

40. *See, e.g.*, Terminiello v. City of Chicago, 337 U.S. 1 (1949); Cantwell v. Connecticut, 310 U.S. 296 (1940). As Ashutosh Bhagwat notes, the hostile audience cases are read today "to impose an effective requirement that law enforcement officers protect unpopular speakers from hostile audiences and silence speakers only if controlling the crowd becomes impossible." Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1011 (2011).

41. Feiner v. New York, 340 U.S. 315, 320 (1951).

42. *Terminiello*, 337 U.S. at 4.

43. *Feiner*, 340 U.S. at 321.

reaction was likely to occur immediately.[44] The immediacy requirement makes sense in the Supreme Court's "paradigm" hostile audience case, which involves a speaker physically face-to-face with a hostile crowd.[45] Arguably it makes less sense when applied to incendiary online speech captured on video, which foreseeably spurs violence almost immediately upon reaching a hostile audience thousands of miles away, even though that audience did not discover the video until days and weeks after the speech was uttered or the video was posted.[46]

That said, there are excellent reasons to be wary of extending the hostile audience doctrines to cover the Quran-burning incident. Speakers should not be held responsible any time a hostile audience somewhere in the world interprets their speech as blasphemous and uses it as justification for riot and murder. To hold the speaker legally responsible for failing to predict a hostile response in another country would create a global heckler's veto and would have a tremendous chilling effect on American speech. Even so, it is tempting to try to carve out an exception to punish the speech of Terry Jones. After all, Jones apparently knew that his speech was highly likely to trigger violence, and he "externalized" the costs of his speech to innocent victims in foreign lands.[47] Despite the seeming injustice of letting Jones escape legal responsibility for his reprehensible speech, there are important justifications for doing so.

Simply put, the cost to free speech would be too great, even if liability were predicated on a speaker's recklessness in ignoring the probable consequences of his speech. Punishing Jones in this instance would encourage radical groups to threaten to commit murder any time an American speaker voiced an opinion they opposed. Moreover, it would encourage radical groups to commit violent acts in response to speech in hopes of pinning legal responsibility on speakers like Jones. Faced with these unpalatable options, the law is right to pin responsibility primarily on the perpetrators of violent acts rather than those whose words provoke them.

Nonetheless, a case like the following begs for an exception: Assume a radical group affiliated with Al Qaeda takes an American journalist hostage in Afghanistan in retaliation for Terry Jones's burning of the Quran. The group announces its intent to kill the journalist if any American burns a Quran during Ramadan. Assume that Terry Jones then burns another Quran, knowing of the specific threat posed to a specific victim. Could a tort duty be imposed on Jones in this instance? Under traditional tort principles, one

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44. *See id.* (stating the same); *Cantwell*, 310 U.S. at 308-09 (stating the state may punish speech "[w]hen clear and present danger of riot, . . . or other *immediate* threat to public safety" exists (emphasis added)).

45. *See Feiner*, 340 U.S. at 316-18.

46. *See id.*; *supra* notes 22-23 and accompanying text.

47. *See supra* notes 20-23 and accompanying text.

might argue that Jones engaged in an affirmative act that created a foreseeable and unreasonable risk of harm.[48] Indeed, one might even argue that Jones should be responsible for battery because he knew with substantial certainty that his actions would trigger the murder.[49] The Jones case would be better resolved in this instance, however, by recalling that ordinarily a person has no duty to prevent even the foreseeable criminal behavior of third parties.[50] Jones lacks any "special relationship" to either perpetrator or victim in this scenario.[51] Though Jones is morally blameworthy, the legal blame should lie with those who consciously chose murder as a response to offensive speech or even used that speech as an excuse to commit murder. Imposing liability on Jones in this scenario would still permit the imposition of a heckler's veto on unpopular speech and encourage threats and violence by intolerant radicals. Unfortunately, the social costs of imposing liability on an irresponsible speaker like Jones remain too great to justify censorship of his speech, whether through criminal or civil liability.[52] Responsibility must be imposed solely on those directly responsible for the violent acts rather than on reprehensible speakers merely indifferent to the potential harm their speech causes.[53]

Existing First Amendment doctrines are not well tailored to address the harms of incendiary social media speech of the sort engaged in by Terry Jones, and perhaps they should not be. As Zechariah Chafee once wrote, no one should be defined as a "criminal simply because his neighbors [whether close at hand or across the globe] have no self-control and cannot refrain from violence."[54] The deeper problem highlighted by the Jones incident, however, is a theoretical one. First Amendment doctrines dealing with incendiary speech rest largely on the assumption that audiences will behave rationally and not leap to violence when confronted with offensive or inflammatory speech.[55] Instead, these doctrines assume that offended

48. *See* DAN B. DOBBS, THE LAW OF TORTS § 116, at 275 (2000) ("Negligence is conduct that creates or fails to avoid unreasonable risks of foreseeable harm to others.").

49. *See id.* § 30, at 58.

50. *See id.* § 322, at 874.

51. *See id.* § 322, at 875.

52. Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1321 (1992) ("The capacity of speech to cause injury in diverse ways contends with the goal of strong free speech . . . and it is a commonplace that robust free speech systems protect speech not because it is harmless, but despite the harm it may cause."). Schauer also contends that "[i]f free speech benefits us all, then ideally we all ought to pay for it, not only those who are the victims of harmful speech." *Id.* at 1322.

53. Query whether it would unduly chill speech to impose liability where the speaker desired that the hostage be killed by the hostage-takers as a result of his speech. Do the bad motives of the speaker, coupled with the high degree of probability of violence, justify imposing liability?

54. ZECHARIAH CHAFEE, JR., FREEDOM OF SPEECH 172 (1920).

55. Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 815 (2010) [hereinafter Lidsky, *Nobody's Fools*].

audience members ordinarily will engage in counterspeech to drive "noxious doctrine" from the marketplace of ideas.[56]

The fighting words doctrine, for example, assumes that only in extreme instances will the target of offensive speech have a "non-cognitive" reaction and leap to violence before reason takes hold.[57] The incitement doctrine, in turn, is the "crowd response" counterpart to the fighting words doctrine, assuming that mere advocacy is insufficient to inflame the passions of audience members and displace rational responses to a firebrand speaker.[58] Both doctrines assume that rational audiences are largely immune to the spark of incendiary rhetoric, and it is only in the rare case where reason has no time to prevail that such rhetoric can be censored.[59]

The assumption, or more precisely the ideal, of a rational audience is often difficult to sustain in an American context,[60] even though democratic

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56. Whitney v. California, 274 U.S. 357, 380 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

57. Lidsky, *Nobody's Fools*, *supra* note 55, at 815.

58. *Id.* The true threats case arguably focuses more on the speaker's bad intent and only secondarily on the target's response since the Court plurality defined threats as "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." Virginia v. Black, 538 U.S. 343, 359 (2003) (emphasis added). The Court's prior decisions on true threats, however, certainly indicated that threats cannot be actionable unless a reasonable person would interpret them as expressions of intent to do harm, and there is no indication that the Court's newer definition supplants rather than supplements them. *See* Hess v. Indiana, 414 U.S. 105, 107 (1973) (per curiam); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam). In *Watts v. United States*, the Supreme Court explicitly looked to the reaction of the speaker's audience in determining that his speech constituted hyperbole rather than an actionable threat. *Watts*, 394 U.S. at 708. There, the 18-year-old speaker told a crowd of protesters, during the height of the Vietnam War, "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. He was convicted at trial of threatening the President of the United States, but the Supreme Court reversed the conviction because "[t]aken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise." *Id.* at 708. The Supreme Court thus determined that the trial jury had interpreted the defendant's statements unreasonably by failing to parse the defendant's language carefully and by ignoring the context in which the speech was made. *Id.* Likewise, in *Hess v. Indiana*, the Court struck down a conviction of an anti-war demonstrator for saying, "[w]e'll take the fucking street later." *Hess*, 414 U.S. at 107. The Court again looked at the surrounding context and determined that it was not directed to any individual or group and 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." *Id.* at 109 (emphasis added). Lower courts have struggled in the wake of *Black* to determine whether it modified their prior tests for true threats. *See, e.g.*, United States v. Stewart, 411 F.3d 825, 827-28 (7th Cir. 2005); United States v. Sanders, 166 F.3d 907, 913-14 (7th Cir. 1999). Prior to *Black*, most circuits determined whether a statement was a threat based on "whether a reasonable speaker would understand that his statement would be interpreted as a threat . . . or alternatively, whether a reasonable listener would interpret the statement as a threat." United States v. Parr, 545 F.3d 491, 499 (7th Cir. 2008) (citing cases that discuss the difference between reasonable speaker and reasonable listener approaches). It is not clear to what degree *Black* forced alteration of these tests. *Id.* "It is possible that the Court was not attempting a comprehensive redefinition of true threats in *Black*. . . . [W]hether the Court meant to retire the objective 'reasonable person' approach or to add a subjective intent requirement to the prevailing test for true threats is unclear." *Id.* at 500.

59. Lidsky, *Nobody's Fools*, *supra* note 55, at 815.

60. This assumption is explored, criticized, and ultimately defended in Lidsky, *Nobody's Fools*, *supra* note 55, at 808.

theory arguably dictates it, at least with regard to political discourse.[61] However, it becomes difficult to justify maintaining the rationality assumption when American speech goes global, reaching audiences with different cultural values and attitudes about matters such as blasphemy. The alternative, however, is to hold American speech hostage to the most credulous, most violent, most radical, or most easily offended audience member anywhere in the world. Given this unpalatable option, basing First Amendment doctrine on the assumption that most audiences will behave rationally in the face of incendiary speech seems the better choice.

IV. THREAT BY BLOG: THE HAL TURNER CASE

The Terry Jones incident focused on the problem of contextual dislocation of social media speech: speech offensive but innocuous in a local context became justification for murder when distributed globally. Another recent case involving social media speech highlights the ability of a speaker to leverage the anonymity and polarization of his social media audience to instill fear in others. Like the Jones incident, this second case questions whether First Amendment principles and doctrines governing incitement and true threats need to be adapted in light of the unique dangers of social media speech.

In December 2010, blogger and occasional radio talk-show host Harold "Hal" Turner was convicted, after two mistrials, of threatening to assault or murder three federal judges based on a blog post stating that they "deserved to be killed."[62] The post was a response to a decision by the judges affirming dismissal of a challenge to a handgun ban.[63] "The postings included photographs, phone numbers, work address, and room numbers of these judges, along with a photo of the building in which they work and a map of its location."[64] Turner's third trial included testimony by federal judges Richard Posner and Frank Easterbrook about their

61. *See id.* at 838. The rational audience ideal "constrains paternalistic speech regulation, thereby protecting autonomy interests and the foundations of democratic self-governance." *Id.* It also "helps prevent the dumbing down of public discourse" and "checks government abuse of its agenda-setting power to drown out other speakers and dominate public discourse." *Id.*

62. Martha Neil, *Shock Jock Hal Turner Gets 33 Months for Threatening 7th Circuit Judges in Blog Post*, A.B.A. J. (Dec. 21, 2010, 3:38 PM), http://www.abajournal.com/news/article/ shock_jock_ hal_turner_ gets_33_months_for_threatening_7th_circuit_judges_in_/.

63. Eric Lichtblau, *Radio Host Is Arrested in Threats on 3 Judges*, N.Y. TIMES, June 25, 2009, at A16, *available at* http://www.nytimes.com/2009/06/25/us/25threat.html. The criminal complaint against Hal Turner is available at http://big.assets.huffingtonpost.com/turner.pdf. The statute under which Turner was convicted was 18 U.S.C. § 115(a)(1)(B) (2006).

64. Press Release, Internet Radio Host Hal Turner Sentenced to 33 Months in Prison for Threatening Three Federal Appeals Court Judges in Chicago Over Decision Upholding Handgun Bans, U.S. Attorney's Office (Chicago Division) (Dec. 21, 2010), *available at* http://www.fbi.gov/chicago/ press-releases/2010/cg122110.htm.

reactions to Turner's speech.[65] Easterbrook, for example, testified: "My reaction was that somebody was threatening to kill me."[66]

Although the *Turner* case was tried as a "true threats" case, the speech involved fits at least as squarely into the legal definition of "incitement."[67] The line between true threats and incitement is not always clear. True threats are statements that manifest a speaker's "serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," whether or not the speaker actually intends to do violence to the target of her speech.[68] True threats are not protected by the First Amendment because they engender fear and intimidation and disrupt the lives of victims.[69] Incitement, by contrast, involves advocacy "directed to inciting or producing imminent lawless action" that is "likely to incite or produce such action."[70] Incitements are unprotected because they create a likelihood of violent actions, not because of the fear they engender.[71]

Put simply, the distinction between a threat and an incitement is as follows: a threat involves a speaker saying to a victim, "I will do you harm,"[72] and an incitement involves a speaker saying to third parties, "You ought to harm someone (or something)."[73] This distinction gets blurred, however, in a case like Turner's.[74] Turner's statement was arguably

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65. *Id.*

66. Colin Moynihan, *Radio Host Is Convicted for Comments on Judges*, N.Y. TIMES (Aug. 13, 2010), http://www.nytimes.com/2010/08/14/nyregion/14turner.html?_r=1.

67. *See* Hammack, *supra* note 1, at 66-67.

68. Virginia v. Black, 538 U.S. 343, 344 (2003). In *United States v. Bagdasarian*, the U.S. Court of Appeals for the Ninth Circuit reversed a conviction of a defendant who had made online comments suggesting that then-presidential-candidate Barack Obama would have "a [.]50 cal in the head soon," accompanied by racial slurs. United States v. Bagdasarian, 652 F.3d 1113, 1115 (9th Cir. 2011). The Ninth Circuit treated Bagdasarian's statements as an "assassination forecast." *Id.* at 1120. The court held both that there was insufficient evidence to convince a reasonable person who read the posting that the defendant intended to injure or kill candidate Obama, and that there was insufficient evidence that Bagdasarian intended for his statements to be interpreted as threats. *See id.* at 1122-23.

69. *See* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 388 (1992).

70. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

71. *See id.*

72. Of course, there are other examples of true threats. For example, if I say "you're going to get it" while waving my fist under your nose, I have made a threat even though the language is ambiguous about who will carry out the threat. Context clarifies that ambiguity. *See* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 244 F.3d 1007, 1018 (9th Cir. 2001) (panel opinion) (discussing this type of threat), *rev'd en banc*, 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003).

73. *See* G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 835 n.15 (2002) (discussing paradigm examples of threats versus incitement).

74. This blurring of lines between threats and incitement also occurred in *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, which involved an anti-abortion website and a list of abortion doctors, some of whom had already been killed. *See Am. Coal. of Life Activists*, 290 F.3d at 1062. Plaintiffs in that case chose not to pursue an incitement theory, however. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 945 F. Supp. 1355, 1371 n.13 (D. Or. 1996) ("Contrary to Defendants' assertions, Plaintiffs are not pursuing an incitement to violence theory . . . .").

designed to create fear and intimidation in the three federal judges against whom it was directed and to cause them to change how they ruled in future cases. It was not clear, however, that Turner contemplated personally doing violence to the judges. Instead, his speech was aimed at persuading a third party to do violence to the judges "on his behalf," so to speak.[75] His speech deserves censure (moral certainly, legal arguably) because it magnifies the risk of violence by unidentified third parties, and the risk is undoubtedly greater because the speech took place on the Internet, in a context where Turner was reaching out to an audience who presumably shared his political views and prejudices.[76]

Nonetheless, it would have been very difficult to successfully prosecute Turner for incitement. *Brandenburg v. Ohio* arguably would prevent convicting a defendant like Turner for incitement, unless the contours of current doctrine were dramatically altered to fit the Internet context.[77] *Brandenburg* provides strong protection for advocacy of violence by radical dissidents like Turner,[78] and it is a proud pillar of American First Amendment jurisprudence precisely because it sets an extremely high bar to imposing liability in incitement cases.[79] The speech in *Brandenburg*, though, is completely despicable. There, the Supreme Court defended the right of a Ku Klux Klan speaker to urge his audience to "[s]end the Jews back to Israel," and to "[b]ury the niggers."[80] This speech took place at an "organizers' meeting" of the Ku Klux Klan, at which some of the members of the audience were clearly armed.[81] The Supreme Court nonetheless held the speech to be protected by the First Amendment.[82]

In striking down Ohio's prosecution of the speaker for advocating criminal activity, the *Brandenburg* Court stated that the First Amendment does not allow "a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or

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75. *See supra* notes 62-64 and accompanying text.

76. *See* discussion *infra* Part IV.

77. *See* Brandenburg v. Ohio, 395 U.S. 444, 448-49 (1969) (per curiam).

78. *See id.*

79. *See* Lyrissa Barnett Lidsky, Brandenburg *and the United States' War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1010 (2002) [hereinafter Lidsky, *Defending a Double Standard*] ("*Brandenburg* thus spreads a broad mantle of protection over the speech of radical political dissidents from even the most despised groups in society."); Marc Rohr, *Grand Illusion? The* Brandenburg *Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 3 (2002) (calling *Brandenburg* "so extraordinarily speech-protective"). *But see* Susan M. Gilles, Brandenburg v. State of Ohio*: An "Accidental," "Too Easy," and "Incomplete" Landmark Case*, 38 CAP. U. L. REV. 517, 530-32 (2010) (noting that the *Brandenburg* decision focuses insufficiently on the defendant's "hateful, threatening speech" regarding African-Americans, but suggesting that "the lesson of *Brandenburg* (as completed by *Black*) is that a state may prohibit intimidating threats of violent harm to an *individual*, but not threats of violent harm to the *state*." (emphasis added)).

80. *Brandenburg*, 395 U.S. at 446 n.1.

81. *Id.* at 445-46.

82. *Id.* at 448-49.

producing imminent lawless action and is likely to incite or produce such action."[83] For a speaker to be prosecuted for incitement, therefore, the State must show "(1) intent to incite another; (2) to imminent violence; and (3) in a context that makes it highly likely that such violence will occur."[84] *Brandenburg*'s test appreciates the fact that the State is likely to overpredict violence from speech, and it seeks to ensure that suppression is not based on fear or dislike of radical ideas or speakers.[85]

The main obstacle to convicting Internet speakers like Turner under *Brandenburg* is the imminence requirement.[86] *Brandenburg*'s imminence requirement was designed around the speech situation it presented: a firebrand speaker trying to rally a crowd in a physical setting.[87] *Brandenburg* contemplates liability for speakers in those rare instances where a "mob mentality" is especially likely to take hold and lead to violent action. The paradigm case for *Brandenburg*, then, is a speaker exhorting an angry torch-wielding mob on the courthouse steps to burn it down immediately. It is only in cases where there is no time for "evil counsels" to be countered by good ones that the advocacy of violence crosses the line into incitement.[88]

Brandenburg's sanguine attitude toward the prospect of violence rests on an assumption about the audiences of radical speech. *Brandenburg* assumes that most citizens (even Ku Klux Klan members) simply are not susceptible to impassioned calls to violent action by radical speakers. In fact, *Brandenburg* represents the fruition of the "libertarian theory of free speech planted by Justices Oliver Wendell Holmes and Louis D. Brandeis,"[89] which even now continues to dominate First Amendment jurisprudence.[90]

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83. *Id.* at 447.

84. Lidsky, *Defending a Double Standard*, *supra* note 79, at 1018; *see* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond* Brandenburg, 41 WM. & MARY L. REV. 1159, 1194 (2000) (indicating that imminence has been the primary focus for courts applying *Brandenburg*).

85. *See* Lidsky, *Defending a Double Standard*, *supra* note 79, at 1018.

86. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1022-23 (5th Cir. 1987) (holding that there was no "imminence" where youth read *Hustler* magazine and subsequently died by performing "auto-erotic asphyxiation" described in the magazine). Note that some scholars have argued that *Brandenburg* only protects speakers advocating the violent overthrow of the state. *See* Gilles, *supra* note 79, at 531-32.

87. *See Herceg*, 814 F.2d at 1023.

88. *See generally* Carol Pauli, *Killing the Microphone: When Broadcast Freedom Should Yield to Genocide Prevention*, 61 ALA. L. REV. 665, 672-77 (2010) (discussing conditions that might prompt audience members to respond to calls for violence).

89. Lidsky, *Defending a Double Standard*, *supra* note 79, at 1018. For an extended discussion, see *id.* at 1018-19.

90. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 884 (2010) (emphasizing the importance of government neutrality in marketplace of ideas); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010) ("The outcome of *Citizens United* is best explained as representing a triumph of the libertarian over the egalitarian vision of free speech.").

The libertarian theory of free speech makes several assumptions about the likely "audiences" of potentially inciting speech. The most fundamental assumption is that these audiences are typically composed of rational beings who will not leap to violence simply because radical speakers urge them to do so.[91] Not only is the audience assumed to be rational and skeptical, but it is also assumed to be willing and motivated to engage in public discourse to refute dangerous falsehoods or "noxious doctrine."[92]

Compare these assumptions to the reality of social media audiences. Most users of social media do not in fact leap to violence when they are solicited to do so, even when they are solicited by someone with whose views they agree. Turner's speech, after all, did not lead to the killing of federal judges, even though his blog post contained the addresses of the judges.[93] Although his speech was targeted at radical right-wingers, there is no empirical evidence that they are any more prone to violence than the Ku Klux Klan members who comprised the audience in *Brandenburg*.[94] Of course, the anonymity of Turner's speech makes the speech seem more dangerous or "scarier" because there is no way to monitor whether a criminal or mentally deranged audience member is succumbing to Turner's advocacy or will succumb to it at some point in the future. But query whether this abstract fear of the nameless, faceless "others" who might hypothetically respond to violent advocacy is a sound basis for prosecuting Turner.[95] Even if one were to alter the imminence requirement of *Brandenburg* to account for the unique features of social media, such as the sense of immediacy they foster, the polarization that they encourage, the disinhibiting effect of anonymity, and so forth, the evaluation of the likelihood that Turner's speech would result in violence runs the risk of being tainted by irrational fears of these nameless, faceless radicals. This risk is especially great given the known tendency of governments to overstate the link between speech and violence.

Given the potential "instability" of the likelihood requirement, if the imminence requirement is to be replaced in cyber-incitement cases, it should be replaced by a requirement that still tips strongly against suppression of threatening hyperbole directed toward public institutions or

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91. *See* Lidsky, *Defending a Double Standard*, supra note 79, at 1020.

92. Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

93. *See supra* note 64 and accompanying text.

94. This arguably makes the *Turner* case distinguishable from the *American Coalition of Life Activists* case, in which the website at issue targeted radical anti-abortion protestors in the aftermath of the murder of abortion doctors. *See supra* note 74.

95. In the aftermath of the shooting of Congresswoman Gabrielle Giffords and eighteen others by a lone gunman in Arizona, the media was rife with speculation that the gunman was a radical right-winger spurred on by right-wing, anti-government hyperbole in the media. *See Arizona Shooting*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/a/arizona_shooting_2011/index.html (last visited Oct. 29, 2011). Instead, it turned out that the gunman was simply a deranged individual not motivated by any political or ideological aims. *See id.*

public officials. It is not immediately clear what such a requirement would look like, given the highly contextual nature of incitement. Nonetheless, a satisfactory replacement for imminence in cyber-incitement cases would focus on ensuring that the causal linkage between the speech and the harm was a direct one; this inquiry into directness might focus, for example, on whether the social-media speech made violence specifically foreseeable—given such factors as the likely make-up of the target audience, whether there was a prior history of violence by members of that audience, whether the speaker supplied detailed instructions on carrying out the violent acts advocated, and whether the violence took place with little delay upon receiving the inciting speech. Although some would no doubt respond that these factors could be manipulated to punish unpopular speech, no verbal formula can completely prevent this result. Modifying the imminence requirement, while continuing to apply the intent and likelihood requirements as stringently as ever, is simply a nod to the new reality social media create.

The discussion up to this point has purposely ignored two arguably crucial features of the *Turner* case to focus on the question of social-media incitement generally. These factors seem to make it more likely that Turner's speech would lead to violence. First, Turner threatened federal judges on the U.S. Court of Appeals for the Seventh Circuit.[96] As Turner well knew, the family of a judge on the Seventh Circuit previously had been murdered in retaliation for a ruling by the judge.[97] Although this prior murder did not necessarily make a future murder more likely, it meant that Turner targeted his speech at judges who doubtless were already operating in a climate of fear greater than that of even ordinary federal judges. Second, Turner appended to his call for violence the addresses of the federal judges he claimed deserved to die.[98] It is one thing to say a judge deserves to be shot for his ruling, knowing that the address of his courthouse is available online, but it is arguably quite another thing to say a federal judge deserves to be shot and to provide detailed directions to his home or office. The surrounding context in which Turner spoke, together with the details appended to his call for violence, seem to take it outside the realm of mere political hyperbole, though the line is a fine one, which is doubtless why the first two attempts to prosecute him for his speech resulted in mistrials.

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96. *See* Neil, *supra* note 62.

97. *See* Jodi Wilgoren, *White Supremacist Is Held in Ordering Judge's Death*, N.Y. TIMES, Jan. 9, 2003, at 16. U.S. District Judge Joan Humphrey Lefkow's husband and mother were murdered in retaliation for her rulings. *See id.*; *see also* LORRAINE H. TONG, CONG. RESEARCH SERV., RL 33464, JUDICIAL SECURITY: RESPONSIBILITIES AND CURRENT ISSUES 30 (2008) (describing murders of Lefkow's husband and mother and other threats against judges).

98. Press Release, *supra* note 64.

Turner, of course, was not prosecuted for incitement but for making a threat to a federal judge.[99] Given the problem of proving the imminence necessary for incitement, it is understandable why the prosecutor chose this path, but prosecuting for the threat raises the prospect that the true threats doctrine can be used as an end run around *Brandenburg*'s seemingly more stringent requirements. On the other hand, a jury found that Turner used his blog post to instill fear in federal judges in retaliation for their ruling—fear over and above that they normally suffer simply by virtue of their positions as judges.[100] The fear instilled by such speech is the very reason "true threats" are unprotected speech, even if Turner's blog post was not a paradigm threats case because he did not indicate that he personally would carry out any harm whatsoever.

V. CONCLUSION

This Essay has attempted to discern whether and (to a lesser extent) how existing First Amendment doctrines should be modified to account for speakers using social media to engage in incitement or threats to others. Social media increase the potential for incendiary speech simply by increasing the amount of unmediated speech being distributed to audiences across the globe.[101] Moreover, social media create a sense of community without the constraining influence of communities in real space, thereby increasing the chances that nameless, faceless audience member seeking support for his violent plans can find it online.

The Quran burning by Gainesville Pastor Terry Jones demonstrated how speech that is merely offensive in one locale can spark riot and murder when conveyed weeks later via YouTube to an audience abroad.[102] Though such cases are likely to arise with increasing frequency, there is precious little the law can do about them without betraying foundational First Amendment principles. Unless we wish to punish American speech because it is offensive to some segment of its global audience, our only response, inadequate as it is, is to respond to speakers like Terry Jones with shunning, shaming, and other forms of moral censure.

Hal Turner's ambiguous call for violence against three federal judges capitalized on the size, anonymity, and ideology of his blog's audience, knowing that telling an unknown number of committed radicals that the judges deserved to die and providing the addresses necessary to track them down and murder them would generate terror without Turner himself having to lift a finger other than to type on his keyboard.[103] Like the Jones

99. *Id.*
100. *See id.*
101. *See supra* note 5 and accompanying text.
102. *See supra* notes 22-23 and accompanying text.
103. *See supra* notes 62-64 and accompanying text.

incident, cases like Turner's are likely to arise more frequently. One response would be to continue to bend the law of threats to meet the challenge of such cases; a better approach might be to modify the imminence requirement of *Brandenburg* so that it does not preclude liability for social-media incitement. The imminence requirement serves to prevent suppression of speech based on the government's exaggerated fears of the danger posed by radical speech. A satisfactory replacement for cyber incitement would focus on ensuring a direct causal linkage between the speech and the harm, focusing on factors such as the likely make-up of the target audience, whether there was a prior history of violence by members of that audience, whether the speaker supplied detailed instructions on carrying out the violent acts advocated, and whether the violence took place with little delay upon receiving the inciting speech. Making this modification to the incitement doctrine would prevent the comparatively underdeveloped First Amendment doctrines governing true threats from being "warped" to deal with cases like Turner's. It would not, however, obviate the independent roles of juries and judges in drawing the subtle lines between advocacy and incitement, and between abstract calls for violence and true threats.