

# Cyber-Sticks and Cyber-Stones: Media Liability for Incitement and True Threats under California Abortion Provider Privacy Law

by ADITI MUKHERJI\*

## Introduction

Since the landmark decision in *Roe v. Wade* nearly forty years ago, the polarizing issue of abortion remains at the forefront of controversy on the American political scene.<sup>1</sup> With controversy often comes violence. In the realm of antiabortion activity, several abortion facilities have been blockaded to prevent women seeking abortions from entering, while others have been bombed and burned.<sup>2</sup> Most recently, antiabortion activists have focused their attention on abortion providers. In 2009, late-term abortion provider Dr. George Tiller was murdered by Scott Roeder, a militant antiabortion activist, while Dr. Tiller was working as an usher at Reformation Lutheran Church.<sup>3</sup>

In an effort to keep in step with the radical antiabortion movement's transition to the digital age, the California Legislature enacted Chapter 3.25.<sup>4</sup> The statute imposes civil penalties on any person who posts specific personal information about abortion providers or patients on the Internet with the intent to threaten or incite violence against a provider or patient.<sup>5</sup> However, apart from its second subdivision, Chapter 3.25 does not expressly confront the

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\* 2012 Juris Doctor Candidate at the University of California, Hastings College of the Law; B.A., University of California, Santa Barbara.

1. *Roe v. Wade*, 410 U.S. 113 (1973).

2. Joe Stumpe & Monica Davey, *Abortion Doctor Shot to Death in Kansas Church*, N.Y. TIMES, June 1, 2009, at A1.

3. *Id.*

4. Chapter 3.25, CAL. GOV'T CODE § 6218 (West 2011) [hereinafter Chapter 3.25].

5. *Id.*

issue of media liability under the statute. This Note, through an example involving murdered abortion doctor George Tiller and cable television personality Bill O'Reilly, explores the likely outcome of a Chapter 3.25 dispute if a member of the press releases personal information online about individual reproductive healthcare providers or patients paired with radical antiabortion statements.<sup>6</sup>

The discussion begins with a survey of the history of antiabortion violence that precipitated the enactment of Chapter 3.25. To provide context for press liability, the Note then traces the historically firm First Amendment protection of the media in incitement and true threats suits. The discussion then turns to analysis of a hypothetical Chapter 3.25 dispute arising from actual statements made by Bill O'Reilly about Dr. Tiller. The guiding legal framework throughout the analysis is the seminal abortion violence case, *Planned Parenthood v. ACLA*.<sup>7</sup> While significant parallels exist between O'Reilly's statements and *Planned Parenthood*, O'Reilly's statements—along with most members of the press—would likely fail to invoke liability under Chapter 3.25. Instead, the most effective solution is to work within the notion that the American media's usage of extreme speech is regulated less by laws than by market factors and evolving norms of civility.<sup>8</sup>

### I. A History of Violence

Activities targeting clinics and clinic employees have made headlines in the news media for decades. Dr. David Gunn was murdered in March 1993, and Dr. John Britton was killed in July 1994.<sup>9</sup> Within a ten-day period in the fall of 1993, clinics in Illinois and Pennsylvania were firebombed, and an arson fire “guttled” a clinic in Bakersfield, California.<sup>10</sup> The Pennsylvania clinic, a Planned

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6. Although the goal of the Note is to explore the liability of the press under the statute, relevant examples are drawn from cases about the media generally. It must also be noted that this Note broaches but does not directly wrestle with the incredibly complex issue of the Internet and how it is to be dealt with under the Luddite incitement and true threats tests.

7. *Planned Parenthood v. ACLA*, 290 F.3d 1058 (9th Cir. 2002).

8. EXTREME SPEECH AND DEMOCRACY 605 (Ivan Hare & James Weinstein eds., 2009). The term “evolving norms of civility” comes from Professor Robert Post, who used it at the conference on which the volume is based (“Extreme Speech and Democracy,” April 22, 2007) to describe one key aspect of the informal regulatory framework that constrains the American media in the publication of extremist messages.

9. Stumpe & Davey, *supra* note 2.

10. Tamar Lewin, *Clinic Firebombed in Pennsylvania*, N.Y. TIMES, Sept. 30, 1993, at A16.

Parenthood facility, did not even offer abortion services, but rather offered only referrals and family planning.<sup>11</sup> Between January and September of 1993, there were nine attacks on clinics in the United States, while dozens of clinics were attacked with butyric acid,<sup>12</sup> a substance which gives off hazardous fumes.<sup>13</sup> Some studies indicate that the decade of the 1990's alone bore witness to over 1000 violent attacks against abortion providers and patients.<sup>14</sup>

The consequences of these violent attacks extend beyond physical damage. Janet Benshoof, President of the Center for Reproductive Law and Policy, explained, "Finding space for clinics has always been hard, but it's gotten twice as hard. What landlord wants to worry about firebombing, death threats and butyric acid?"<sup>15</sup> Some physicians, as a result of the unrelenting fearmongering of extremists, have altogether given up providing abortion care.<sup>16</sup>

In the wake of the bombings of clinics and the murders of Drs. Britton, Gunn, and Tiller, physicians who perform abortions have had to adapt to the risks. Dr. Frank Snyder of Central Florida Women's Health Organization in Orlando carries a gun to work and wears a bulletproof vest: "I am sick and tired of being terrorized every day of my life for the last four years."<sup>17</sup> As Dr. Susan Wicklund, an abortion provider who also carries a gun and wears a bulletproof vest to work everyday, puts it, "it is absolutely absurd [that] I, as a physician in the United States of America performing a legal procedure, have to go to these measures to make it possible for me to go to work."<sup>18</sup>

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11. *Id.*

12. Butyric acid is a clear, colorless liquid and gives off a rancid and vomit-like odor. In early 1992, antiabortion extremists began to use butyric acid to prevent the use of abortion facilities. Butyric acid was often a means to disrupt abortion services, close clinics, and harass abortion care providers, staff, and patients. Depending on the amount used and how it is introduced into the clinic, butyric acid can cause thousands of dollars of damage, requiring clinics to replace carpeting, and furniture, and conduct extensive cleanup of the facility. [http://www.prochoice.org/about\\_abortion/violence/butyric\\_acid.asp](http://www.prochoice.org/about_abortion/violence/butyric_acid.asp) (last visited Feb. 2, 2012).

13. Lewin, *supra* note 10.

14. Michael Wines, *House Approves Measure on Anti-Abortion Attacks*, N.Y. TIMES, Nov. 19, 1993, at A16.

15. Lewin, *supra* note 10.

16. Michael Kirkland, *Operation Rescue Says Clinic Blockades To Continue*, UPI, Nov. 19, 1993.

17. Lynne Bumpus-Hooper, *Abortion Providers Seek More Protection: Clinic Owners and Doctors Say Stronger Laws are Needed to Safeguard Them From Intimidation*, ORLANDO SENTINEL, Oct. 19, 1993, at B1.

18. Eryn Loeb, *The Abortion Doctor*, SALON, Jan. 22, 2008.

## II. The Precursor to Chapter 3.25: *Planned Parenthood v. ACLA*

Several doctors who were targets of antiabortion violence had been previously identified on “unWANTED” posters produced by the American Coalition of Life Activists (ACLA).<sup>19</sup> The posters said the doctors were “extremely dangerous to women and children” and were “guilty” of “crimes against humanity.”<sup>20</sup> They offered \$5,000 rewards to people who assisted in ensuring the doctors “leave” the profession.<sup>21</sup> The ACLA’s printed materials suggested that a mafia-type “contract” should be taken out on abortion providers whose “crimes” were compared to the Nazi extermination of Jews during World War II.<sup>22</sup> The ACLA Web site listed 200 “abortionists” and approximately 200 other supporters of abortion.<sup>23</sup> Color-coding identified these individuals as “working,” “wounded,” or “fatality.”<sup>24</sup> The three murdered doctors were listed with their names struck through to identify them as fatalities.<sup>25</sup>

Four doctors whose names, addresses, and family-member information appeared on the Web site and the posters, sued under a federal law that made it a crime to intentionally intimidate abortion providers with a threat of force.<sup>26</sup> The doctors claimed they feared for their lives and were afraid to continue practicing medicine.<sup>27</sup> A jury

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19. *Id.*

20. *Id.* at 1063–66.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1065.

25. *Id.*

26. In response to the eruption of antiabortion violence, Congress enacted the Freedom of Access to Clinic Entrances (FACE) Act in 1994. 18 U.S.C. § 248(a)(1) (West 2000). The FACE Act prohibits a person from using force or the threat of force to prevent access to reproductive services and provides criminal and civil penalties for a violation of the statute. *See id.* (“Whoever by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from obtaining or providing reproductive health services” may be subject to criminal and civil liability); *see also* CAL. PENAL CODE § 423.2 (West Supp. 2007) (codifying California’s version of the FACE Act). Courts have interpreted “threat of force” in spirit with the true threats doctrine. *See, e.g.,* United States v. Hart, 212 F.3d 1067, 1071 (8th Cir. 2000) (“[B]ecause the First Amendment forbids the government from prohibiting speech that is merely forceful or aggressive, conduct constitutes a ‘threat of force’ in violation of the FACE Act only if it constitutes a ‘true threat.’”).

27. *Id.*

found the ACLA guilty of intentionally threatening to harm the doctors as a means to stop them from providing legal medical services.<sup>28</sup> Thus, the United States District Court for the District of Oregon entered judgment in favor of the abortion providers, and granted a permanent injunction.<sup>29</sup> On appeal, the Ninth Circuit initially upheld both the decision and a permanent injunction preventing ACLA from publishing or posting threats against abortion doctors.<sup>30</sup> On appeal, Judge Kozinski of the Ninth Circuit reversed the ruling. Upon rehearing en banc, however, the Ninth Circuit Court of Appeals' Judge Rymer held that the actions of antiabortion activist organizations in publicly disclosing names and addresses of abortion providers constituted true "threats of force" within the meaning of FACE, and thus were not protected under the First Amendment.<sup>31</sup>

### III. Overview of Chapter 3.25

Chapter 3.25 aims to protect the online privacy of reproductive healthcare providers, employees, volunteers, and patients.<sup>32</sup> The statute imposes civil liability for publicly posting on the Internet specific personal information of protected individuals with the intent to threaten them or incite third parties to harm them.<sup>33</sup> Under the

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28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. ASSEMBLY COMMITTEE ON JUDICIARY, COMMITTEE ANALYSIS OF AB 2251, at 4 (Apr. 18, 2006). ("Persons working in the reproductive health care field, specifically the provision of terminating a pregnancy, are often subject to harassment, threats, and acts of violence by persons or groups. In order to prevent potential acts of violence from being committed against providers, employees, and volunteers who assist in the provision of reproductive health care services and the patients seeking those services, it is necessary for the Legislature to ensure that the home address information of these individuals is kept confidential.") *See also* CAL. GOV'T CODE § 6254.21 (West 2010) (prohibiting the public posting or displaying on the Internet of the home address or telephone number of an elected or appointed official if that official has made a written demand that the information not be disclosed).

33. CAL. GOV'T CODE § 6218(a)(1) (West 2011) ("No person, business, or association shall knowingly publicly post or publicly display on the Internet the home address, home telephone number, or image of any provider, employee, volunteer, or patient of a reproductive health services facility or other individuals residing at the same home address with the intent to do either of the following: (A) Incite a third person to cause imminent great bodily harm to the person identified in the posting or display, or to a coresident of that person, where the third person is likely to commit this harm. (B) Threaten the person identified in the posting or display, or a coresident of that person, in a manner that places

California statute, individuals may make a “written demand for the removal of certain personal information from the Internet.”<sup>34</sup> Additionally, this legislation imposes “civil liability upon any person who solicits, sells, or trades this personal information with either the intent to incite or the intent to threaten.”<sup>35</sup>

#### A. Liability for Posting Personal Information

Under the first subdivision of Chapter 3.25, “an abortion service provider, employee, volunteer, or patient of a reproductive health services facility, or a person living in the same home with such person, may bring an action for damages or injunctive relief if any person, business, or association publicly posts on the Internet that individual’s home address, telephone number, or image with the intent set forth by Chapter 3.25.”<sup>36</sup> The first intent is the “intent to incite a third person who is likely to cause immediate great bodily harm to a [protected person].”<sup>37</sup> The second intent is the intent to threaten a protected person in such a way that the person is placed in “objectively reasonable fear for his or her personal safety.”<sup>38</sup> Additionally, an interactive computer service or access software provider may be liable under Chapter 3.25 where “the service or provider intends to abet or cause bodily harm that is likely to occur or threatens to cause bodily harm to a provider, employee, volunteer, or patient of a reproductive health services facility” or any person living in the same home with such person.<sup>39</sup>

A victim of a Chapter 3.25 violation may seek relief and compensation in two ways.<sup>40</sup> A victim may seek injunctive or declaratory relief and, if a violation is found, the victim is entitled to court costs and reasonable attorneys’ fees.<sup>41</sup> The victim may also bring an action for damages.<sup>42</sup> Additionally, if a violation is found, a

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the person identified or the coresident in objectively reasonable fear for his or her personal safety.”).

34. CAL. GOV’T CODE § 6218(b)(1) (West 2011).

35. CAL. GOV’T CODE § 6218(c)(1) (West 2011).

36. *See id.*, § 6218(a)(1); CAL. GOV’T CODE § 6218(a)(2)(A)-(B) (West 2011).

37. CAL. GOV’T CODE § 6218(a)(1).

38. *Id.*

39. CAL. GOV’T CODE § 6218(d) (West 2011).

40. CAL. GOV’T CODE § 6218(a)(2)(A)-(B).

41. CAL. GOV’T CODE § 6218(a)(2)(A) (West 2011).

42. CAL. GOV’T CODE § 6218(a)(2)(B) (West 2011).

victim is entitled to a maximum amount of three times the actual damages, but no less than \$4,000.<sup>43</sup>

### **B. Demand for Removal of Personal Information Posted on the Internet**

Chapter 3.25's second subdivision prohibits a "person, business, or association" from "publicly post[ing] . . . the home address or home telephone number of any provider, employee, volunteer, or patient of a reproductive health services facility if that individual has made a written demand of that person, business, or association to not disclose his or her home address or home telephone number."<sup>44</sup> The demand requires a sworn statement that declares the person is entitled to protection under the section and that describes a reasonable fear for the safety of that person or another person living in the same home based on a violation of the first subdivision of Chapter 3.25.<sup>45</sup> A demand is effective for four years.<sup>46</sup> If a demand is not honored and the information is made public, a person may seek injunctive or declaratory relief.<sup>47</sup> A person is entitled to court costs and reasonable attorneys' fees if a violation is found.<sup>48</sup> This subdivision does not, however, extend liability to those employed in connection with a newspaper, magazine, or other media organizations.<sup>49</sup>

### **C. Liability for Soliciting, Selling, or Trading Personal Information**

The third subdivision of Chapter 3.25 mirrors the first but addresses the issue of people who buy, sell, or trade personal information over the Internet.<sup>50</sup> It provides that "[n]o person, business, or association shall solicit, sell, or trade on the Internet the home address, home telephone number, or image of a provider, employee, volunteer, or patient of a reproductive health services

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43. *Id.*

44. CAL. GOV'T CODE § 6218(b)(1) (West 2011).

45. *Id.*

46. *Id.*

47. CAL. GOV'T CODE § 6218(b)(2) (West 2011).

48. *Id.*

49. See CAL. GOV'T CODE § 6218(b)(3) (West 2011) ("This subdivision shall not apply to a person or entity defined in Section 1070 of the Evidence Code."). See also CAL. EVID. CODE § 1070 (West 2011) (including people involved with "newspapers, magazines, and other media organizations").

50. CAL. GOV'T CODE § 6218(c)(1) (West 2011).

facility” with either the intent to incite or the intent to threaten.<sup>51</sup> If personal information is solicited, sold, or traded, a victim may, in addition to other legal rights or remedies available, bring an action for damages.<sup>52</sup> The measure of damages is the same as those in the first subdivision.<sup>53</sup>

#### **IV. Brief Historical Background on the First Amendment and Extreme Speech Made by the Press: *Near, Sullivan, and Brandenburg***

In 1931, the U.S. Supreme Court decided *Near v. Minnesota*, which invalidated a Minnesota statute that permitted a judge to block the publication of a newspaper if the court found its content “obscene, lewd and lascivious,” or “malicious, scandalous and defamatory.”<sup>54</sup> Writing for a majority of the Court, Chief Justice Charles Evan Hughes found that prior restraints on the press are presumptively unconstitutional, striking at the very core of the First Amendment, and can be tolerated only in the most exceptional cases—for example, to halt the publication of troop movements in time of war.<sup>55</sup> The decision reveals that the Supreme Court was already accustomed to using the First Amendment as a profound guardian for press freedoms.

More than thirty years later, the Supreme Court unanimously decided *New York Times Co. v. Sullivan*, a libel case that declared our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”<sup>56</sup> Recognizing that “erroneous statement is inevitable in free debate,” Justice William Brennan’s opinion for the Court in *Sullivan* noted that even false statements must be protected “if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”<sup>57</sup>

If *Near* “stiffened the backbone of countless editors and publishers and helped stave off periodic attempts . . . to muzzle the

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51. CAL. GOV’T CODE § 6218(c)(1)(A)-(B) (West 2011).

52. CAL. GOV’T CODE § 6218(c)(2) (West 2011).

53. *Id.*

54. *Near v. Minnesota*, 283 U.S. 697, 702 (1931).

55. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 675 (Kermit L. Hall et al. eds., 2d ed. 2005).

56. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

57. *Id.* at 271–72 (citation omitted).

journalistic watchdog,”<sup>58</sup> *Sullivan* gave the media “breathing space” to publish defamatory falsehoods.<sup>59</sup> *Near* and *Sullivan* have come to assure the American media that their stories cannot be enjoined—except in the rarest of circumstances—and that subsequent punishment for libel and related claims cannot be meted out except upon clear and convincing proof of actual malice.<sup>60</sup>

In 1969, the Supreme Court decided a third case on the issue of free speech, which would protect publication of speech that comes breathtakingly close to incitement. In *Brandenburg v. Ohio*, the Court reviewed a conviction under an Ohio criminal syndicalism statute.<sup>61</sup> The case involved heated advocacy at a televised Ku Klux Klan rally.<sup>62</sup> After revisiting its fifty-year history of attempting to construct a workable test to distinguish protected from unprotected advocacy of illegal conduct, the Court adopted a two-pronged test. Under the *Brandenburg* test, the Court permitted the punishment of speech advocating illegal *imminent* lawless action that is *likely* to incite or produce such action.<sup>63</sup> In perfect step with *Near* and *Sullivan*, *Brandenburg* reaffirmed the Court’s firm protection of the press and ushered in a high threshold to establish incitement by the media.<sup>64</sup>

With *Near*, *Sullivan*, and *Brandenburg*, the Supreme Court established a strong and lasting framework for the protection of extreme speech enabled by the press in America. All three cases involved speech that was in some sense extreme, or at least offensive

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58. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 55, at 675.

59. *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 148 (1967) (citation omitted).

60. By 1971, *Near*’s rejection of prior restraints had become bedrock First Amendment law in the United States. Hence, when the Nixon administration sought to enjoin the *New York Times* from publishing a classified document on the history of America’s involvement in the Vietnam War, the Supreme Court, in a per curiam decision, found that the government had failed to meet its heavy burden of proving a need for prior restraint. Three justices dissented, objecting to the rush of the proceedings. In a separate concurring opinion, Justice Byron White emphasized that publishers could be prosecuted for criminal violations of national security laws regulating the dissemination of classified information, but only *after* publication. *New York Times Co. v. United States*, 403 U.S. 713, 733 (1971). In dissent, Chief Justice Warren Burger expressed his “general agreement” with Justice White’s views on the availability of “penal sanctions” for possession or dissemination of documents or information relating to national defense. *Id.* at 752.

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

62. *Id.*

63. *Id.* at 447 (emphasis added).

64. *Id.*

to a community with power to suppress it. *Near* invalidated a judge's attempt to enjoin rabid, anti-Semitic remarks in the *Saturday Press*, a weekly newspaper.<sup>65</sup> Though *Near* was "an unsavory character—anti-Catholic, anti-Semitic, anti-black, and anti-labor"—the Court overturned an arguably well-intentioned law (and reversed the judge who sought to apply it) on First Amendment grounds.<sup>66</sup> The *Sullivan* case focused on false and defamatory statements contained in a paid advertisement titled "Heed Their Rising Voices," a fundraising solicitation for the defense of Dr. Martin Luther King, Jr. and the Struggle for Freedom in the South.<sup>67</sup> *Brandenburg* reversed the conviction of a man who had advocated violence at a Ku Klux Klan rally.<sup>68</sup> In these cases, "uninhibited, robust, and wide-open"<sup>69</sup> speech was given wide berth—wide enough to withstand the state's attempts to enjoin publication, collect money damages, and imprison someone for deeply offensive speech.

### V. The Hypothetical Chapter 3.25 Dispute

In the case of murdered abortion doctor, George Tiller, Fox News personality Bill O'Reilly "put Tiller in the public eye, and help[ed] make him the focus of a movement with a history of violence against exactly these kinds of targets"—"including Tiller himself, who had already been shot" once before.<sup>70</sup> Tiller's name first appeared on O'Reilly's show, "The Factor,"<sup>71</sup> on February 25, 2005.<sup>72</sup> "Since then, O'Reilly . . . brought up the doctor on 28 more episodes," and as late as April 27, 2009,<sup>73</sup> almost exactly one month before Dr. Tiller was murdered.<sup>74</sup> O'Reilly repeatedly referred to the doctor as "Tiller the Baby Killer" and said on June 12, 2007, "[I]f the state of Kansas doesn't stop this man, then anybody who prevents that from happening has blood on their hands as [Governor Sebelius] does right

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65. *Near v. Minnesota*, 283 U.S. 697, 697 (1931).

66. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 55, at 675.

67. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256–59 (1964). See also TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 288–89 (1988).

68. *Brandenburg*, 395 U.S. at 444.

69. *Sullivan*, 376 U.S. at 270.

70. Gabriel Winant, *O'Reilly's campaign against murdered doctor*, SALON (May 31, 2009, 4:32 PM), [http://www.salon.com/2009/05/31/tiller\\_2/singleton](http://www.salon.com/2009/05/31/tiller_2/singleton).

71. The show was also available for viewing online.

72. Winant, *supra* note 70.

73. *Id.*

74. *Id.* George Tiller was murdered on May 31, 2009. *Id.*

now.”<sup>75</sup> “Three days later, he added, ‘No question Dr. Tiller has blood on his hands . . . I wouldn’t want to be these people if there is a Judgment Day . . . Kansas is a great state, but this is a disgrace upon everyone who lives in Kansas. Is it not?’”<sup>76</sup> O’Reilly said “[T]he sophisticates have shielded Tiller from the appropriate, legal consequences of his deeds.”<sup>77</sup> Most important for the purposes of Chapter 3.25, O’Reilly showed Tiller’s face and place of work on “The Factor.” Producer Porter Barry conducted an ambush interview with Tiller at his place of work, which made Tiller and his place of work recognizable to the viewers.<sup>78</sup> The question then turns on whether O’Reilly’s statements and release of Tiller’s personal information—namely, his face and place of work—meet the requisite incitement or true threats standards to invoke liability under Chapter 3.25.

## VI. The Incitement and True Threats Standards

### A. Incitement

*Brandenburg* seems to suggest that even if the press technically is included in the reach of Chapter 3.25, it would be very difficult for a media defendant to meet the requisite standard of incitement to invoke liability under the statute. With rare exceptions, courts have not found that a mass media defendant incited physical injury.<sup>79</sup> To convince the courts that a member of the media is guilty of inciting violence against abortion providers or patients, the plaintiff must prove the media defendant intentionally advocated illegal *imminent* lawless action that is *likely* to incite or produce such action.<sup>80</sup>

#### 1. *Imminent Lawless Action*

The incitement test requires a plaintiff to show that media content would result in violent or unlawful activity immediately after the criminal is exposed to it.<sup>81</sup> When the suspect content is posted

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75. *Id.*

76. *Id.*

77. *Id.*

78. The Cajun Boy, *Bill O’Reilly’s Holy War Against George Tiller*, GAWKER (May 31, 2009, 10:16 PM), <http://gawker.com/5273612/bill-oreillys-holy-war-against-george-tiller>.

79. David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 984 (2002).

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

81. *Id.*

through the media, such a requirement is nearly impossible to prove in court. The difficulty of the immanency threshold keeps in step with the *Brandenburg* principle that speech ought to be protected unless the speaker so inflamed others that there was “no more time for speech” but only violence.<sup>82</sup> Media content does not ordinarily provoke such an immediate response. After seeing, reading, or hearing media content, there is still time for further deliberation before taking action, even time to have someone else dissuade or prevent a person from committing violent acts.

For example, after a young friend stabbed to death a thirteen-year-old boy, the murdered child’s mother sued the manufacturers of “Mortal Kombat,” a video game.<sup>83</sup> The mother claimed the murderer’s addiction to the game made him believe he was one of the game’s characters, causing him to stab her son.<sup>84</sup> Using the incitement test, a federal district court said even if the game caused the boy’s death, the media defendant’s advocacy of violence was no more than urging illegal action at some indefinite future time.<sup>85</sup> The incitement test requires that the media content cause imminent lawless action—a crime directly and immediately connected with the content. The lack of immanency rendered the connection between “Mortal Kombat” and her son’s death too attenuated to prove incitement.

Similarly, in *Planned Parenthood v. ACLA*, the abortion doctors did not even claim that ACLA’s speech amounted to incitement because the speech was found incapable of “producing imminent lawless action.”<sup>86</sup> ACLA “offered rewards to those who stopped the doctors at ‘some indefinite future time,’ and the ambiguous message was hardly what one would say to incite others to immediately break the law.”<sup>87</sup> The Court concluded, “incitement requires an immediacy of action that simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.”<sup>88</sup>

Thus, even if Bill O’Reilly’s statements on “The Factor” were made to cause George Tiller’s death by the release of visual images of Tiller’s face and place of work along with statements advocating

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82. *Id.*

83. *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002).

84. *Id.* at 168.

85. *Id.* at 170.

86. *Brandenburg*, 395 U.S. at 447.

87. *Planned Parenthood v. ACLA*, 290 F.3d 1058, 1092 (9th Cir. 2002) (citing *Hess v. Indiana*, 414 U.S. 105, 108 (1973)).

88. *Id.*

violence, a court would almost certainly find that O'Reilly's actions failed to provoke an *immediate* violent reaction against Tiller. It is unlikely an individual would even be physically situated, let alone inspired, to inflict harm on an abortion provider or patient immediately after reading or hearing an incendiary press piece.

## 2. *Likelihood of Lawless Acts*

The incitement test also requires proof that it is *likely* the media content will cause violence.<sup>89</sup> This is not the same as foreseeability. For example, it may be foreseeable that a movie with violent scenes will cause a deranged person to commit unlawful acts. But courts say the determining factor is whether the movie is *likely* to cause a reasonable person to act illegally.<sup>90</sup>

One court held that a radio station's promotional campaign inspired reasonable people to commit illegal acts.<sup>91</sup> A Los Angeles Top 40 station with a large teenage audience devised a promotional campaign.<sup>92</sup> Anyone finding the station's well-known DJ in a red car would win a cash prize and be interviewed on the air.<sup>93</sup> Two teenagers independently saw the DJ's car on a Los Angeles freeway and raced to catch him.<sup>94</sup> One of the teenagers forced a third car off the highway, killing the driver.<sup>95</sup> The driver's relatives sued the station.<sup>96</sup> The family won at trial and the jury awarded \$300,000 in damages.<sup>97</sup>

On appeal, the California Supreme Court ruled that it was likely the station's promotion would lead to physical injury or death.<sup>98</sup> The disc jockey testified he had seen certain cars following him from one location to another.<sup>99</sup> The court took this admission to mean the station should have known that a teenager who missed winning the money at one location would likely speed to the next.<sup>100</sup> Under the

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89. *Brandenburg*, 395 U.S. at 450.

90. *Id.*

91. *Weirum v. RKO Gen., Inc.*, 15 Cal. 3d 40 (1975).

92. *Id.* at 43-44.

93. *Id.* at 44

94. *Id.* at 45

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 46-47. The station staged the promotion in the summer when many teenagers with cars were at home and bored. Additionally, the promotion offered money and a bit of fame.

99. *Id.* at 47.

100. *Id.*

“reasonable person” standard, speeding and reckless driving was likely to result in death or serious injury.<sup>101</sup>

In *Planned Parenthood*, the Court held that ACLA’s statements failed to rise to the level of likely under the “reasonable person” standard.<sup>102</sup> The Court held the statements were not in fact followed by acts of violence which is important because had [the speech] been followed by acts of violence, a substantial question would be presented as to incitement, but “[w]hen such appeals do not incite lawless action, they must be regarded as protected speech.”<sup>103</sup>

The “likelihood of violence” standard is tremendously difficult to meet in the case of Bill O’Reilly’s statements regarding George Tiller. On the one hand, the likelihood of violence is high because of the number of people O’Reilly’s “The Factor” website reaches online. A large and diverse audience of extreme media speech would yield an array of reactions, a few of which may very well be violent, especially given the history of violent acts inflicted upon abortion providers and patients. But on the other hand, under the incitement test’s reasonable person standard, despite the number of people “The Factor” reaches through its online stream, a reasonable person would be unlikely to inflict violence upon a reproductive health care provider or patient immediately after reading or hearing the media content.

Moreover, given the judiciary’s long history of press protection,<sup>104</sup> O’Reilly’s extreme speech is effectively presumed protected by the First Amendment’s freedom of the press. In order to preserve the principle that debate on matters of public concern should be “uninhibited, robust, and wide-open,”<sup>105</sup> establishing that violence is likely to result from O’Reilly’s speech becomes all the more crucial in proving liability under Chapter 3.25. Thus, the immanency and likelihood prongs of the incitement test, although protective of public discourse, are obstacles for victims of radical antiabortion violence who fear physical attacks instigated by members of the media.

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101. *Id.* at 48.

102. *Planned Parenthood v. ACLA*, 290 F.3d 1058, 1096 (9th Cir. 2002).

103. *Id.* at 1095–96 (citing *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982)).

104. *See supra* Part IV.

105. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

**B. True Threats**

The history of violence and atmosphere of intimidation surrounding abortion providers and patients permits a Chapter 3.25 suit to explore true threats as an alternative to incitement. Media liability under Chapter 3.25 is potentially more feasible under a true threats claim in part because unlike an incitement analysis, judges need not weigh immanency or go down the slippery slope of probabilities—whether it was likely that violence would result.<sup>106</sup> Furthermore, unlike incitement, true threats require the targeting of a specific victim which can be an individual or identifiable group.<sup>107</sup> True threats include “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.”<sup>108</sup> The true threats standard, like the incitement standard, encompasses statements made with the intent to intimidate.<sup>109</sup> In order to “protect individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur,” such statements are not shielded by the First Amendment.<sup>110</sup> The speaker’s intent to threaten the person itself suffices to meet the definition and the speaker need not actually intend to carry out the threat.<sup>111</sup>

The court must weigh two crucial factors in its determination of whether a statement rises to the level of a true threat: The *content* of the statement and *context* in which the statement was made.<sup>112</sup> In *Virginia v. Black*, the Supreme Court recognized that true threats

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106. Jennifer Elrod, *Expressive Activity, True Threats, and the First Amendment*, 36 CONN. L. REV. 541, 564–74 (2004) (discussing the doctrinal distinction between incitement and true threats).

107. *Id.*

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

109. *Id.* at 360 (explaining that intimidation is a type of threat not protected by the First Amendment “where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death”).

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

111. *See United States v. Cassel*, 408 F.3d 622, 632–33 (9th Cir. 2005) (analyzing *Virginia v. Black* and concluding that a majority of the Justices agreed that intent to intimidate is necessary).

112. *See Elrod, supra* note 106, at 559–60 (acknowledging that the Supreme Court “did not draw bright lines in terms of the true threat doctrine” and that content and context “were central to the Court’s analysis”).

contain a subjective element; the speaker must actually intend to threaten the individual or group that the threat is directed toward.<sup>113</sup>

In *Planned Parenthood*,<sup>114</sup> the 6 to 5 majority of the Ninth Circuit, sitting en banc, held that actions of a militant antiabortion activists organization in publicly disclosing on posters and websites the names and addresses of abortion providers amounted to true “threats of force” and were unprotected by the First Amendment.<sup>115</sup> The Court distinguished *Brandenburg* on the ground that the activists had named individual abortion providers; here there was an implicit threat to their life, as the defendants must have appreciated that other named doctors on similar posters and sites had been killed.<sup>116</sup>

Like *Planned Parenthood*, Bill O’Reilly named an individual abortion provider; his stories targeted Dr. Tiller. Since Dr. Tiller had previously been shot by a radical antiabortion activist,<sup>117</sup> one can reasonably assume Tiller felt genuinely intimidated by the critical television exposure. According to the goal of true threats liability and the facts of *Planned Parenthood*, an argument could be made that O’Reilly’s statements should not be protected by the First Amendment in order to protect Dr. Tiller from “the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”<sup>118</sup>

While the fear and sense of intimidation Tiller likely felt is of the nature the true threats principle aims to target and prevent, the standard’s “intent to intimidate”<sup>119</sup> requirement nevertheless shields media members with a penchant for extreme speech, like Bill

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113. After analyzing the *Black* decision the Ninth Circuit held that speech is only unprotected as a true threat “upon proof that the speaker subjectively intended the speech as a threat.” *Cassel*, 408 F.3d at 633. The court recognized that this definition of true threats was in tension with prior cases applying the Ninth Circuit’s objective definition of true threat. *Id.* The Ninth Circuit also recognized that no other circuit had addressed the issue of whether *Black* requires a person to prove the defendant’s intent. *Id.* at 634. *But see* *United States v. Stewart*, 420 F.3d 1007, 1016–19 (9th Cir. 2005) (declining to decide whether *Black*’s subjective test or the Ninth Circuit’s objective definition of true threats applied to statutes that the Ninth Circuit previously held did not require proof of subjective intent). *See also* Roger C. Hartley, *Cross Burning—Hate Speech as Free Speech: A Comment on Virginia v. Black*, 54 CATH. U. L. REV. 1, 33 (2004) (“*Black* now confirms that proof of specific intent (aim) must be proved also in threat cases.”).

114. *Planned Parenthood v. ACLA*, 290 F.3d 1058, 1058 (9th Cir. 2002). *See supra* Part II.

115. *Planned Parenthood*, 290 F.3d at 1085–86.

116. *Id.* at 1086.

117. *See* Winant, *supra* note 70 and accompanying text.

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

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

O'Reilly, from true threats liability. Members of the press like Bill O'Reilly can make the claim that there was no such intent to intimidate, that the goal of the speech was to pique public discourse, and that the content should be viewed in the context of the news media engaging in a controversial topic of great public concern. The splintered court in *Planned Parenthood* held that "statements ought to be treated as hyperbole because of their political content."<sup>120</sup> For this reason, a court would not find O'Reilly's incendiary statements to be a true threat and instead would protect his "hyperbolic vernacular" under the umbrella of First Amendment protection.<sup>121</sup>

**C. A Recent Case Examining Incitement and True Threats with a News Media Defendant: *Citizen Publishing Co. v. Miller***

A recent Arizona Supreme Court case provides a useful panoramic view of media liability under the incitement and true threats standards. The recent case *Citizen Publishing Co. v. Miller* reviewed an incitement and true threats suit involving a news media defendant, a group with a history of suffering acts of violence, and extreme speech on an issue of public concern.<sup>122</sup> Although not binding on California law, the case gives a fair idea of the liability that a news media defendant would experience in an incitement or true threats claim under Chapter 3.25, since Chapter 3.25 uses the same standards for incitement and true threats.

The Arizona Supreme Court determined whether a newspaper's online publication of extreme speech aimed at Muslims, a group that after the September 11 attacks has faced numerous acts of violence, could give rise to liability for intentional infliction of emotional distress.<sup>123</sup> The case involved a daily newspaper's publication of a letter to the editor about the war in Iraq. The relevant part of the letter stated:

We can stop the murders of American soldiers in Iraq by those who seek revenge or to regain their power. *Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter.*

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120. *Planned Parenthood*, 290 F.3d at 1097. It is also important to note that the ruling in *Planned Parenthood* could very well have gone the other way if the FACE Act had not existed, and therefore must be held to its facts as a narrow ruling. *See id.*

121. *Id.*

122. *Citizen Publ'g Co. v. Miller*, 115 P.3d 107 (Ariz. 2005).

123. *Id.*

After all this is a ‘Holy War’ and although such a procedure is not fair or just, it might end the horror. Machiavelli was correct. In war it is better to be feared than loved . . . .<sup>124</sup>

Two Islamic-Americans brought the suit against the newspaper, brazenly on behalf of all Islamic-Americans who live in the area covered by the circulation of the *Tucson Citizen*, including the reach of the Internet website published by the *Tucson Citizen*.<sup>125</sup>

In a unanimous decision, the Arizona Supreme Court held that the First Amendment absolutely protects newspapers from tort suits involving speech on matters of public concern unless the plaintiff can prove that the speech fits squarely into one of the few exceptional categories recognized by the U.S. Supreme Court.<sup>126</sup> The Arizona high court identified both incitement and true threats as possible exceptions to the general rule of First Amendment protection of political speech—and proceeded to reject both of them in the case at hand.

First, the court analyzed a possible incitement exception under the *Brandenburg* rule, but discarded it because the letter did not advocate “*imminent* lawless action.”<sup>127</sup> Second, the court made short shrift of plaintiffs’ asserted application of the “fighting words” doctrine.<sup>128</sup> Under that doctrine, the First Amendment does not protect words “which, by their very utterance inflict injury or tend to incite an imminent breach of the peace.”<sup>129</sup> Underscoring the importance of context, the United States Supreme Court noted that fighting words must be addressed to the target of the remarks, and that the doctrine has generally been limited to “face-to-face” interactions.<sup>130</sup> Finally, the Arizona court considered whether the letter could constitute a true threat under precedent arising from a case in which an anti-war protester was convicted for threatening the President’s life for exclaiming at an anti-war rally that “[i]f they ever make me carry a rifle the first man I want to get in my sights is L. B.

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124. *Id.* at 109 (emphasis added). The author served as counsel to Citizen Publishing Company and argued the case on March 24, 2005, to the Arizona Supreme Court.

125. *Id.*

126. *Id.*

127. *Id.* at 112–13 (emphasis added).

128. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

129. *Id.*

130. *Id.*

J.”<sup>131</sup> In *Watts v. United States*, the Supreme Court distinguished certain actionable threats from constitutionally protected speech, found the defendant’s remark to be a form of crude political hyperbole, and reversed the conviction.<sup>132</sup> Following *Watts* and cases decided thereafter, the Arizona Supreme Court emphasized that context is essential.<sup>133</sup> Harkening back to Justice Oliver Wendell Holmes’ famous line, the Court observed, “There is a vast constitutional difference between falsely shouting fire in a crowded theater and making precisely the same statement in a letter to the editor.”<sup>134</sup> It also found that “plainly political messages” are far less likely to be true threats than statements directed “purely at other individuals.”<sup>135</sup>

The *Citizen Publishing* case is emblematic of the judiciary’s anticipated deferential approach toward the media’s use of extreme speech. Rhetorically, the court described the language in the letter to the editor as “no doubt reprehensible” and “offensive.”<sup>136</sup> Still, the Arizona Supreme Court recognized the fundamental importance of protecting “the free flow of ideas and opinions on matters of public interest and concern,”<sup>137</sup> and ordered dismissal of the lawsuit.<sup>138</sup>

And yet, an argument could be made that the personal information aspect of Chapter 3.25 distinguishes Bill O’Reilly’s statements from *Citizen Publishing* and aligns the statements more with *Planned Parenthood*. Even if the speech itself is crude political hyperbole, when it is coupled with the dissemination of personal information—like images of the doctor and his workplace—the speech ought to be stripped of protection as “most-likely-harmless rhetoric” and deemed an unprotected threat. But again, given the Court’s firm protection of the press, it is unclear whether the personal information slant could serve as a sufficient tipping point for the gavel to fall on the other side. Although a media defendant would likely escape liability given the strict standards for incitement and true threats, it is not definitively predictable how a Chapter 3.25 suit involving a media defendant would pan out.

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131. *Watts v. United States*, 394 U.S. 705, 706 (1969).

132. *Id.*

133. *Citizen Publ’g Co. v. Miller*, 115 P.3d 107, 111 (Ariz. 2005).

134. *Id.* at 115.

135. *Id.*

136. *Id.* at 113.

137. *Id.* at 111 (quoting *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)).

138. *Citizen*, 115 P.3d at 115.

## VII. Solution: The Marketplace and Evolving Norms of Civility

With uncertainty looming about press liability under Chapter 3.25, the question then becomes, how can press members like Bill O'Reilly be held accountable for provoking readers to commit acts of violence against abortion providers or patients? Put another way, what can be done if courts refuse to depart from their unwavering protection of the press, and consequently, press members almost always fail to meet the requisite standard of incitement or a true threat set forth in Chapter 3.25?

One potential solution is to recalibrate the *Brandenburg* and true threats tests for members of partisan news media who repeatedly produce violence-inducing content. Making the tests more malleable to include a media defendant for valueless extreme rhetoric could give the media an incentive to return to newsroom ethics policies—to engage in vigorous discourse and deliberation, but to do so while treating everyone, including targets of criticism, with common standards of dignity. Such a system would not only raise the level of discourse but also widen the exchange of information, which is the very core of the press function. But the freedom of the press is so vigilantly guarded by the judiciary, as exemplified by the *Citizen Publishing* case, that courts would be vehemently opposed to recalibrating the tests when applied to the media. Such a result would also raise serious concerns about the judicial system's ability to exercise a bias in silencing certain media outlets. Instead, to hold members of the media accountable for provoking violence against abortion providers and patients, a more effective solution would be for the public to assume the role of the conscientious consumer and vigilantly vocalize its disapproval of such incendiary remarks.

For practical reasons, “the American media’s use of extreme speech is regulated less by laws than by market factors and evolving norms of civility.”<sup>139</sup> In the name of survival in a dwindling industry, media outlets increasingly use the bottom-line to guide the pen. The impulse to produce what sells is only exacerbated by the difficulties traditional media outlets are currently facing in their transition to the digital market. To many, the new media business model is a grim one

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139. EXTREME SPEECH AND DEMOCRACY, *supra* note 8, at 605.

as “Justice Holmes’ notion of an exalted “marketplace of ideas” has become little more than the marketplace.”<sup>140</sup>

Fortunately, the modern mainstream media’s reservations about written ethics guidelines<sup>141</sup> have largely given way to thorough newsroom policies. The shift towards stronger journalistic ethics reveals that “when major media companies can pledge to treat people with respect and compassion and to observe common standards of dignity, they are doing as much to elevate the level of discourse—and reduce the repetition of hate speech—as the dicta in any lengthy judicial opinion.”<sup>142</sup>

In April 2007, CBS Radio was confronted with a public outcry against one of its most popular talk show personalities, Don Imus, after the host used racially-charged offensive speech on air.<sup>143</sup> The controversy faced by CBS demonstrates how mounting pressure by the marketplace and evolving civility norms can be just as effective as a law. During a game, Imus referred to the black female athletes on Rutgers University’s team as “nappy-headed ho’s.”<sup>144</sup> Far from the first time, Imus had hurled a slew of offensive terms such as “thieving Jews,” “faggots,” and “Lesbos” on several prior occasions.<sup>145</sup> The public—in addition to network employees, civil right leaders, and advertisers—called on CBS to fire Imus.<sup>146</sup> Soon thereafter, the popular “Imus in the Morning” was cancelled.<sup>147</sup> By comparison, legal

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140. *Id.* at 606 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting opinion)) (“[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment.”).

141. The fear of written guidelines may have been due to evidentiary concerns about the use of internal ethics standards against media defendants in a breach of privacy or libel suit. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* (citing David Carr, *Networks Condemn Remarks by Imus*, N.Y. TIMES (Apr. 7, 2007), <http://query.nytimes.com/gst/fullpage.html?res=9A07E4D8173FF934A35757C0A9619C8B63&pagewanted=all>; Andrea Peyser, *Ugly “Diss” Jockey Can Take the Unfunny and Run*, N.Y. POST (Aug. 15, 2007), [http://www.nypost.com/p/news/item\\_42id0lHontbXLBtB0f32LJ](http://www.nypost.com/p/news/item_42id0lHontbXLBtB0f32LJ)).

146. EXTREME SPEECH AND DEMOCRACY, *supra* note 8, at 606.

147. *Id.*

recourse for the action was tepid: litigation involved only breach of contract claims. Particularly noteworthy, the Federal Communications Commission, by definition, could not brand Imus' offensive speech as "indecent."<sup>148</sup>

From fired to hired, the fact that Imus could soon thereafter land a show on another network further demonstrates how balanced the marketplace and evolving civility norms are. As the Supreme Court said nearly 60 years ago, reversing a conviction for breach of peace, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>149</sup>

### Conclusion

Courts must protect the freedom of the press, for it is a cornerstone of democracy. Yet it is equally imperative for courts to hold serious threats and verbal conspiracies unprotected by freedom of speech because they fail to make a contribution to the public discourse, which is the very core of a participatory democracy. The difficulty rests between emotionally-charged hyperbolic language and a true threat that instills within its victims a genuine fear for their personal safety. But generally the context of the speech will reveal on which side of the line it falls: Factors such as the language used, the primary audience addressed, and the position of the speaker with regard to that audience are all relevant. It was relevant in the *United States v. Rahman* case,<sup>150</sup> for example, that a preacher urging assassinations had the power to dispense fatwas, so it was hard to characterize these urgings as mere persuasion. In contrast, a general encouragement of terrorism, including assassination of political leaders, where no *immediate* acts are incited, should be regarded as a contribution to political or public discourse, and so falls under a

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148. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding an indecent broadcast as one that includes "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual, or excretory organs or activities").

149. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

150. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999). The defendants had been convicted of conspiracy and other offenses for plotting to bomb office buildings and to assassinate the President of Egypt and Rabbi Meir Kahane, a prominent extreme Zionist. The leading defendant, Abdel Rahman, a Muslim preacher, was not immune from prosecution because he participated in the conspiracy "through the medium of political speech or religious preaching." *Id.* at 117.

freedom of speech or expression principle. That at least is what *Brandenburg* and later jurisprudence suggests.

However, the effect of the *Brandenburg* test—when coupled with the judiciary’s long history of protecting the press<sup>151</sup> in order to preserve open debate on matters of public concern—is that the immediacy and likelihood of violence prongs will almost always weigh in the press’s favor, which creates a gaping hole in protection for abortion providers like George Tiller. As a result, the predictability of the protection gives members of the press like Bill O’Reilly free rein to make radical statements with no substantive checks for third party violence in place. So long as the words are shy of an explicit true threat against someone,<sup>152</sup> the press is shielded from liability for any extreme speech, even if the speech is about a specific individual like an abortion doctor, who is part of a group vulnerable to violence. For the past half century, the Court has built strong judicial ramparts to protect the press from legal claims over various kinds of extreme speech with no sign of change otherwise.<sup>153</sup>

At the same time, the press is growing increasingly dependent on public approval for its survival in the marketplace. The marketplace, as CBS and Don Imus discovered, is controlled by an array of factors, including the public’s desire for ethical journalism.<sup>154</sup> Indeed, the tension between for-profit civility and for-profit crudity is a valuable mechanism for curbing extreme speech.<sup>155</sup> Despite its imperfections, the marketplace “complements and informs the judicial protections that the American media enjoys.”<sup>156</sup>

Although the press may very well escape the grasp of Chapter 3.25, all hope for a shift in journalism is not lost. So long as an informed public exists with a palate for human decency, the press can serve as a powerful tool to lift speech from violent hatemongering. For “liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.”<sup>157</sup>

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151. See *supra* Part IV.

152. In *Planned Parenthood*, the hit list sufficed as an explicit threat. *Planned Parenthood v. ACLA*, 290 F.3d 1058, 1066 (9th Cir. 2002).

153. See *supra* Part IV.

154. EXTREME SPEECH AND DEMOCRACY, *supra* note 8, at 607.

155. *Id.*

156. *Id.*

157. LEARNED HAND, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189–90 (3d ed. 1960).

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