

BYU Law Review

Volume 2015 | Issue 4


Article 8

October 2015

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Recommended Citation

Bradley J. Pew, *How to Incite Crime with Words: Clarifying Brandenburg's Incitement Test with Speech Act Theory*, 2015 BYU L. Rev. 1087 (2016).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol2015/iss4/8>

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How to Incite Crime with Words: Clarifying *Brandenburg's* Incitement Test with Speech Act Theory

I. INTRODUCTION

Since the early 1900s, the Supreme Court has grappled with how to distinguish protected speech from speech that incites others to lawless action. The Court set forth the current standard for determining whether speech falls into the latter category in the 1969 case of *Brandenburg v. Ohio*.¹ There, the Court held that advocacy of violence is protected unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²

The *Brandenburg* test is the product of a rich history of judicial debate.³ Unfortunately, the test is still unclear in some respects. For example, it is not clear *how* imminent the resulting unlawful conduct must be to satisfy *Brandenburg*. The Court’s subsequent opinion in *Hess v. Indiana*,⁴ for example, suggested that *imminent* may mean within a matter of moments or hours, though it did not expressly provide any specific time frame.⁵ This lack of guidance has led to confusion among lower courts. For example, some courts require immediacy, while at least one court has suggested that *imminent* encompasses conduct as far out as five weeks in the future.⁶ Many scholars have already made significant headway in resolving this

1. 295 U.S. 444 (1969).

2. *Id.* at 447.

3. *See infra* Part IV.

4. 414 U.S. 105 (1973).

5. *Id.* at 108–09 (finding that there was no imminent risk of lawless action when a rioter apprehended by the police yelled that he and the other rioters would take to the streets later); John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 455 (2002) (“Under a likely interpretation of *Brandenburg*, the ‘imminence requirement’ extends only to lawless action that results immediately after the words are spoken.”); L.A. Powe, Jr., *Brandenburg: Then and Now*, 44 TEX. TECH L. REV. 69, 78 (2011) (suggesting, based on the Court’s opinions in *Brandenburg* and *Hess*, that “imminence is probably a matter of hours, or stretching, a few days”).

6. *See* Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 715 (2009).

issue, suggesting that the word *imminent* be defined as a matter of days.⁷ Much has been said on this issue already, and this Comment adopts the more relaxed definition of imminence without further explanation.⁸

Another aspect of the *Brandenburg* test that remains unclear, and the one this Comment endeavors to clarify, is the requirement that the speech be “directed to” inciting imminent lawless action. This Comment contends that speech act theory, a linguistic philosophy that was first made famous in J.L. Austin’s book *How to Do Things with Words*, can help clarify what it means to direct speech to inciting crime.

Part II of this Comment discusses three Federal Court of Appeals cases where the courts had to determine whether particular online postings were directed to inciting imminent lawless action. In each case, the courts decided (in a more or less conclusory fashion) that the speech in question was not directed to inciting imminent crime. Part III of this Comment introduces speech act theory and the concepts of illocutionary force and perlocutionary effect. It then proposes that focusing on an utterance’s illocutionary force can help courts identify what kinds of speech are directed to inciting lawless action. Part IV then analyzes the evolution of the incitement doctrine through the lens of speech act theory, pointing out that early Supreme Court incitement cases tended to focus only on the

7. See, e.g., *id.* at 715–18; KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 267 (1989).

8. It is also unclear how the imminence requirement would play out in the modern world of communication. *Brandenburg* was decided two decades before the Internet came to be. See Cronan, *supra* note 5, at 448. The Court could not have even imagined such a communicative forum. Accordingly, the Internet and other forms of modern communication such as cell phones present some serious issues for the imminence requirement. Few communications online are truly imminent because posts are often read long after they are posted. Some modern forms of communication, such as text messaging or online instant messaging, are immediate. But when someone posts something to a blog or a website, there is often a significant time delay between posting and reading. *Id.* at 428. In this context, a major unanswered question is whether imminence is measured from the time the speaker posts the inciting language or from the time the reader reads it. *Id.* at 455–56. If measured from the time it is posted, the imminence requirement “does not work with the vast majority of Internet communications, as words in cyberspace are usually ‘heard’ well after they are ‘spoken.’” *Id.* at 428. But if measured from the time posts are read, the imminence requirement could still work in the context of online incitement cases. *Id.* at 455–56. At least one scholar has suggested that the latter option is more viable. See *id.* This Comment adopts that conclusion but does not endeavor to explore the issue at length.

speech's perlocutionary effect, and concluding that *Brandenburg* is best read as requiring an inquiry into an utterance's illocutionary force *and* its perlocutionary effect. Part V returns to the cases discussed in Part II to demonstrate how a court would go about analyzing an utterance's illocutionary force.

II. CASES ATTEMPTING TO APPLY *BRANDENBURG'S* "DIRECTED TO" LANGUAGE

A. Antiabortion Radicals: Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists

Beginning around 1993, antiabortion radicals distributed a series of "wanted" posters containing the names, photographs, and addresses of abortion providers.⁹ The posters accused the doctors of "crimes against humanity" and stated that they were "armed and extremely dangerous to women and children."¹⁰ Between 1993 and 1994, three physicians were killed as a result of the posters.¹¹

In 1995, the antiabortionists uploaded approximately 200 more physicians' names to a website, again including their photographs and addresses.¹² Some of the physicians' names were crossed out, others were in grey font, and the rest were in black font. The following legend accompanied the files: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)."¹³ In other words, the website recorded murders and other violent attacks against the abortion doctors. The names of the three doctors who had been murdered from 1993 to 1994 were struck through.¹⁴

Several physicians featured on the website, terrified for their lives, brought suit.¹⁵ The case was first heard by a three-judge panel on the

9. *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1063–64 (9th Cir. 2002).

10. *Id.* at 1062, 1064.

11. *Id.* at 1063–64.

12. *Id.* at 1065.

13. *Id.*

14. *Id.*

15. *Id.* at 1066.

Ninth Circuit.¹⁶ There, the court looked to *Brandenburg* for guidance. In the end, it concluded that the website contained protected speech:

Political speech may not be punished just because it makes it more likely that someone will be harmed at some unknown time in the future by an unrelated third party. In [*Brandenburg*], the Supreme Court held that the First Amendment protects speech that encourages others to commit violence, unless the speech is capable of “producing imminent lawless action.” . . . If the First Amendment protects speech advocating violence, then it must also protect speech that does not advocate violence but still makes it more likely.¹⁷

Because the suggested attacks on the physicians were not given a definite time frame, the court concluded that they were not imminent. More notably, the court suggested that the website was not actually directed at producing violence at all. Rather, it simply made violent attacks more likely.

The decision was eventually reversed in *en banc* review.¹⁸ The court agreed that the speech was protected under *Brandenburg* (focusing mainly on the imminence requirement), but it found another avenue by which to declare it unprotected: “[W]hile advocating violence is protected, threatening a person with violence is not.”¹⁹ The Court analyzed the case under the true threats doctrine and concluded that the files were designed to make the physicians fear. Because so many physicians featured in “wanted” posters had already been killed or injured, “no one putting [these physicians] on a ‘wanted’-type poster . . . could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed.”²⁰

16. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 244 F.3d 1007 (9th Cir. 2001), *rev'd en banc*, 290 F.3d 1058 (9th Cir. 2002).

17. *Id.* at 1015 (citations omitted).

18. *Planned Parenthood*, 290 F.3d at 1058.

19. *Id.* at 1072.

20. *Id.* at 1086.

B. Animal Rights Activists: United States v. Fullmer

In *United States v. Fullmer*, a group of animal rights activists engaged in protests against Huntingdon Life Sciences, a company that provided animal testing services for clients bringing new products to the market.²¹ The group operated a website where it posted stories of successful protests. Some of the protests were legal, others were not.²² One such post relayed a protest from an anonymous source:

Late last night, August 30th, we paid a visit to the home of Rodney Armstead, MD and took out two of his front windows . . . gave him something to labor over this Labor Day weekend. Rodney serves as an officer and agent of service for “Medical Diagnostic Management, Inc.,” a scummy little company [associated with Huntingdon]. Any ties with [Huntingdon] or its executives will yield only headaches and a mess to clean up.²³

This post also included Dr. Armstead’s address and the comment: “[We are] excited to see such an upswing in action against Huntingdon and their cohorts. From the unsolicited direct action to the phone calls, e-mails, faxes and protests. Keep up the good work!”²⁴

Several posts on the website similarly targeted specific Huntingdon employees. These typically contained the word “Target: . . .” followed by an employee’s name, address, and a brief description of her connection to Huntingdon.²⁵ Some of these posts also contained information about targets’ children and where they went to school.²⁶ These posts often resulted in the targets being violently harassed or threatened either in person or over the phone.²⁷ The website was careful to state that such direct action was “unsolicited,” and contained several disclaimers, such as: “We operate within the boundaries of the law, but recognize and support

21. 584 F.3d 132, 137–38 (2009).

22. *Id.* at 139–40.

23. *Id.* at 140.

24. *Id.*

25. *Id.* at 142–46.

26. *Id.*

27. *Id.*

those who choose to operate outside the confines of the legal system.”²⁸

The website also featured an article entitled “Top 20 Terror Tactics.” The article outlined different ways of terrorizing or harassing others, including physically assaulting victims, smashing the windows of their homes, and firebombing their cars. The list was prefaced by the website’s standard disclaimer that it was not soliciting criminal activity but concluded by saying, “Now don’t go getting any funny ideas!”²⁹

Applying *Brandenburg*, the court concluded that

merely posting information on unlawful acts that have already occurred, in the past, does not incite future, imminent unlawful conduct. Moreover, the publication of the “Top Twenty Terror Tactics,” without more, is also protected, because although it lists illegal conduct, there is no suggestion that [the protesters] planned to imminently implement these tactics.³⁰

Similar to the decision in *Planned Parenthood*, however, the court decided that posting the employees’ addresses and personal information constituted a true threat.³¹ The reason, again, was because the speakers “used past incidents to instill fear in future targets.”³²

C. *An Angry Blogger*: United States v. Turner

In 2009, the United States Court of Appeals for the Seventh Circuit issued a decision upholding a city handgun ban against a Second Amendment challenge.³³ That same day, Turner, a white supremacist with a shortwave-radio talk show, made a blog post expressing his outrage at the decision.³⁴ He stated:

28. *Id.* at 139.

29. *Id.* at 140.

30. *Id.* at 155. The court did find that some of the group’s other activities, such as organizing “electronic civil disobedience,” did constitute incitement. *Id.*

31. *Id.* at 156.

32. *Id.*

33. See Nat’l Rifle Ass’n of Am. v. Chicago, 567 F.3d 856 (7th Cir. 2009), *rev’d sub nom.* McDonald v. Chicago, 561 U.S. 742 (2010).

34. United States v. Turner, 720 F.3d 411, 414 (2013).

All the years of peaceful legal challenges; all the years of peaceful appeals; all the years of peacefully and lawfully lobbying federal and state legislators, to achieve the penultimate goal of finally interpreting the meaning of the Second Amendment, only to have it all thrown in the trash by three Appellate Judges in a manner so sleazy and cunning as to deserve the ultimate response.

...

Let me be the first to say this plainly: These Judges deserve to be killed. Their blood will replenish the tree of liberty. A small price to pay to assure freedom for millions.³⁵

The post then referred to the 2005 murder of Judge Joan Lefkow's mother and husband and attributed the murders to her ruling in a case involving a white supremacist organization.³⁶ After the decision, Turner had publicly stated that she was "worthy of death," and Turner interpreted the subsequent attacks as evidence of his influence.³⁷

Turner continued to update the blog with harsh criticisms of Frank Easterbrook, Richard Posner, and William Bauer (the judges who decided the Seventh Circuit case).³⁸ He posted their photographs, their work addresses, the room numbers for their chambers, and a map of the courthouse including the locations of anti-truck-bomb barriers.³⁹ Turner also posted statements such as: "I intend to incite revenge. . . . Vicious, brutal, savage revenge with malice aforethought."⁴⁰ There was no subtlety in Turner's words. He made his intentions clear:

While I can't legally undertake killing, I may—just MAY—be able to say enough of the right things, to enough of the right people, to make it happen: People who have lost everything on account of you. People whose children have lost everything on account of you. People with nothing to lose by hunting you down and murdering you. I am going to be pounding them with information about you day and night. On and on, week after week after week.

35. *Id.* at 415.

36. *Id.*

37. *Id.* at 417.

38. *Id.* at 415–16.

39. *Id.*

40. *Id.* at 416.

Sooner or later, some of them are gonna snap and you will get dead.⁴¹

Naturally, the judges found these posts alarming and brought suit. The court concluded that the statements constituted true threats.⁴² When Turner suggested that this really should be an incitement case because he himself did not intend to carry out the murders, the court concluded: “Turner’s conduct was reasonably found by the jury to constitute a threat, unprotected by the First Amendment; it need not also constitute incitement to imminent lawless action to be properly proscribed.”⁴³

Both the dissenting opinion and the opinion below argued that Turner’s actions were not threats, but were directed to inciting imminent lawless action.⁴⁴ They concluded that posting the names, photographs, and locations of the judges, together with the information about the anti-truck-bomb barriers, demonstrated that Turner’s blog posts were aimed at encouraging others to kill or seriously injure the judges.⁴⁵ The dissenting opinion, however, would have overturned the district court’s ruling on other grounds.⁴⁶

D. Incitement or Truth Threats?

Each of the above cases presents the question of whether the speech at issue was “directed to inciting or producing imminent lawless action.” In *Planned Parenthood*, the three-judge panel concluded that posting abortion doctors’ home addresses and crossing off the names of those killed was not advocacy of illegal action. In *en banc* review, the court dodged the question by turning to the true threats doctrine. The court in *Fullmer* similarly concluded that posting the employees’ addresses, past instances of violent protests, and the “Top Twenty Terror Tactics” was not directed to inciting future, imminent lawless action. In *Turner*, the court avoided the question completely by turning to the true threats

41. *Id.* at 417.

42. *Id.* at 425.

43. *Id.*

44. *Id.* at 434–35 (Pooler, J., dissenting).

45. *Id.*

46. *Id.* at 435–36.

doctrine.⁴⁷ Ultimately, all three cases were decided under the true threats doctrine rather than the incitement doctrine.

This Comment does not endeavor to explore at length whether it was proper to analyze these cases under the true threats doctrine. It only notes that analyzing these cases under the true threats doctrine required some mental gymnastics. The Supreme Court has held that “[t]rue threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”⁴⁸ In the above cases, however, the speaker was not really communicating an “intent to commit an act of unlawful violence.” It is difficult to escape the fact that the speakers wanted third parties to carry out violent crimes.⁴⁹ As the dissent in *Turner* suggests, these cases likely fit better in the incitement context. The question that remains is whether the courts correctly decided that the speech in each case was not directed to inciting imminent lawless action.

III. THE PROPOSED TEST

A. An Introduction to Speech Act Theory

Speech act theory was developed largely by the work of linguistic philosophers J.L. Austin and John R. Searle.⁵⁰ Austin’s book *How to Do Things with Words* first introduced the concept of speech act theory, which analyzes the ways in which people use language. Searle, one of Austin’s students, further developed the concept in later years.

47. See Lyriisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 163 (2011) (“Turner, of course, was not prosecuted for incitement but for making a threat to a federal judge. Given the problem of proving the imminence necessary for incitement, it is understandable why the prosecutor chose this path . . .”).

48. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

49. 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) (noting that in cases such as these, the speakers “create fear by increasing the likelihood of ensuing violence without actually threatening to carry out the violence themselves”).

50. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969); see also Peter Meijes Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303, 305 (1987).

Both Austin and Searle asserted that every utterance has an illocutionary force.⁵¹ “The illocutionary force of an utterance reflects a speaker’s intent and is often expressed by verbs such as *order*, *warn*, *assert*, *question*, *offer*, and *promise*.”⁵² Put simply, when people say something, they *do* something. When a speaker says “the sky is blue,” she is *asserting* a fact. When she says “pass the salt,” she is *ordering* or *requesting* that someone do something. When she says “what is your name?,” she is *asking* a question.

The illocutionary force is typically not expressly stated (such as by saying “I assert that the sky is blue” or “I request that you pass the salt”) but is gathered from the circumstances and the speaker’s intonation.⁵³ Thus, the same words can have a different illocutionary force depending on the context in which they are uttered. For example, the sentence “You are coming over tomorrow” could be an assertion if stated with ordinary intonation. It could also be a question if the speaker’s intonation so indicated or even a command if said sternly.⁵⁴

Austin claimed that there were more than a thousand illocutionary verbs in the English language.⁵⁵ Searle later categorized these verbs into five categories:

In the illocutionary line of business there are five and only five basic things we can do with propositions: We tell people how things are (assertives), We try to get them to do things (directives), We commit ourselves to doing things (commissives), We express our feelings and attitudes (expressives), and We bring about changes in the world so that the world matches the proposition just in virtue of the utterance (declarations).⁵⁶

51. SEARLE, *supra* note 50, at 23.

52. Tiersma, *supra* note 50, at 305.

53. *Id.*

54. *See id.*

55. SEARLE, *supra* note 50, at 23.

56. John R. Searle, *Epilogue to the Taxonomy of Illocutionary Acts*, in CULTURAL COMMUNICATION AND INTERCULTURAL CONTACT 409, 410 (Donald Carbaugh ed., 1990); John R. Searle, *A Classification of Illocutionary Acts*, 5 LANGUAGE IN SOC’Y 1, 11–16 (1976). *But see* KENT BACH & ROBERT M. HARNISH, LINGUISTIC COMMUNICATION AND SPEECH ACTS 41 (1979) (categorizing illocutionary acts into only four categories: constatives, directives, commissives, and acknowledgments). This Comment does not attempt to defend one taxonomy over another. Although this Comment utilizes Searle’s taxonomy, the same propositions could be established utilizing a different taxonomy.

Although various verbs fall within each of these five categories, they only describe various manners of *asserting*, *directing*, *committing*, *expressing*, or *declaring*.

Utterances also have what speech act theory calls perlocutionary effects or perlocutionary acts.⁵⁷ Searle explained perlocutionary effects as follows:

Correlated with the notion of illocutionary acts is the notion of the consequences or *effects* such acts have on the actions, thoughts, or beliefs, etc. of hearers. For example, by arguing I may *persuade* or *convince* someone, by warning him I may *scare* or *alarm* him, by making a request I may *get him to do something*, by informing him I may *convince him*.⁵⁸

As seen from Searle's examples, there is generally a causal relationship between the illocutionary force and the perlocutionary effect.⁵⁹

B. The Test

This Comment proposes that courts should focus on an utterance's illocutionary force when deciding whether speech is directed to producing crime. If the utterance has a directive illocutionary force encouraging or urging imminent lawless action, it is directed to producing such action. If it falls within one of the remaining four categories of illocutionary forces (assertives, commissives, expressives, or declarations), it is not.

In the easiest cases, the speaker will say something to the effect of "I *urge* you to do *X* lawless action." Other directive verbs that would also have the same or similar illocutionary force would include *counsel*, *advise*, *request*, *ask*, *exhort*, etc. Usually, however, the utterance will not expressly include the verb indicating the illocutionary force. One way to assure that the speech really does directly advocate lawless action is to ask whether the statement can fairly be rephrased using such a verb.⁶⁰ For example, "kill the President" can fairly be rephrased "I urge you to kill the President."

57. SEARLE, *supra* note 50, at 25; *see also* Tiersma, *supra* note 50, at 305.

58. SEARLE, *supra* note 50, at 25.

59. Tiersma, *supra* note 50, at 305.

60. *See id.* at 315 ("The essential question is whether an utterance is expressible with an explicit performative phrase ('I accuse') or its semantic equivalent.").

Harder cases arise when the illocutionary force is not as clear. Often, an utterance can have more than one illocutionary force. For example, the statement “You are standing on my foot” has an assertive illocutionary force. Its plain meaning simply asserts the fact that the hearer is standing on the speaker’s foot. But this statement generally has an inferred directive illocutionary force as well—“Get off my foot.”⁶¹ In this example, the inferred directive illocutionary force is called an *indirect* speech act. Searle summarized indirect speech acts as follows: “In indirect speech acts the speaker communicates to the hearer more than he actually says by way of relying on their mutually shared background information, both linguistic and nonlinguistic, together with the general powers of rationality and inference on the part of the hearer.”⁶² Thus, analyzing indirect incitement requires the court to objectively look at what inferences the hearer would rationally make from the utterance. An utterance has an indirect, directive illocutionary force if, given the circumstances under which the speaker made the utterance, the hearer would rationally infer from the words used that the speaker is urging her to engage in lawless action.

IV. INCITEMENT FRAMEWORKS THROUGH THE LENS OF SPEECH ACT THEORY

The following subsections explore the evolution of the incitement doctrine, pointing out where courts have come close to distinguishing protected speech from unprotected incitement based on an utterance’s illocutionary force. It concludes with a summary of scholar Kent Greenawalt’s work on encouragements to law violation, which made significant headway in explaining, based on linguistic philosophy, why speech that incites lawless action does not merit complete First Amendment protection.

61. See John R. Searle, *Indirect Speech Acts*, in SYNTAX AND SEMANTICS 59, 60 (P. Cole & J.L. Morgan eds., 1975).

62. *Id.* at 60–61.

A. *Masses Publishing Co. v. Patten: An Early Attempt at Analyzing an Utterance's Illocutionary Force*

Two years before the United States Supreme Court would hear an incitement case, Judge Learned Hand, then a district court judge, formulated an incitement test in *Masses Publishing Co. v. Patten*.⁶³ The year was 1917, and the United States had just entered World War I. Congress had passed the Espionage Act, which prohibited anyone “from willfully causing insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States.”⁶⁴ Based on this Act, the postmaster of New York refused to accept and deliver a revolutionary magazine called *The Masses*.⁶⁵ The publisher sought a court order forcing the postmaster to deliver the magazine.

The particular magazine issues in question contained cartoons and text expressing animosity to the draft and to the war.⁶⁶ For example, one issue contained a poem dedicated as a tribute to two prisoners convicted of obstructing the draft.⁶⁷ The magazine as a whole clearly opposed the draft but did not expressly encourage or direct anyone to resist it.⁶⁸ The postmaster defended his refusal to circulate the magazine on the basis that the ideas expressed therein “tend[ed] to promote a mutinous and insubordinate temper among the troops.”⁶⁹ For Judge Hand, it was not enough that an idea *tended* to promote insubordination:

[T]o interpret the word “cause” so broadly would . . . involve necessarily as a consequence the suppression of all hostile criticism, and of all opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument. It would contradict the normal assumption of democratic government that the suppression of hostile criticism does not turn upon the justice of its substance or the decency and propriety of its temper.⁷⁰

63. 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

64. *Id.* at 539.

65. *Id.* at 536.

66. *Id.*

67. *Id.* at 544.

68. *See id.* at 543–44.

69. *Id.* at 539.

70. *Id.* at 539–40.

To prevent the risk of suppressing dissenting viewpoints based solely on the fact that they criticized the government, Judge Hand suggested that such speech was protected unless it directly counseled or advised others to violate the law. Under Judge Hand's test, deciding whether the speech directly urged law violation required looking at the actual words uttered. Judge Hand explained:

To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. . . . If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.

. . . I have construed the [Espionage Act] as therefore limited to the direct advocacy of resistance to the recruiting and enlistment service. If so, the inquiry is narrowed to the question whether any of the challenged matter may be said to advocate resistance to the draft, taking the meaning of the words with the utmost latitude which they can bear.⁷¹

In other words, the question is whether the speaker (a) urged, counseled, or directed someone to violate the law or instead (b) expressed a viewpoint which could indirectly cause someone to violate the law because of its content. If (a), then the speech is not protected. If (b), it is. To use speech act theory terminology, Judge Hand's test focuses on the utterance's illocutionary force. The question is whether the speaker's utterance (a) had a directive illocutionary force counseling, advising, or urging law violation or (b) had an assertive illocutionary force stating a set of affairs or an expressive illocutionary force voicing dissatisfaction with a set of affairs.

Applying this test, Judge Hand found that the magazine did not "counsel or advise" others to violate the law.⁷² Referring to the poem giving tribute to two draft resisters, Judge Hand reasoned:

That such comments have a tendency to arouse emulation in others is clear enough, but that they counsel others to follow these examples is not so plain. . . . One may admire and approve the course of a hero without feeling any duty to follow him. There is

71. *Id.* at 540–41.

72. *Id.* at 541–42.

not the least implied intimation in these words that others are under a duty to follow. The most that can be said is that, if others do follow, they will get the same admiration and the same approval. Now, there is surely an appreciable distance between esteem and emulation; and unless there is here some advocacy of such emulation, I cannot see how the passages can be said to fall within the law.⁷³

The other contested texts and cartoons also amounted only to “political agitation,” which Judge Hand found worthy of protection.⁷⁴

Judge Hand’s test is similar to the test this Comment proposes. The difference, however, is that Judge Hand was focused on the literal language that the speaker used.⁷⁵ This led to two main criticisms of his test. First, it failed to account for purposeful but indirect incitement to crime. Judge Hand’s contemporaries often pointed to Marc Antony’s oration over Caesar’s body in Shakespeare’s *Julius Caesar*, where Marc Antony never directly counseled his audience to attack Brutus but clearly intended to impassion them to do so.⁷⁶ Under Judge Hand’s test, Mark Antony’s oration would be protected despite the fact that the circumstances indicated that he was seeking to produce violence. Second, the *Masses* test may also sweep in speech that, taken literally, urges other people to commit crime but that in context is figurative or mere hyperbole.⁷⁷ For example, a person frustrated with a government official may exclaim that someone should go shoot her. Even if it is clear to the audience that the speaker is just letting off steam and not seriously directing anyone to actually shoot the official, the *Masses* test may find such speech unprotected.

This Comment’s proposed test would resolve these issues. Marc Antony’s praises of Caesar would be considered encouragements to

73. *Id.*

74. *Id.* at 540–41. Judge Hand’s opinion was subsequently overturned and his test abandoned, but *Masses* continues to be a focus of scholarly debate.

75. *Id.* at 542. Judge Hand acknowledged the possibility of indirect advocacy but never addressed how far beyond the literal language the factfinder can look. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 729 (1975).

76. See KATHLEEN M. SULLIVAN & NOAH FELDMAN, *FIRST AMENDMENT LAW* 28 (5th ed. 2013); Gunther, *supra* note 75, at 729.

77. See SULLIVAN & FELDMAN, *supra* note 76, at 28–29.

violent action because it was clear under the circumstances that he was provoking the crowd to violence. His speech would constitute an indirect speech act, the functional equivalent of expressly directing the crowd to attack Brutus. Also, the frustrated constituent's hyperbolic language suggesting that someone kill a government official would be protected under this Comment's test. Austin noted that when a speaker uses language figuratively or in jest, the illocutionary force cannot be derived from the literal words used.⁷⁸

B. Incitement, the Early Years: A Focus on Perlocutionary Effects

The Supreme Court's first incitement case was *Schenck v. United States*.⁷⁹ The relevant statute was again the Espionage Act.⁸⁰ Schenck had mailed flyers to men who had accepted calls to military service.⁸¹ The flyers stated that conscription violated the Thirteenth Amendment and otherwise criticized the draft.⁸² It encouraged the draftees "not to submit to intimidation" and to assert their rights, but confined itself to "peaceful measures such as a petition for the repeal of the [draft]."⁸³

Justice Holmes, writing for the Court, set forth the following rule: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."⁸⁴ Justice Holmes gave his now-famous example of a man "falsely shouting fire in a theatre and causing a panic."⁸⁵ He concluded that, given the nation's state of crisis, mailing the flyers would likely cause such proverbial panic in the form of draft resistance.⁸⁶

Justice Holmes's test, along with the fire-in-a-crowded-theater example, illustrates the Court's early focus on perlocutionary effects.

78. AUSTIN, *supra* note 50, at 104.

79. 249 U.S. 47 (1919).

80. *Id.* at 48–49.

81. *Id.*

82. *Id.* at 50–51.

83. *Id.* at 51.

84. *Id.* at 52.

85. *Id.*

86. *Id.*

As long as there was a clear and present danger of evil, the test was satisfied. The utterance could have a directive, assertive, or expressive illocutionary force and be unprotected as long as there was a clear and present risk of a harmful perlocutionary effect. Although the “clear and present” language suggested that the perlocutionary effect would have to be immediate, its application in *Schenck* made it clear that even remote and tentative dangers made the speech unprotected. The contemporaneous opinions in *Debs v. United States*⁸⁷ and *Frohwerk v. United States*⁸⁸ further clarified that speech was unprotected as long as its “natural tendency and reasonably probable effect” was to cause insubordination or disloyalty.⁸⁹

Later opinions saw Justice Holmes give some weight to his example of shouting fire in a crowded theater. In *Abrams v. United States*, he dissented from an opinion convicting several Russian immigrants of violating the Espionage Act for distributing flyers asking workers in ammunition factories to go on strike to prevent weapons from getting to Russia.⁹⁰ “[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so *imminently* threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”⁹¹ This test still focused on the utterance’s perlocutionary effect, but required an imminent risk of danger rather than the attenuated risk in *Schenck*.

Decades of debate over the proper standard ensued. For example, in the 1927 case of *Whitney v. California*, the majority continued the tradition of *Schenck*’s natural-tendency test.⁹² Justice

87. 249 U.S. 211 (1919).

88. 249 U.S. 204 (1919).

89. See Gunther, *supra* note 75, at 737–39 (noting that Holmes’s early incitement test was more akin to a “bad tendency” test than a “clear and present danger” test); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391, 414–15 (1992) (same).

90. 250 U.S. 616 (1919).

91. *Id.* at 630 (Holmes, J., dissenting) (emphasis added).

92. *Whitney v. California*, 274 U.S. 357, 371 (1927), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (“That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in

Brandeis wrote a concurring opinion adopting Justice Holmes's imminence requirement: "[A] valid restriction does not exist unless speech would produce . . . a clear and *imminent* danger of some substantive evil which the state constitutionally may seek to prevent."⁹³ Though the majority's and the dissent's standards can lead to vastly different results, both focused on an utterance's perlocutionary effect. Justices Brandeis and Holmes simply would require more clarity that the speech produce an immediate perlocutionary effect.

During the second Red Scare, a unique variation of previous incitement tests emerged. In *Dennis v. United States*, the Court affirmed the convictions of several Communist Party leaders convicted of conspiring to "advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence."⁹⁴ The Court adopted the following standard: "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁹⁵ This formula allowed the Court to take into consideration the seriousness of the harm (or "evil") being advocated. It also asked the Court to consider how likely (not how imminent) it was that harm would result. The focus, however, was still on the likelihood that the utterance would result in a harmful perlocutionary effect. The speech's illocutionary force remained irrelevant.

This era of debate over the correct incitement standard contributed greatly to the current test. The problem with these tests, however, is that they only focus on the utterance's perlocutionary effect. Focusing only on the utterance's perlocutionary effect is unsatisfactory for a number of reasons. For example, Judge Hand later stated that he chose not to focus on an utterance's effects in his *Masses* decision primarily because he (1) doubted judges' competency to accurately predict an utterance's likely consequences,

the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.").

93. *Id.* at 373 (Brandeis, J., concurring) (emphasis added).

94. 341 U.S. 494, 497 (1951).

95. *Id.* at 510 (quoting *United States v. Daniels*, 183 F.2d 201, 212 (2d Cir. 1950)).

(2) similarly distrusted juries, and (3) found jury incompetency particularly problematic during times of national crisis.⁹⁶ The first two require little explanation—how can judges and juries presume to know the consequences of an utterance? Judges and juries are not oracles. They can only rely on their own experience and are likely to be biased against speech they dislike. Predictions of future violence could become a façade by which juries punish unpopular ideas.⁹⁷

Judge Hand especially distrusted judges and juries during times of war. He seemed especially aware in *Masses*, which took place during World War I, that fear could provide strong motives to sanction unpopular ideas.⁹⁸ The right to criticize the government is a fundamental part of free speech because it safeguards the public from government deception and abuse of power.⁹⁹ But during national crises, safeguards appear to be weak links and government critics appear to be traitors. Concerned that such would be the case, Judge Hand avoided tests that would require judges and juries to predict the likely consequences of speech.

If the goal is to distinguish speech that merely advocates ideas from speech that advocates criminal action, a test that focuses only on an utterance's perlocutionary effect is unsatisfactory. Under the Court's early tests, it would not matter whether the speaker advocated an idea or an action as long as there was a danger of harm.

96. See Gunther, *supra* note 75, at 725 (“To second-guess enforcement officials about probable consequences of subversive speech was to [Judge Hand] a questionable judicial function: judges had no special competence to foresee the future. Moreover, even if predictions about the consequences of words were thought to be appropriate court business, the task would ordinarily fall not to the judge but to the jury, a body reflecting majoritarian sentiments unlikely to be conducive to the protection of dissent in wartime.”). Judge Hand articulated these criticisms in letters to Justice Holmes written during the period when the Supreme Court was hearing early incitement cases such as *Schenk* and *Abrams*. *Id.* at 719–22. During the correspondence, Judge Hand tried, without success, to convince Justice Holmes to adopt the standard set forth in *Masses*. *Id.* at 736.

97. See *Masses Publ'g Co. v. Patten*, 244 F. 535, 539–40 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).

98. *Id.* at 540 (“[T]o assimilate [political] agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom.”).

99. See SULLIVAN & FELDMAN, *supra* note 76, at 7 (“[F]ree speech prevents government abuse of power.”); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977) (arguing that the First Amendment plays an important role in checking the government).

Adding an imminence requirement was a step in the right direction, but it still failed to adequately distinguish protected advocacy of ideas from unprotected advocacy of lawless action.

C. Brandenburg v. Ohio: A Blend of Illocutionary Force and Perlocutionary Effect

After many years of development, the Court announced the current incitement test in 1969. In *Brandenburg v. Ohio*, the leader of a Ku Klux Klan group was convicted of violating Ohio's Criminal Syndicalism Statute, which made it illegal to "advocat[e] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."¹⁰⁰ At a Ku Klux Klan rally, the leader gave a speech, saying in relevant part: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."¹⁰¹

The Court found that the Ohio statute was unconstitutional:

[As we have stated], 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.¹⁰²

The Court then set forth the following incitement standard, which would prove to last longer than any of its previously articulated tests:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting

100. 395 U.S. 444, 444–45 (1969).

101. *Id.* at 446.

102. *Id.* at 447–48 (citations omitted).

or producing imminent lawless action and is likely to incite or produce such action.¹⁰³

Thus, the test holds that speech constitutes incitement only when speakers direct their speech at creating imminent lawless action and it is likely that such imminent lawless action will result. Various relics from former tests appear in this formulation. For example, scholar Gerald Gunther observed that the “directed to” language comes from Judge Hand’s opinion in *Masses*, and that the imminence requirement is the product of Justice Holmes’s early contributions to the case law.¹⁰⁴

The *Brandenburg* test should be read as requiring an inquiry into an utterance’s illocutionary force and its perlocutionary effect. The “directed to” language suggests that speech constitutes unprotected incitement only if it is aimed at getting others to violate the law as opposed to simply expressing or asserting an idea. This requirement is best understood as requiring that the speech have a directive illocutionary force, as explained more fully in Part III. The remaining elements of the test focus on the utterance’s perlocutionary effect and set forth important narrowing principles. Once it is established that the speech was directed to inciting lawless action, the imminence requirement limits the test to encompass only incitement to crimes to be committed within a short period of time. The remaining requirement adds an additional constraint that the perlocutionary effect be likely.¹⁰⁵

D. Kent Greenawalt on Encouragements to Crime

Scholar Kent Greenawalt also borrowed from linguistic philosophy in his scholarship on incitement.¹⁰⁶ Greenawalt contrasted encouragements and requests to commit crime with assertions of fact

103. *Id.*

104. See Gunther, *supra* note 75, at 754–55.

105. The Court has not addressed what the “likely” requirement means. See Healy, *supra* note 6, at 713. For scholarly discussion of what “likely” should mean, see *id.* at 713–15 (suggesting that the “probable cause” standard from Fourth Amendment jurisprudence would be an adequate standard); GREENAWALT, *supra* note 7, at 267–68 (suggesting that the likelihood requirement should be flexible, requiring a greater probability for less serious crimes).

106. Greenawalt, however, focused more on Austin’s early work discussing performative utterances. GREENAWALT, *supra* note 7, at 58.

and value. Statements that assert facts or values, Greenawalt argued, fall squarely within First Amendment protection.¹⁰⁷ Assertions of fact such as, “Rapid inflation causes social instability” and assertions of value such as, “Love is the greatest good” contribute to society’s overall quest for information and help inform public decision-making.¹⁰⁸ In contrast, “[t]he purpose of [an encouragement or request] is not to convey some truth, but to get something done.”¹⁰⁹ Accordingly, Greenawalt concluded that encouragements and requests to commit crime merit less First Amendment protection.¹¹⁰

But Greenawalt also noted that assertions of fact and value and encouragements to crime are often intertwined.¹¹¹ For example, a person expressing her intense opposition to the draft may communicate her ideas and, to illuminate the practical implications of her belief, suggest that listeners resist the draft.¹¹² This tricky interplay led Greenawalt to conclude that “[b]ecause requests and encouragements are designed to induce action and because much of what they impliedly communicate about facts and values could be otherwise communicated, they lie at the margin of a principle of free speech, but such a principle cannot disregard them altogether.”¹¹³ Greenawalt suggested that the *Brandenburg* test, with a few clarifications, would be an adequate way to distinguish protected assertions of fact and value from encouragements and requests to commit crime.¹¹⁴

Greenawalt’s distinction between assertions of fact and value and encouragements to commit crime is essentially the same as this Comment’s distinction based on a statement’s illocutionary force. Greenawalt even appreciated that there are both direct and indirect

107. *Id.* at 43–45.

108. *Id.*

109. *Id.* at 69.

110. *Id.* at 70.

111. *Id.*

112. *Id.*

113. *Id.* at 70–71.

114. *Id.* at 266–67. For example, Greenawalt wished to clarify that for less serious crimes such as tax evasion, the appropriate remedy would be to punish the actor, not the encourager. *Id.* at 269. Greenawalt also suggested that the test should be limited to instances where the speaker advocates committing specific crimes, as opposed to advocating crime generally. *Id.* at 266. As discussed in Part I, Greenawalt also favored a more relaxed imminence requirement. *Id.* at 267.

ways of encouraging crime, and that often it is difficult to know whether someone is actually encouraging crime or simply expressing an idea.¹¹⁵ This Comment's proposed test builds on and further develops Greenawalt's distinction to clarify how courts can distinguish encouragements to crime from assertions of fact and value. Focusing on the utterance's illocutionary force provides a way to objectively analyze whether an utterance encourages law violation or merely asserts an idea.

V. APPLYING THE TEST

This section applies the test proposed in Part III to the cases discussed in Part II. To decide whether speech is directed to inciting or producing imminent lawless action, courts should focus on the speech's illocutionary force. If the utterance has a directive illocutionary force urging lawless action, it satisfies the "directed to" requirement of the *Brandenburg* test. Sometimes it will be apparent that the speech has a directive illocutionary force, such as if the speaker says "I urge you to kill Bob." Other times, the illocutionary force will be indirect. In those cases, courts should consider whether the audience, under the circumstances, would rationally infer that the speaker is urging lawless action.

For the sake of argument, this Comment assumes that *Brandenburg*'s "imminence" and "likely" requirements are met in the three cases. In each case, the audience had all of the necessary information to carry out violent crimes. It is reasonable to infer that someone equipped with the names and addresses of the abortion doctors, Huntingdon employees, or judges would be capable of carrying out violent attacks within a matter of days. Furthermore, the speakers in each case had previously engaged in similar speech that resulted in violent attacks: the antiabortion activists' "wanted" posters had successfully elicited crime in the past, the animal rights activists' blog had previously resulted in violent attacks against Huntingdon employees, and Turner had previously made a

115. *Id.* at 110–12, 118–26 ("Often words are ambiguous, leaving doubt whether the speaker actually urges the commission of criminal acts. When the words are plain on their face, it may still be unclear whether they are intended literally or to make some rhetorical point. . . . Unless the net of criminal liability is cast carefully, persons may be held responsible for communications not actually intended by them to cause criminal behavior.").

statement about a judge that resulted in a violent attack.¹¹⁶ Given this history, it seems likely that violent conduct would result. These conclusions may, of course, be subject to debate, but this Comment takes them as given and only addresses whether the speech in question was directed at inciting such imminent lawless action.

A. Planned Parenthood

In *Planned Parenthood*, the three-judge panel concluded that posting the names, photographs, and addresses of abortion doctors to a website did not advocate violence against them, even though it perhaps made violent attacks more likely. To be sure, nothing about the website expressly encouraged readers to use that information to carry out violent attacks. It is possible that the website provided the information to facilitate non-violent protests against the abortion doctors, such as writing letters or picketing outside of the doctors' offices. In fact, some of the "wanted" posters simply offered a reward to those who could persuade the doctors to stop performing abortions.¹¹⁷

The legend indicating which of the abortion doctors had been killed or wounded, on its own, also did not expressly encourage people to attack the abortion doctors. Crossing out the names of doctors that had been killed had an assertive illocutionary force. In effect, the website functioned as a report, stating the fact that "the following doctors have already been killed or seriously wounded." Of course, reporting and apparently approving of violent crime that has already occurred may result in emulation. But unless the website actually encouraged emulation, it cannot conclusively be said to have been directed at producing future violent attacks.¹¹⁸

116. See *supra* Section II.C. The extent of Turner's actual influence in the previous attack against Judge Lefkow's family is unclear, but Turner suggested that he played a role in eliciting that crime. See *supra* note 37 and accompanying text.

117. See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1064–65 (9th Cir. 2002).

118. See *supra* note 73 and accompanying text. Whether or not an audience will emulate conduct reported by the speaker goes to the statement's perlocutionary effect. The relevant question for determining an utterance's illocutionary force is whether the speaker, directly or indirectly, encouraged such emulation. The mere fact that one reports criminal conduct does not necessarily establish that she is encouraging others to follow suit.

Neither the information provided about the abortion doctors nor the report on which doctors had already been attacked contained a directive illocutionary force standing alone. But combined, a court could reasonably find that they constituted an indirect speech act urging readers to violence against the abortion doctors. The legend indicated that names that were struck through had been killed, names that were in grey had been wounded, and names in black were yet to be attacked.¹¹⁹ In effect, the website said, “This is what has been done, and this is what is left to do.” Providing the names and addresses of the doctors yet to be attacked or killed would rationally lead readers, especially those sympathetic to the organization’s cause and methods, to infer that the website encouraged them to participate in carrying out the remaining attacks. Thus, although the website did not *directly* urge law violation, the circumstances suggested that people would infer that the website was both urging and facilitating murders or other violent protests. Notably, *Planned Parenthood* is likely the closest call of the three cases discussed in this Comment, and it would not be unreasonable for a court to find that the website fell shy of inciting crime if it felt these inferences were too weak.

B. Fullmer

Similar to the court in *Planned Parenthood*, the court in *Fullmer* found that the act of simply reporting previous attacks against Huntingdon employees was not directed at imminently inciting future attacks. Certainly, reporting past attacks, without more, is merely an assertion of fact. But the website did more than simply report. After reporting the violent attack against Dr. Armstrong, the website stated, “[We are] excited to see such an upswing in action against Huntingdon and their cohorts. From the unsolicited direct action to the phone calls, e-mails, faxes, and protests. Keep up the good work!”¹²⁰ The phrase “Keep up the good work” has a directive illocutionary force encouraging readers to carry out similar violent attacks as well as non-violent attacks. It is of no moment that the website went to great lengths to specify that illegal protests were

119. *Planned Parenthood*, 290 F.3d at 1065.

120. *United States v. Fullmer*, 584 F.3d 132, 140 (3rd Cir. 2009).

unsolicited. Indeed, the website contradicted itself in stating that it was excited to see “*unsolicited* direct action” and then continuing to encourage people to “[k]eep up the good work.”

Aside from this express encouragement to commit violent attacks, the website also indirectly urged lawless action. The “Top Twenty Terror Tactics” article alone did not necessarily encourage people to carry out those tactics. But after the article, the website stated, “Now don’t go getting any funny ideas!”¹²¹ In context, this sarcastic comment would lead readers to infer that the speaker was encouraging them to utilize the violent tactics in their protests against Huntingdon employees. It therefore has an indirect, directive illocutionary force urging lawless action.

Additionally, the website provided readers with the names and addresses of certain employees as well as information about their children. As in *Planned Parenthood*, it is possible that the website simply provided this information to facilitate non-violent protests. But, together with reports on past violent attacks and the “Top Twenty Terror Tactics” article, readers would infer that the information was intended to be used to carry out both violent and non-violent protests. Furthermore, the website would have no reason to include information about the employees’ families and children if it were simply encouraging non-violent protests. Including the information about the employees’ family members strongly suggests that the information was meant to be used to terrorize and not just to peacefully protest.

C. Turner

Turner’s statements similarly had directive illocutionary forces. Stating that the judges “deserve to be killed”¹²² has an assertive illocutionary force that, at first blush, merely asserts an idea. Statements like this are often hyperbole or rhetoric used to express extreme outrage. In this sense, they also may have an expressive illocutionary force. Read in context, however, the reader would rationally infer that Turner was urging third parties to kill the judges. Statements such as “I intend to incite revenge” or stating that he

121. *Id.* at 140.

122. *See supra* note 35 and accompanying text.

may “be able to say enough of the right things” to get the judges killed suggest that Turner not only thought the judges deserved to be killed but that he was also encouraging others to kill them.

Where Turner really crossed the line was posting the judges’ names, work addresses, and a map of the courthouse pointing out the anti-truck-bomb barriers.¹²³ There was no direct counseling—each of these statements only assert facts. But as the dissenting opinion suggested, it would be reasonable to infer that Turner was urging readers to utilize that information to “take revenge” on the judges. It is difficult to see what other purpose he could have had in providing the judges’ work location and the information about anti-truck-bomb barriers. Perhaps, as the majority opinion suggested, he was simply trying to instill fear in the judges. But the attention to detail and the accompanying encouragements undermine such an analysis. As a whole, the website conveyed an indirect illocutionary force urging the audience to kill the judges.

VI. CONCLUSION

Courts and scholars have been trying for nearly a century to adequately distinguish protected advocacy of ideas from unprotected advocacy of lawless action. The *Brandenburg* test is the product of decades of development and, overall, provides a satisfactory test for making the distinction. Under *Brandenburg*, advocacy of lawless action is protected unless it “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹²⁴ But *Brandenburg* leaves several questions unanswered. Much has been said about what *Brandenburg*’s imminence requirement should mean, but still unanswered is the equally important question of what it means to *direct* speech at producing imminent lawless action.

Speech act theory has already explained how to decide what kinds of speech encourage others to actions and what kinds of speech merely assert ideas. The distinction between protected speech and unprotected encouragement to crime can best be made by focusing on the utterance’s illocutionary force. Adopting this test would

123. See *supra* note 39 and accompanying text.

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

provide more clarity among courts and enable them to deal with hard cases where the speaker does not expressly encourage crime, but does so indirectly.

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