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Molly Amman & Reid Meloy

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Incitement to Violence and Stochastic Terrorism: Legal, Academic, and Practical Parameters for Researchers and Investigators

Molly Amman and Reid Meloy

ABSTRACT

In the U.S., legal incitement is generally understood as speech that is intended to incite or produce imminent lawless action, and is likely, in fact, to do so. It is an old construct extending back to ancient Greece. In contrast, stochastic terrorism is a relatively new academic term describing an unpredictable act of targeted violence stemming from political demagoguery. Both constructs are hard problems in a liberal democratic society. How do we think about such issues of speech involving both persuasion and influence that may lead to intentional harm of others? In furtherance of understanding such historical attacks and those that may unfold in the future, we juxtapose the concepts of stochastic terrorism and incitement to violence, and define the legal, academic, and practical parameters of these concepts for researchers and investigators who are not formally trained in the law. There are points of both convergence and divergence regarding these terms, both legally and psychologically, which may help clarify their application to academic research, legal opinion, and other real world problems.

KEYWORDS

Incitement to violence;
Brandenburg; terrorism;
stochastic terrorism;
persuasion; violence risk

“I did not commit the act to stop the peace process, because there is no such thing. It is a process of war, and the murder was my obligation according to religious law.” –Yigal Amir, assassin.¹

This was the sentiment of the twenty-five-year-old assassin of the late Yitzhak Rabin, prime minister of Israel until his death on November 4, 1995. Rabin’s support of the Oslo peace process during that time had provoked intense and sustained anger on the opposite side of Israel’s political spectrum. His political opponents, including Benjamin Netanyahu, opposed the accords so deeply they declared Rabin to be personally devoid of Jewish values for supporting compromise. The Likud political party and other right wing groups labeled Rabin a Nazi and a traitor. In July 1995, Netanyahu led a mock funeral procession, complete with coffin and noose, at a rally where protesters shouted, “Death to Rabin.” Prominent right-wing rabbis even declared *din rodef*, a traditional Jewish law allowing extrajudicial killing, against Rabin himself; they argued such a declaration was justified in that the Oslo Accords were endangering Jewish lives. The assassin Yigal Amir, a young Israeli nationalist extremist, had a comprehensive and complex ideology which, when combined with inflammatory messaging to which he was receptive, facilitated his decision to attack. He was intensely opposed to the compromises involved in the peace process and an enthusiastic receiver of far-right messaging regarding the same. He had accepted the belief that Yitzhak Rabin was a *rodef* and a danger to Jewish lives. He had among his belongings an essay of one particularly prominent right wing rabbi, describing violence and violent revenge as a manifestation of devotion to God and even an act of redemption on the world’s behalf.² Rabin’s security detail was generally aware of danger to Rabin but could not have predicted Amir was lying in wait on the day of the assassination. After his arrest, Amir described himself to the Shin Bet as an emissary of the far-right rabbis who had influenced his thinking—an emissary of sorts to act on their dogma.³

How do we think about such persuasion and influence? In light of such historical attacks and those that may unfold in the future, we juxtapose the concepts of stochastic terrorism and incitement to

violence, and define the legal, academic, and practical parameters of these concepts for researchers and investigators who are not formally trained in the law. There are points of both convergence and divergence regarding these terms, both legally and psychologically, which may help clarify their application to academic research, legal opinion, and other real world applications.

What is stochastic terrorism?

Stochastic terrorism, a relatively new term originally conceived to describe an increased likelihood of terrorist violence following extensive media coverage of a prior act of terrorist violence,⁴ has seen expansive use in the past several years. The most *au courant* view of the term describes an unpredicted act of targeted violence stemming from political demagoguery.⁵

As a practical matter stochastic terrorism is an interactive process between a public speaker who may be a charismatic leader, one or more amplifying forces such as a media platform, and one or more ultimate receivers. The originator speaks out publicly and with hostility toward a selected outgroup or individual in order to advance a political or social goal. An unknown receiver takes it in and churns out anger, contempt or disgust,⁶ often mirroring the speaker's hostility and combining it with his own fear and anxiety stoked by the speech; such negative emotions may be intentionally aroused by the speaker to prove the need for his leadership and generate feelings of imminent threat posed by the target of his rhetoric that will personally impact the persecuted receiver.⁷ The speaker may overtly declare the target to be a threat, or "joke" about violent solutions to the shared problem represented by the target; violence is never explicitly suggested and plausible deniability remains intact. Social and news mass media outlets wittingly or unwittingly spread and amplify the message and its themes. Through repetition and saturation the target may be further degraded and dehumanized via attacks on the target's personal attributes. Once he reaches a threshold for action, the receiver, unknown to the speaker, plans and executes an attack of violence against the targeted outgroup or individual. Afterward, the leader condemns the violence to a greater or lesser degree; or asserts a staunch law and order stance; or insists such random acts of violence are unpredictable and the responsibility of no one but the hands-on offender, or all three. This allows the speaker to avoid blame, even if the assertions themselves are unconvincing. While such an attack may defy statistical predictability, as is always the case in targeted violence, the likelihood of its occurrence is greatly increased by this public demonization process.⁸

Stochastic terrorism represents a new application of what "terrorism" is generally thought to be. To be sure, "terrorism" has resisted a precise definition that is supported widely among scholars.⁹ It is an "essentially contested concept, debatable at its core, indistinct around its edges, and simultaneously descriptive and pejorative."¹⁰ In essence, it is often understood to be ideologically motivated violence against noncombatants, usually civilian populations, undertaken for the purpose of driving social or political change. In the relatively new term "stochastic terrorism," we find a concept that may not neatly line up with a classical presentation of terrorism in that it seems to require a process involving multiple, unrelated actors in a chain of strangers who, while each playing contributing parts, may have different goals, methods, and beliefs—more like falling dominoes than an organization of intentional cooperators or a lone actor; yet ideology-driven violence for the purpose of social or political change remains at its core.

The history of incitement to violence

Generally, incitement to violence has been a recognized problem as far back as ancient Greece. Aristotle's *Rhetoric* reflected his observation that public speech was often used to persuade through emotional manipulation and factual omission. *Rhetoric* chronicles an Ancient Greek sensibility that, "the man who prompted the deed was more guilty than the doer, since it would not have been done if he had not planned it."¹¹ This sense is not confined to the ancients. Indeed, the tradition of limitation on speech in liberal societies is well-established, and as noted by Van Mill, "[e]very society places some

limits on the exercise of speech because it always takes place within a context of competing values.”¹² Thus, if the prevention of criminal violence is a more pressing societal value than the right of individuals to unlimited free speech, then limitless protection for speech that incites violence cannot be. Even staunch free speech champion John Stuart Mill, in crafting his oft-cited “Harm Principle,” agreed that limitations on speech are legitimate where such interference is necessary to prevent harm to others, though he avoided adopting a stance that all harms involve equal levels of urgency or severity.¹³ The famous example cited by Mill imagined a corn dealer accused of starving the poor. If such accusation were to be circulated in the newspaper, it should be left alone from interference, argued Mill. If, on the other hand, the accusation was communicated to an angry mob amassed outside the corn dealer’s home, then such speech is rightly subject to limitation. Mill refrained from suggesting the accusatory actor must actually propose violence for the speech to be wrong; it was enough to accuse the corn dealer of committing a wrong that carried an important negative consequence with personal ramifications for the assembled mob.

Incitement to violence and free speech

Assuming that pure speech (e.g. “Your family is starving because the people inside this house are hoarding the corn!”), rather than criminal conduct coincidentally taking the form of speech (e.g. a bank robbery demand note), is involved,¹⁴ in criminal law a stochastic terrorism case might manifest in one or both of two ways: prosecution of the “downstream” actor for a violent crime such as homicide or destruction of property, depending on what actually unfolded, or prosecution of the “upstream” speaker for incitement. Prosecution of upstream defendants may be trickier inasmuch as they are tangibly removed from the ultimate harm, not having laid hands or paid money to cause it.

The Supreme Court of the United States (SCOTUS) has established a doctrine, similar to Mill’s “Harm Principle,” to identify under what circumstances free speech protections should be limited in this context. First, it must be understood that, generally speaking, speech including hate speech is protected by the First Amendment to the U.S. Constitution, though the protection only applies to interference by governmental actors such as in a criminal enforcement action (a private actor, under most circumstances, is not similarly bound). However, as SCOTUS observed in *Chaplinsky v. New Hampshire*,¹⁵ “certain well-defined and narrowly limited classes of speech [that] are no essential part of any exposition of ideas, and are of such slight social value . . . that any benefit . . . derived from them is clearly outweighed by the social interest in order and morality” ought not carry the same protections as most speech (572). In other words, there are exceptions to be made to the First Amendment.

One such class of unprotected speech is “incitement to imminent lawless action.” Tracking the evolution of dangerous speech jurisprudence following the demise of the “clear and present danger” test, we pick up the trail in 1969, when SCOTUS ruled in the landmark case of *Brandenburg v. Ohio*. Local Ku Klux Klan (KKK) leader Clarence Brandenburg gave an inflammatory speech at a KKK rally. No one was there aside from twelve members and two representatives of the news media. Brandenburg’s oration included a pronouncement that “revengeance” might be needed in response to the suppression of the white, Caucasian race in America by certain governmental entities. He was convicted under a state statute criminalizing advocacy of violence intended to bring about political change, as well as assembly for the same purpose; the statute made no mention of actual violence resulting from the prohibited behavior. In overturning Mr. Brandenburg’s conviction, SCOTUS held speech can be prohibited when it is intended to incite or produce imminent lawless action and is likely, in fact, to do so. Therefore the statute, as written, violated the Constitution because it punished mere advocacy and assembly without a consequence requirement. The *Brandenburg* doctrine was born.

That doctrine may still be slowly evolving. In 1973, SCOTUS slightly refined its thoughts on incitement, vis-à-vis the dimension of imminency in *Hess v. Indiana*, elaborating that advocacy for unlawful action at an indefinite future time will not suffice to dispense with First Amendment protection. An additional statement of importance is found in the *per curiam* opinion: “. . . since there was no evidence, or rational inference from the import of the language, that [Hess’] words were

intended to produce, and likely to produce, imminent disorder, [his] words could not be punished by the State on the ground that they had ‘a tendency to lead to violence’” (109).¹⁶ While the Court seems to have been referring to evidence or inference coming directly from the words spoken by Hess rather than a temporally broader sample of his communications or behavior, it is nevertheless an acknowledgment that evidence or inference regarding what a speaker intended to achieve is relevant in an incitement analysis. Although the Court’s conservative minority filed a dissent, the dissenters did not seem to take issue with that statement, and therefore it may remain a valid clue to the importance of rhetorical context in incitement jurisprudence. Additionally, SCOTUS positioned the word “imminent” differently in each case. In *Brandenburg*, the imminence requirement appeared to apply to the speaker’s intention—that his intention must have been to produce imminent lawless action. In the subsequent *Hess*, however, the word “imminent” is somewhat separated from intention and appears simply to apply to the unlawful disorder that was likely to ensue.

Decades later, in 2002, Justice Paul Stevens filed a statement in connection with a denial of *certiorari* in *Stewart v. McCoy*, pointing out what he viewed as a gap in *Brandenburg*’s coverage related to instructional speech within a criminal enterprise. In that case, Defendant McCoy was prosecuted in relation to giving criminal operations guidance to a street gang, including counseling violence in certain situations. Following the *Brandenburg* ruling, the Ninth Circuit Court of Appeals overturned McCoy’s conviction on the grounds that his speech was mere advocacy and did not incite imminent lawless action; the Supreme Court chose not to hear the case. Justice Stevens, however, was concerned that denying *certiorari* could be mistaken for an endorsement of the Ninth Circuit’s rationale and added this statement:

While the requirement that the consequence be “imminent” is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. As our cases have long identified, the First Amendment does not prevent restrictions on speech that have “clear support in public danger” (*Thomas v. Collings*, 323 U.S. 516, 530 [1945]). Long range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written materials—involves speech that should not be glibly characterized as mere “advocacy” and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech. Our denial of *certiorari* in this case should not be taken as an endorsement of the reasoning of the Court of Appeals.¹⁷

Though not legal precedent, Justice Stevens’ statement raises an interesting question about where the Court may go in the future. Indeed, in 2010 SCOTUS upheld a provision in the USA PATRIOT Act prohibiting material support in the form of “expert assistance or advice” to terrorist organizations.¹⁸ Writing for the 6–3 majority, Chief Justice John Roberts took note of the government’s compelling interest “of the highest order” in combating terrorist violence. He found persuasive that the statute “avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.”¹⁹ In other words, speech acts in direct service to a terrorist organization could not enjoy First Amendment protection. However, *Holder v. Humanitarian Law Project* is not part of the *Brandenburg* lineage; it had a specific focus on particular statutory language related to the global war on terror. The statutory language at issue in that case prohibited conduct that just happened to take the form of speech; “pure” speech was not at issue. For the remainder of this article, we focus on *Brandenburg* in relation to our legal analysis, as we believe the speech acts we will highlight belong in the “pure speech” realm, rather than prohibited conduct coinciding with speech by happenstance.

The incitement doctrine may continue to flex as times evolve; after all, wartime²⁰ has historically meant more restrictive results on speech, suggesting that changes in societal circumstances could continue to justify doctrinal fluidity.²¹ Or, it may be that the Court’s earlier movement toward protection of speech rights even during times of national conflict will endure.²² Either way, it is difficult to imagine that unstoppable and spectacular cultural shifts, such as the tectonic force of social media’s role in shaping communications and behavior, are destined never to figure in.

Whether there is a gulf between doctrinal incitement and the modern, practical manifestations of it is a pressing question. The high bar set for incitement to imminent lawless action allows for a potentially vast cache of speech in the protected-yet-produces-violence realm, accessible to clever speakers who follow the stochastic terrorism script proposed herein by the authors.²³ Indeed, “camouflaged incitement”²⁴ has been described as precisely that. Thinking it naïve to ignore the possibility of indirect advocacy of lawless action, Crump commented with concern on the various contextual facets missing from SCOTUS’ historical analysis of protected versus inciting speech, noting “camouflaged exhortations to murder” that would seem likely to slip through the cracks of a *Brandenburg* analysis. Contextual facets such as audience factors, use of coded speech (so-called dog whistles), predictability of violence, reckless disregard, disclaimers, and the availability of alternate means of communicating a similar message were noted by Crump.²⁵ Particularly when camouflaged speech intersects with, for example, the highly charged and increasingly rules-free political climate of the current era, this seems a valid concern as such speech could be well suited to obscure incitement in disguise.

Political speech, SCOTUS has repeatedly written, is a rough business. Where threatening or otherwise unpleasant comments directed toward a U.S. President or other elected officials are concerned, the Court has suggested that it may simply be the cost of doing business, being “often vituperative, abusive, and inexact” (708).²⁶ It has also commented that “debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”²⁷ However, neither *Watts* nor *New York Times Co.*, both pre-*Brandenburg*, involved a President of the United States pipelining anger, contempt and disgust²⁸ directly to millions of adoring followers in the context of social media echo chambers amplifying ideas and accelerating action; research points toward more virality in social media postings and online engagement with others if emotion and disagreement are highlighted.^{29,30}

Context does matter when assessing whether First Amendment protections will apply to speech. However, it has been argued that context is precisely what the *Brandenburg* Court inched away from in devising the current incitement doctrine. Crump, for example, expressed concern about SCOTUS’ perceived trajectory away from the clear and present danger test’s emphasis on societal conditions.³¹ If, as Justice Stevens’ statement about instructional speech suggest should happen, the Court were ever to move away from a strict stance on imminence, some additional indicia of a forthcoming violent outcome will surely be required. It seems quite doubtful the Court would retreat to “clear and present danger,” which held that “[t]he 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. It is a question of proximity and degree.”³² As noted by Justice Louis Brandeis, in his powerful concurrence in the subsequent *Whitey v. California*, “[f]ear of serious injury alone cannot justify suppression of free speech and assembly. Men feared witches and burnt women” (376).³³ This criticism was part of a gradual realization by the Court that “clear and present danger” allowed too much interference. Justice Brandeis further urged that speech ought to be protected except when “immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated” (376, emphasis added). In time, the incitement to imminent lawless action test was born out of recognition of this problem, though a strict reading of the test offers an austere environment for an incitement analysis. The question now is whether strict “imminence” is sufficient to meet the times in which we live. In the wake of the insurrection of January 6, 2021, it is at least conceivable that this issue will be litigated in the coming future, and it remains to be seen how the Court will rule in a twenty-first-century incitement case which may also be stochastic terrorism; an opinion would surely turn on the facts, as so many SCOTUS opinions famously do.

To be clear, any litigation surrounding January 6 would not involve legal aspects of terrorism. Stochastic terrorism is not a legal term and it has no meaning in the law.³⁴ Nor should it. One immediate issue is that the stochastic terrorism process described above requires multiple, independent actions by multiple, independent actors with their own agendas and states of mind.

Definitionally, there is no conspiracy because they do not know each other and are not intentionally cooperating. Further, on the part of the speaker and amplifiers, there is either no *mens rea*, or guilty mind, or no way to prove it in all likelihood. Stochastic terrorism’s nearest approximation in the law may be incitement, which can only apply to the original speaker in a stochastic terrorism chain of actors, leaving out others who played a role. The U.S. system of laws requires some degree of *mens rea*, in order to support a conviction of crime, as to each person charged. A person cannot and should not be held criminally accountable without this key component. Lastly, it is worth noting the United States has no domestic terrorism statute and so in all cases when a crime is thought of as an act of (domestic) terror, any criminal charges cannot reflect this sentiment.

Incitement to violence and stochastic terrorism

Incitement to imminent lawless action, vis-à-vis criminal violence, and stochastic terrorism can potentially overlap, but may not in many cases (See Figure 1).

We explore whether the January 6, 2021, violent incursion at the U.S. Capitol potentially qualifies both as incitement to imminent lawless action and stochastic terrorism (See Figure 2), noting that this is an academic exercise and in no way should be interpreted as endorsement of legal action or undue focus on any individual. This diagram demonstrates convergence, with primary elements of *Brandenburg* and stochastic terrorism coinciding in the commonality zone. As seen in Figure 1, inflammatory speech exists as a catalyst for subsequent events, but this raises a foundational question: What qualifies as inflammatory? Many supporters of the former President would probably not describe his speech on that day and during the months prior as inflammatory, but rather as a patriotic, justified and necessary warning about the danger to the American republic posed by election rigging. However, we suggest inflammatory is defined not by the patriotic fervor of the speaker or listener or by the perceived necessity to deliver words on the subject matter. Rather a definition of inflammatory as “tending to arouse anger, hostility, passion, etc.”³⁵ seems to fit. We think this definition, which avoids qualitative judgments about the righteousness of speech’s underlying subject matter, when combined with the stochastic terrorism process outlined above, results in the provocation to action compelled by

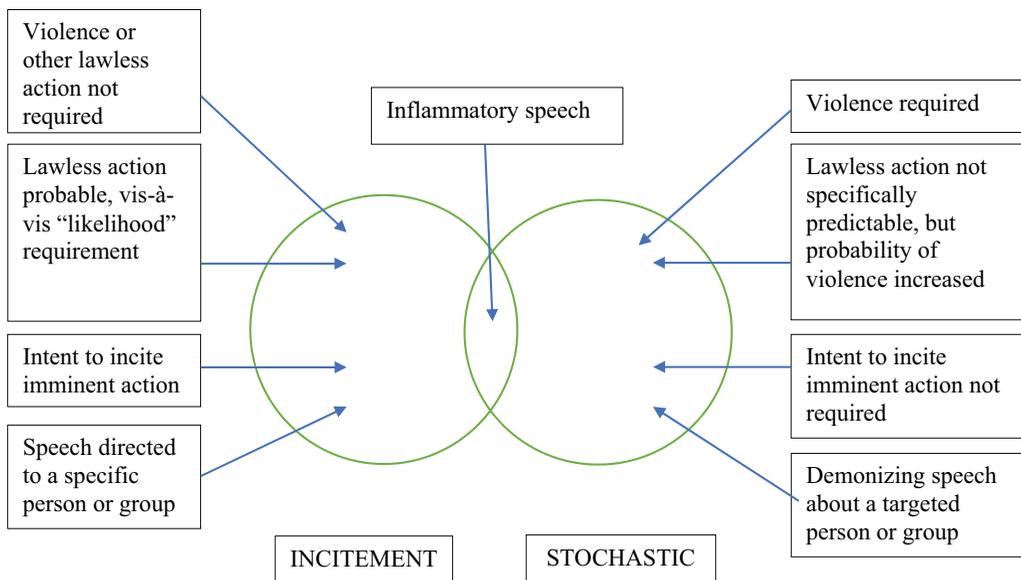


Figure 1. Visual representation of the relationship between incitement to imminent lawless action and stochastic terrorism.

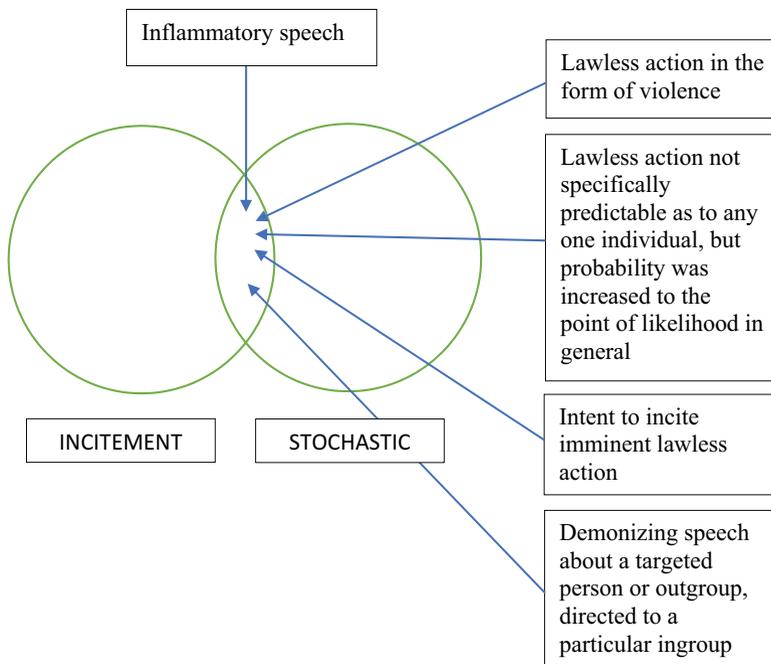


Figure 2. Visual representation of the convergence of incitement to imminent lawless action and stochastic terrorism on January 6, 2021.

the speech's other elements such as the imminent (time compression) and existential (loss of life) nature of the threat posed to the group.³⁶

As shown in [Figure 2](#), lawless action at minimum in the form of unlawful entry into the Capitol, property damage, and assaults on police officers occurred on January 6, satisfying stochastic terrorism's requirement for violence while having no impact on a *Brandenburg* analysis which does not require lawlessness to actually unfold. Next, the occurrence of lawless violence at the hands of any one individual was not specifically predictable due to the virtually infinite variables playing a role in individual decisions and capabilities at any given time, while the probability of lawless violence on January 6 was increased to the point of likelihood by aggressive use of fear-provoking rhetoric in the public discourse over time—satisfying both stochastic terrorism's need for unpredictable events and *Brandenburg's* requirement that the lawless action was made likely by way of speech. The third box in [Figure 2](#) represents intent; the intent of the then-President's and others' speech over time was to overturn the election by either lawful or unlawful means—as openly acknowledged by his supporters at the Capitol,³⁷ in memoranda drafted by Trump 2020 campaign counsel,³⁸ and arguably by the former President himself.³⁹ His widely reported inaction, and even some reports of satisfaction, during the siege can further be regarded as circumstantial evidence of this intent, layered on top of a reasonable interpretation of much of the preceding speech both during and prior to the January 6 rally—satisfying *Brandenburg*, while having no impact on stochastic terrorism's requirements. And finally, circling back to the original catalyst, speech, the threatening rhetoric about a stolen election and loss of one's very country absent strong action both demonized the evil outgroup (Democrats and Republicans in Name Only [RINOS]) and was directed to the President's supporters in clear calls for intervention in the course of lawful events.

Given the former President's and others' desire to establish the election had been stolen, his apparent comfort with lawlessness by others in furtherance of securing an election victory, and their messaging of both sentiments directly to his followers, along with the totality of public discourse about Democrat-perpetrated election fraud leading up to January 6, the exhortations to action made by the

President and others at the rally prior to Congressional certification of the electoral results could be sufficient to meet the first part of the *Brandenburg* test—intention to incite imminent lawless action. However, in order to so conclude it may be necessary to consider rhetoric used in the months leading up to January 6, either as circumstantial evidence allowing an inference of intent to incite at the rally, as encouraged by Justice Brandeis and arguably allowed in *Hess*, or in an expanded Constitutional test, described below, as direct evidence of intention to incite. As for the second part of *Brandenburg*—likelihood of occurrence—the fact that a violent mob actually did invade the Capitol to stop the certification must be regarded as excellent evidence.

In addition, stochastic terrorism in the context of the speeches prior to the march toward the Capitol appears to exist given its academic elements: (1) a group was demonized (the Democrats and “RINOS” in Congress, and especially the Vice President and Speaker of the House for their leadership positions in certifying the electoral college vote); (2) no one could specifically predict which individuals in the crowd would ultimately engage in violence; (3) observers could conclude that, given the content of the speeches at the rally, the probability of violence motivated by ideology and carried out by one or more heretofore unknown individuals would increase.

If there were to be litigation in which the First Amendment question is raised, a totality of circumstances surrounding the communications in question and their collective relationship to the ensuing lawless action should become relevant. The authors would, as suggested by Crump,⁴⁰ consider “context, word patterns, medium, and audience—in short, [...] all the evidence that a sensible person would count as relevant.” This philosophy might stand in contrast to a strict reading of *Brandenburg* unless prior rhetoric became admissible as circumstantial evidence. Individual tweets in April or rhetoric from the January 6 rally, standing alone, may not have incited *per se*. However, months of rhetoric, driven and magnified by rapid mass and social media sharing among ardent followers, did seem *de facto* to incite the invasion of the Capitol.

“Rhetorical accelerationism” and the future of incitement

The modern realities of communication have probably stretched beyond a traditionally austere reading of the 1969 *Brandenburg* test. We find Justice Stevens’ statement in *Stewart v. McCoy* compelling because it is factually accurate. Even more compelling is the nature of communication technology and how it has quite literally remade the way people give, receive and react to information. It is not merely instructional speech that could come back to haunt long after a period of imminence has faded away.

If the *Hess* Court’s thoughts, on “evidence, and rational inference” pertaining to intention to incite, can embrace a temporally wide but topically cohesive swath of speech that laid a foundation of readiness to react violently to inflammatory speech at a specific moment, and ideally other relevant factors such as the speaker’s ongoing understanding of the attitudes and intentions of receivers as they assimilate the rhetoric, it could accommodate in our phrase *rhetorical accelerationism*: the phenomenon of social media echo chambers amplifying ideas with exponential rapidity⁴¹ and resulting in action by both foreseeable and unforeseeable actors. This would occur especially if the rhetoric is emotionally charged and highlights disagreement.⁴² We propose this term, having been unable to find one that encompasses the spirit of this reality. *Rhetorical* for the embrace of language as a technique of persuasion rather than explanation; *acceleration* to signify greater magnitude and greater speed—farther and faster, reaching no one knows whom. Social media’s artificial intelligence algorithms directly spread information, both true and false, beyond the ability of its own engineers to predict or control, to the regret and concern of former executives in the industry.⁴³ False information has also been found to spread dramatically faster than true information, even when controlling for bots.⁴⁴ One study of the Twitter platform quantified the phenomenon in several ways: false news stories were 70 percent more likely to be retweeted than true ones; true stories took approximately six times as long to reach 1,500 people as false stories; in Twitter “cascades,” or unbroken retweet chains, falsehoods achieve a cascade depth of 10 approximately twenty times faster than facts; falsehoods were retweeted by unique users more broadly than facts at every depth of cascade.⁴⁵ That study found “falsehood

diffuses significantly farther, faster, deeper, and more broadly than the truth, in all categories of information, and in many cases by an order of magnitude,” according to one of its authors (para. 2).⁴⁶ Another recent study, this one of cluster entanglements on Facebook, found that, though fewer in number, anti-vaccination clusters are more engaged and more efficient at spreading anti-vaccination views than pro-vaccination clusters; the study authors created a simulation, based upon a mathematical analysis of 2019 cluster behaviors, predicting anti-vaccination views will dominate on Facebook in approximately 10 years.⁴⁷

Information on social media spreads both vertically (through cascades within single platform) and horizontally (platform to platform). It has been demonstrated that falsehoods do not stay on the platforms from which they are launched, but rather flow across social media sites, reinforcing and amplifying each other across platforms.⁴⁸ We find it entirely reasonable to extrapolate these known data about false information spread to other communications that may inspire violence even if one individual statement, itself, contains no falsehoods (e.g. LIBERATE MICHIGAN!), where it is part of a general theme containing falsehoods, e.g., President Trump’s history of downplaying and making false statements related to COVID-19 and the need for restrictions. Additionally, as observed in the cluster entanglement study, anti-vaccination clusters offer a diversity of narratives, including conspiracy theories, to attract a diversity of converts, blending many different topics and reasons to promote acceptance of an anti-vaccination view.⁴⁹

Social media activity remains, at its core, an extension of its users. Social groups can form echo chambers with or without reliance on social media, but when formed in conjunction with intensive social media use it must be understood to magnify the acceleration effect even more. Individuals who tend to submit to strong leadership, exhibit high levels of aggression in the name of their leaders, and believe strongly that they and others must follow the norms espoused by their leaders, tend to be highly reliant on their like-minded cohort for validation and support.⁵⁰ This mutual reinforcement has been referred to as consensual validation—the fact of consensus is of greater import than the fact under consideration,⁵¹ which aligns closely with the *ad populum* fallacy—if everyone says it is so, then it must be so—and enhances the already profound effect of rhetorical accelerationism.

If, on the other hand, *Brandenburg* and *Hess* are ultimately not so flexible, then we wonder if another option should be added to the incitement doctrine to accommodate speech that incites more distantly into the future. We agree with Crump’s analysis of camouflaged incitement,⁵² and also share Justice Stevens’ concern about long-range planning speech and suggest it is illuminative and relevant. A prime example is found in the “stolen election” rhetoric permeating American public discourse between April 2020 and January 6, 2021, and beyond. Although the former president and others offering similar rhetoric probably could not have predicted, at least early on, the day, time, and place in which it ultimately manifested, the likelihood of violence was substantially increased by the totality of their speech over several months and the evolving context in which it was delivered. To be sure, a high bar would be appropriate when concluding that non-imminent speech constitutes unprotected incitement. Explicit counsel to engage in unlawful activity combined with its likelihood, a la *Stewart v. McCoy*, would seem to fit that bill. Sly communications of lesser definitiveness but which involve the use of threatening discourse turbo charged by rhetorical accelerationism, might also find their place in an evolving doctrine of unprotected incitement. In keeping with the spirit of the remainder of the incitement doctrine, it would have to be clear in retrospect that a speaker’s intention was to lay groundwork for triggering lawless action at some culminating point.

Threatening speech

Related to stochastic terrorism and incitement, are threats resulting from demagogic speech. About a third of U.S. local election officials surveyed in April 2021 indicated they have felt unsafe in direct relation to their election duties and 17 percent have been threatened in connection with those duties.⁵³ Where the threateners can be identified, many will be prosecuted for those acts. Separately from the incitement to imminent lawless action doctrine, “true threats” are also unprotected by the First

Amendment.⁵⁴ Under the true threats doctrine, unprotected speech has occurred when a threatener's purpose was to communicate a serious expression of intent to commit unlawful violence against the target being threatened; the threatener need not actually have intended to *carry out* the threat—only to convey it as if the threatener is serious about it. If evidence is available to demonstrate a threatener has met this standard, it is likely prosecutable.

One particular SCOTUS case centered on internet threats, which are now virtually ubiquitous in American society, is susceptible to misinterpretation and is therefore presented here. In *Elonis v. United States*, SCOTUS took up the topic of what *mens rea*, or state of mind, is necessary to support a conviction under U.S. federal law for making threats via interstate commerce—in this case, by wire via a vis Facebook. In this matter, Defendant Elonis posted a number of statements to Facebook—some explicit and brutally violent—articulating an interest in killing his soon to be ex-wife and numerous others including kindergarten children, coworkers and certain named law enforcement agents. He argued in court that he never intended to threaten anyone but was simply trying out rap lyrics as a means of venting his frustrations. Convicted, he appealed his case all the way up to the Supreme Court, which was expected to decide the case on First Amendment grounds. While SCOTUS did reverse, it did so on a technical aspect involving a faulty jury instruction on the correct *mens rea*, never reaching the free speech issue.⁵⁵ Misinterpretation of this ruling as a reversal on free speech grounds has created an as-yet unjustified fear that internet threat cases cannot, or will be very difficult to, be successfully prosecuted on First Amendment grounds. This is untrue; in fact, Elonis' conviction was ultimately reinstated.⁵⁶

Although violence stemming from inflammatory speech is a concern of the highest order, threats are also incredibly disruptive to the lives of the targeted individuals, their families and workplaces, and communities and society at large. When threats happen in large waves, they destabilize by creating an environment of fear and uncertainty and by driving competent professionals from their posts.⁵⁷ In the experience of the authors, unchecked threat waves can also facilitate a permissive environment in which more threats, as well as violence, become increasingly likely.⁵⁸ However, we note that one of the great paradoxes of actual targeted violence is that threats of violence are infrequently uttered by the attacker directly toward the target, a robust finding in the research over the past thirty years.⁵⁹ Instead, the attacker(s) will communicate their intent to third parties the majority of the time, what is referred to as “leakage.”⁶⁰

Conclusion

Stochastic terrorism and incitement to violence are hard problems. Liberal democratic societies have always been challenged to identify limitations on inflammatory or dangerous speech that protect life and safety, while not running afoul of a nation's laws that protect freedom of expression. In the United States, this protection has been elevated to a Constitutional one which significantly limits the government's ability to impose such limits. Just as one cannot adequately or accurately assess the danger of crossing a road without listening and looking to determine if a car is coming at high speed, it is neither adequate nor accurate to ponder a communication uttered at a single moment in time with no consideration of the context in which it was made—particularly if that context was constructed by the speaker himself in furtherance of his own goals. When that context involves the use of inflammatory and threatening rhetoric, accelerated by social media and pipelined to a group made to feel both special and persecuted, it should be reasonably expected that violence has become likely in some quarter—seen or unseen. As Jean Paul Sartre (1905–1980) wrote, “words are loaded pistols.”

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Notes on contributors

Molly Amman, JD, is an Attorney and retired FBI behavioral analyst who is engaged in private practice threat assessment and management, specializing in threats, extremism and targeted violence. She conducts training around the world and works extensively with public and private partners in assessing threats of violence.

Reid Meloy, PhD, is a board-certified forensic psychologist and former clinical professor of psychiatry at the University of California, San Diego. He is a faculty member of the San Diego Psychoanalytic Center, and consults on terrorism and other targeted violence cases throughout the United States and Europe. He is co-editor of the *International Handbook of Threat Assessment*, 2nd ed (Oxford University Press, 2021).

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