FIRST AMENDMENT — FREEDOM OF SPEECH — SECOND CIRCUIT AFFIRMS THREATS CONVICTION IN INTERNET SPEECH CASE. — *United States v. Turner*, 720 F.3d 411 (2d Cir. 2013).

Threats and incitement are distinct but closely related categories of speech unprotected by the First Amendment. In 1969, the Supreme Court handed down *Watts v. United States*,[1] which held that "true threats" are unprotected speech,[2] and *Brandenburg v. Ohio*,[3] which identified incitement as an unprotected category but defined that category in a narrow, highly speech-protective way.[4] However, courts struggle when faced with cases that contain elements of both threats and incitement. Recently, in *United States v. Turner*,[5] the Second Circuit affirmed talk show host Harold Turner's conviction under a statute that criminalizes threatening a federal judge after Turner called for the deaths of Seventh Circuit Judges Posner, Easterbrook, and Bauer on his blog.[6] The facts of the case suggest that the court should have applied the *Brandenburg* incitement test instead of treating the speech as a threat. By failing to do so, the court missed an opportunity to create precedent illustrating a *Brandenburg* analysis in an ambiguous context and blurred the categories of threats and incitement.

Harold Turner operated a website and hosted a talk radio show that attracted the interest of violent white supremacist groups.[7] On June 2, 2009, Turner published a blog post on his website regarding the Seventh Circuit's decision in *National Rifle Ass'n of America v. City of Chicago*,[8] which held that the Second Amendment does not apply to the states.[9] Turner wrote that Judges Posner, Easterbrook, and Bauer "deserve[d] to be killed" for their decision.[10] Invoking Thomas Jefferson, Turner wrote that the blood of these judges would "replenish the tree of liberty."[11] Turner suggested that the judges "didn't get the hint"[12] sent by a gunman who had murdered the family

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1 394 U.S. 705 (1969) (per curiam).

2 *Id.* at 707–08.

3 395 U.S. 444 (1969) (per curiam).

4 *See id.* at 447–49.

5 720 F.3d 411 (2d Cir. 2013).

6 *Id.* at 413–14.

7 *Id.* at 414. Turner's popularity with this audience led the FBI to use Turner for several years as a contact for information about extremists. *Id.*

8 567 F.3d 856 (7th Cir. 2009), *rev'd sub nom.* McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

9 *Turner*, 720 F.3d at 413–14.

10 *Id.* at 414. In a previous post on his website, Turner had declared: "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 . . . ." *Id.* at 417.

11 *Id.* at 415.

12 *Id.*

of another federal judge in Chicago, Judge Joan Lefkow, and even offered those murders as "proof" of his power, since he had written that Judge Lefkow was "worthy of death" shortly before the tragedy.[13] The next day, Turner posted the names and photographs of the three judges, a photograph and map of their courthouse marked to show the location of "[a]nti-truck bomb barriers," and the room numbers of their chambers.[14] Turner was charged under 18 U.S.C. § 115(a)(1)(B), which prohibits threatening to assault or murder a federal judge with the intent "to impede, intimidate, or interfere with" the judge in his or her duties or "to retaliate against such . . . judge . . . on account of the performance of official duties."[15]

The case was assigned to Judge Walter of the Western District of Louisiana rather than to a district judge in the Seventh Circuit due to the victims' identities.[16] Judge Walter granted Turner's motion to transfer the case to the Eastern District of New York.[17] The New York district court denied Turner's motion for a judgment of acquittal, finding "that [his] actions [were] sufficient to incite or urge lawlessness" and that Turner "provided exact information to *facilitate* the threat" by posting the photographs, room numbers, and map.[18] It instructed the jury that Turner's statements were to be evaluated from the perspective of a reasonable person reading them who was familiar with their context.[19] The jury returned a guilty verdict.[20]

The Second Circuit affirmed the conviction.[21] Writing for the panel, Judge Livingston[22] held that the conviction was supported by sufficient evidence, the district court's jury instructions contained no prejudicial error, and no other improper government statements or evidentiary rulings prejudiced the trial.[23]

First, Judge Livingston rejected Turner's contention that the evidence was insufficient to sustain a conviction.[24] She noted that the Second Circuit applies an objective test in threats cases, asking "whether an ordinary, reasonable recipient who is familiar with the context of the [communication] would interpret it as a threat of inju-

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[13] *Id.* at 417.

[14] *Id.* at 415–16.

[15] *Id.* at 420 (alterations in original) (quoting 18 U.S.C. § 115(a)(1)(B) (2012)) (internal quotation mark omitted).

[16] *Id.* at 418. Judge Walter sat by designation in the Northern District of Illinois. *Id.*

[17] *Id.*

[18] United States v. Turner, No. 09-00650, 2009 WL 7265601, at *2 (E.D.N.Y. Oct. 5, 2009).

[19] *Turner*, 720 F.3d at 418.

[20] *Id.*

[21] *Id.* at 414.

[22] Judge Livingston was joined by Judge Cogan of the Eastern District of New York, sitting by designation.

[23] *Turner*, 720 F.3d at 429.

[24] *Id.* at 418–19.

ry."[25] She found that the evidence was sufficient to allow a jury to conclude that Turner's speech was more than mere political criticism or hyperbole protected by the First Amendment.[26] Judge Livingston dismissed Turner's argument that speech similar to his is common in public discourse, noting that the examples Turner offered were not comparable in seriousness to his blog posts and that even if they were, the existence of other threatening speech would not exonerate him.[27] She emphasized Turner's reference to the murders of Judge Lefkow's family members in evaluating the seriousness of his comments, particularly since Turner had implied on his website that his statement about Judge Lefkow had led to the murders.[28] Turner also argued that his statements could not have been true threats because they were written in the passive voice[29] and "purported to be directed at third parties, rather than the judges themselves."[30] Judge Livingston rejected this argument on the ground that it would require "rigid adherence to the literal meaning of a communication without regard to its reasonable connotations," an approach that would frustrate the purpose of the statute.[31] Thus, Judge Livingston found that the jury had sufficient evidence to convict Turner.

Second, the court upheld the jury instructions given at trial.[32] Turner argued that the district court's instructions should have included language from *United States v. Kelner*,[33] where the Second Circuit characterized true threats as "so unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."[34] Judge Livingston pointed out that this language was dicta and found no error in the district court's failure to include it.[35]

Third, the court rejected Turner's claim that the district court should not have allowed the government to intimate to the jury the large size of Turner's white supremacist audience since audience size is

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[25] *Id.* at 420 (alteration in original) (quoting United States v. Davila, 461 F.3d 298, 305 (2d Cir. 2006)) (internal quotation mark omitted).

[26] *Id.* at 421.

[27] *Id.* For example, Turner compared his speech to that of a former congressman who was quoted in a newspaper as saying that "they ought to . . . shoot" a particular gubernatorial candidate. *Id.*

[28] *Id.* at 421–22.

[29] *Id.* at 422.

[30] *Id.* at 424.

[31] *Id.* at 422 (quoting United States v. Malik, 16 F.3d 45, 50 (2d Cir. 1994)) (internal quotation mark omitted).

[32] *Id.* at 427.

[33] 534 F.2d 1020 (2d Cir. 1976).

[34] *Turner*, 720 F.3d at 424 (quoting *Kelner*, 534 F.2d at 1027).

[35] *Id.* at 425–26.

irrelevant in a true threats analysis.[36] According to Judge Livingston, the size of Turner's audience was relevant to determining "whether Turner intended for his threats to reach — and thus to intimidate — Judges Easterbrook, Bauer, and Posner."[37]

Judge Pooler dissented. She would have held that the evidence was insufficient to sustain a conviction because Turner's statements did not constitute a true threat under 18 U.S.C. § 115(a)(1)(B) and the First Amendment.[38] Judge Pooler emphasized the distinction between the categories of true threats and incitement.[39] For her, the issue was the category into which Turner's statements fell, since the category determines the legal standard to be applied.[40] In distinguishing between threats and other forms of speech, Judge Pooler identified three relevant considerations: whether the victim "is fearful of the execution of the threat *by the speaker*,"[41] whether the threat is directed toward the victim, and, to the extent the speech is ambiguous, whether the speech is conveyed in public discourse or private communication.[42] In particular, she found the public/private distinction to be "highly significant" when the threat is ambiguously worded.[43] She noted that Turner's statements were written in the passive voice and that they were posted on a publicly accessible blog, which suggested that Turner's speech was "public political discourse" rather than a threat.[44] Turner was not charged under an incitement statute, but Judge Pooler intimated that if he had been, his speech may have been unprotected under *Brandenburg*.[45]

Threats and incitement are doctrinally distinct, and several rationales based on First Amendment principles justify keeping the two categories separate. Rather than simply "*presuppos*[*ing*] that the speech at issue [was] a purported threat"[46] and applying the Second Circuit's threats test, the court should have considered how to sort the case into one of the two categories to determine the applicable standard. A con-

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[36] *Id.* at 427–28.

[37] *Id.* at 427. The court also rejected Turner's arguments "that the district court plainly erred by charging the jurors only that they 'may' — rather than 'must' — acquit if they found Turner's statements to be mere political hyperbole," *id.* at 426; that the government made incorrect statements about the First Amendment in its summation; that the district court should not have allowed Judges Posner, Easterbrook, and Bauer to testify; and that the district court should have permitted him to introduce evidence that the threats were not carried out, *id.* at 428–29.

[38] *Id.* at 429–30 (Pooler, J., dissenting).

[39] *Id.* at 430–34.

[40] *Id.* at 430.

[41] *Id.* at 431 (quoting New York *ex rel.* Spitzer v. Operation Rescue Nat'l, 273 F.3d 184, 196 (2d Cir. 2001)).

[42] *Id.* at 432–33.

[43] *Id.* at 433 (quoting Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coal. of Life Activists, 244 F.3d 1007, 1018 (9th Cir. 2001)) (internal quotation marks omitted).

[44] *Id.* at 434.

[45] *Id.* at 434–36.

[46] *Id.* at 431.

sideration of three factors that bear on the distinction between threats and incitement actually weighs in favor of applying *Brandenburg* to *Turner*'s facts. By failing to apply *Brandenburg*, the court missed an opportunity to create precedent illustrating how a *Brandenburg* analysis can be applied to a type of Internet speech case that courts may find difficult, and undermined the distinction between threats and incitement.

Threats and incitement have developed as distinct doctrinal categories.[47] The primary conceptual distinctions between the two categories derive from the type of harm they cause and the path by which that harm travels to the victim: incitement creates a risk that third parties will inflict violence on the victim, whereas threats engender fear and intimidation that usually reach the victim directly.[48] In the threats context, most jurisdictions use an objective test like the one the *Turner* court applied, focusing on whether a reasonable person would consider the language threatening.[49] For an incitement conviction, *Brandenburg* creates a more demanding test, requiring three elements: intent to incite, imminence of violence, and likelihood of violence.[50] The threats and incitement standards differ greatly in the degree of protection they afford to speakers. *Brandenburg* is a highly speech-protective standard,[51] while the threats standard is less speech-protective and more ambiguous.[52]

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[47] Even though *Brandenburg* and *Watts* were decided in the same Term, the Supreme Court did not apply the *Brandenburg* standard in *Watts*, indicating that the Court views incitement and threats as doctrinally separate categories. *See* Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 565 (2004).

[48] William Funk, *Intimidation and the Internet*, 110 PENN ST. L. REV. 579, 589, 594–95 (2006); Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 158 (2011); *see also* Elrod, *supra* note 47, at 566. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court articulated three rationales for punishing threats: "protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur." *Id.* at 388. However, Professor Kenneth L. Karst has noted that the third rationale "has little to do with the harm suffered by the target of a threat." Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1339 n.7 (2006).

[49] *See Turner*, 720 F.3d at 421; Karst, *supra* note 48, at 1348; Marc Rohr, *Grand Illusion? The* Brandenburg *Test and Speech that Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 47–48 (2002); Paul T. Crane, Note, *"True Threats" and the Issue of Intent*, 92 VA. L. REV. 1225, 1246 (2006).

[50] Under *Brandenburg*, a state may not "proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[51] *See, e.g.*, Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 656–57 (2009); Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1137 (2003).

[52] The Supreme Court's definition of threats has proved unclear to lower courts. *See, e.g.*, *Turner*, 720 F.3d at 420 n.4 (discussing Virginia v. Black, 538 U.S. 343 (2003)). Karst argues that the threats standards that have emerged are doctrinally weak, "a set of abstractions offering minimal predictability of results from one case to the next." Karst, *supra* note 48, at 1338.

Several First Amendment principles justify the differential protection courts provide these two categories. First, incitement tends to be public speech and thus is more likely to concern matters of public interest, which constitute the core of First Amendment protection.[53] Threats, on the other hand, are often privately communicated. Second, according to the "persuasion principle" identified by Professor David Strauss, the First Amendment should be more protective of speech that appeals to the listener's reason.[54] Thus, incitement should be analyzed under a more speech-protective standard because it attempts to persuade third-party listeners in a way that threats characteristically do not.[55] A threat causes harm merely by its utterance.[56] Third, incitement is distinct from threats in the causation problem it presents; there may be a serious question in an incitement case as to whether the cause of any harm was the speaker or a third party listener who might actually engage in violence.[57] It therefore makes sense to apply a more protective standard to those who advocate violence than to those who threaten, since the former may be less clearly responsible for any harm.[58]

In determining which standard was best suited to *Turner*'s facts, the court could have given weight to the above justifications by considering whether the speech was public or private, whether the harm associated with the speech was fear or a likelihood of violence, and whether the speech was directed toward the victims or third parties. Turner's speech does not fit neatly into either category,[59] but at least two of these three factors weigh in favor of applying the *Brandenburg*

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[53] *See Turner*, 720 F.3d at 432–33 (Pooler, J., dissenting); Elrod, *supra* note 47, at 566–69. For instance, *Brandenburg* and *Hess v. Indiana*, 414 U.S. 105 (1973), both concerned speeches in public settings. Elrod, *supra* note 47, at 566–69.

[54] *See* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 335 (1991).

[55] *See* Rohr, *supra* note 49, at 48 (noting that threats, unlike incitement, "fall outside the protection of the First Amendment because they coerce by unlawful conduct, rather than persuade by expression, and thus play no part in the 'marketplace of ideas'" (quoting *In re* M.S., 896 P.2d 1365, 1373–74 (Cal. 1995) (emphasis omitted))).

[56] *See* Elrod, *supra* note 47, at 552, 574. Taking this reasoning a step further may suggest that "threats . . . are ways of doing things, not of saying things, and thus do not further the underlying values of free speech." Healy, *supra* note 51, at 669.

[57] *See* Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635, 642–43 (1993).

[58] *Cf.* Shiffrin, *supra* note 51, at 1136–37 (noting that in the case of incendiary speech that does not satisfy *Brandenburg*'s requirements, courts hold the listener solely responsible because "[i]t is his legal responsibility not to spring to harmful action on account of the speech").

[59] *See Turner*, 720 F.3d at 434 (Pooler, J., dissenting); *see also* Lidsky, *supra* note 48, at 158. The district court used the language of both threats and incitement to refer to Turner's offense and cited both *Brandenburg* and *Watts*, reflecting the category-blurring nature of the case. *See* United States v. Turner, No. 09-00650, 2009 WL 7265601, at *2 (E.D.N.Y. Oct. 5, 2009). For instance, the court found that Turner's "actions [were] sufficient to incite or urge lawlessness." *Id.*

test. With regard to the first factor, Turner's blog is a public platform. The second factor is inconclusive: the facts suggest that Turner's speech both increased the likelihood that third parties would inflict violence on the judges and directly engendered fear in them.[60] The third factor weighs in favor of applying *Brandenburg* because Turner's comments were written in the passive voice and appear to have been directed primarily toward third parties rather than the judges.[61]

The dissent suggested that *Brandenburg* was the appropriate test but argued that the court could not have applied it in *Turner* because Turner was charged under a "threats statute." However, this argument is flawed given the court's broad interpretation of the statute. The statutory language suggests that only a defendant who himself threatens to inflict harm on the victim would violate the statute, since he must "threaten[] *to . . . murder . . .* a United States judge."[62] The court, however, implicitly rejected such an interpretation in dismissing Turner's argument that his speech was not a threat because it was directed at third parties.[63] The majority argued that threats need not be "conveyed with the grammatical precision of an Oxford don."[64] The court did not go on to determine whether the statutory term "threaten" was broader than the "true threats" of First Amendment jurisprudence.[65] Yet if, as the opinion suggests, the court interpreted the statutory term broadly to include speech directed at third parties, then the statute may sweep in some speech that could constitute incitement. This speech can be punished only if the *Brandenburg* test is satisfied. Thus, a threat within the meaning of the statute could be constitutionally unprotected as a threat or as incitement.

By declining to apply *Brandenburg* when the facts arguably called for it,[66] the *Turner* court missed an opportunity to develop valuable precedent within incitement doctrine and took a step toward weakening the distinction between the incitement and threat categories. A *Brandenburg* analysis in this case would have provided useful guidance for other courts encountering Internet incitement, particularly

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[60] For instance, it could be argued that in referring to the murders of Judge Lefkow's family, Turner directed his speech toward the judges themselves and intended to engender fear in them. *See Turner*, 720 F.3d at 415 (quoting Turner's statements regarding the Lefkow murders). On the other hand, Turner seemed to be encouraging third parties to commit violence with statements like "[t]hese Judges deserve to be killed." *Id.*

[61] See *id.* for excerpts from Turner's statements.

[62] 18 U.S.C. § 115(a)(1)(B) (2012) (emphasis added).

[63] *See Turner*, 720 F.3d at 424–25.

[64] *Id.* at 425.

[65] The dissent, by contrast, did consider the possibility "that the word 'threaten' under Section 115(a)(1)(B) includes 'incitement.'" *Id.* at 435 (Pooler, J., dissenting).

[66] *See* Lidsky, *supra* note 48, at 158. The dissent also strongly suggested that the facts fit into the incitement category rather than the threats category. *See Turner*, 720 F.3d at 435–36 (Pooler, J., dissenting).

since cases involving the Internet may pose unique challenges for courts[67] and there is some uncertainty as to how *Brandenburg*'s requirements will be applied to it.[68] The Internet's broad reach magnifies the problems courts face in applying *Brandenburg* to settings in which the audience is hazily defined and the meaning of "imminence" is likewise unclear. There seems to be a "paucity of cases involving *Brandenburg*,"[69] and Professor Thomas Healy has noted that *Brandenburg* is being eroded as lower courts severely restrict its application.[70] Courts that do not apply *Brandenburg* to facts constituting incitement risk contributing to the erosion of *Brandenburg*'s constitutional protections for speakers[71] and allowing incitement doctrine to stagnate rather than develop to accommodate ambiguous facts like *Turner*'s. Furthermore, by applying threats doctrine to facts that tend more toward incitement, the court blurred the threats and incitement categories without transparently stating that it was doing so.

In the Internet age, courts may increasingly encounter facts like *Turner*'s that do not immediately and obviously fall into one category or the other.[72] Rather than undermining the distinction between the categories by applying threats doctrine to facts that tend more toward incitement, courts should engage in a clear analysis to sort the cases into doctrinally distinct categories, while respecting that the standard for each category must develop sufficient flexibility to deal with ambiguous fact patterns.

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[67] *See, e.g.*, Lidsky, *supra* note 48; Eric J. Segall, *The Internet as a Game Changer: Reevaluating the True Threats Doctrine*, 44 TEX. TECH L. REV. 183, 191 (2011); 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). *But see* Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of* Brandenburg, 4 HARV. L. & POL'Y REV. 361, 373 (2010).

[68] *See* Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 370–71. *Compare* Lidsky, *supra* note 48, at 160 (arguing that *Brandenburg*'s imminence requirement would be extremely difficult to satisfy in an Internet speech case), *with* Adelman & Deitrich, *supra* note 67, at 372 (citing the argument that "the government could more easily satisfy the imminence requirement" of *Brandenburg* in an Internet speech case).

[69] L.A. Powe, Jr., Brandenburg*: Then and Now*, 44 TEX. TECH L. REV. 69, 77 (2011); *cf.* Adelman & Deitrich, *supra* note 67, at 370 ("The *Brandenburg* standard also seems to have played a part in causing a decline in the number of criminal prosecutions focusing on advocacy.").

[70] *See* Healy, *supra* note 51, at 669.

[71] *See Turner*, 720 F.3d at 431 (Pooler, J., dissenting) ("*Brandenburg* (incitement) and *Watts* (true threats), and their respective progeny, offer different Constitutional protections, and those afforded to advocacy would have less force if we analyzed all speech under the 'true threats' test.").

[72] The blurring of threats and incitement is not an entirely new problem of the Internet age, but it has been argued that "[t]he Internet facilitates these threat/incitement hybrids by . . . allow[ing] a potentially unlimited and transient audience to communicate across the world with great speed and anonymity, and to do so at a fraction of the cost of other modes of communication." Hammack, *supra* note 67, at 67.