

WORDS NOT SAID: CAN THE *BRANDENBURG* INCITEMENT TEST COPE WITH CODED SPEECH?

Abstract: The Supreme Court’s 1969 decision in *Brandenburg v. Ohio* introduced a new paradigm for evaluating incitement by looking at whether the speech was intended to induce imminent lawless action by third parties and whether such action was likely to occur. The tripartite test offered by the Court, however, is arguably overprotective of speech that may cause legitimate harm, including coded speech, or speech whose true meaning is not facially obvious. In particular, coded speech—including dog whistles, or speech designed to elicit a specific reaction from certain listeners—may escape the requisite scrutiny under *Brandenburg* by giving the speaker plausible deniability, despite contextual clues known to all or part of the audience as to the words’ true meaning. Applying speech-act theory, this Note argues that the Court should adopt a more uptake-sensitive approach to incitement, which would allow audience response to assist in determining intent and better capture the veiled manner of such speech.

INCITEMENT AND INSURRECTION: JANUARY 6TH, 2021

Just over a week after the January 6th, 2021 Capitol riot, Jacob Chansley’s attorney asked former President Donald J. Trump to pardon his client for his actions during the attack, which included wielding an American flag as a spear.¹ Chansley—also known as the “QAnon shaman”—argued that his actions in the Capitol were taken in response to President Trump’s speech before the riot.²

¹ Quint Forgey, ‘He Has an Obligation to Them’: Attorney for ‘QAnon Shaman’ Asks Trump to Pardon Rioters, POLITICO (Jan. 15, 2021), <https://www.politico.com/news/2021/01/15/attorney-qanon-shaman-trump-pardon-459608> [<https://perma.cc/YWP2-29TW>]. Chansley had been indicted for a felony violation of the Federal Anti-Riot Act, which prohibits interstate planning, support, incitement, or participation in a riot. *Id.*; see also 18 U.S.C. § 2101(a) (making it a federal felony to “organize, promote, encourage, participate in, or carry on a riot,” or commit or assist another in committing an act of violence in connection with a riot), *invalidated in part by* United States v. Miselis, 972 F.3d 518 (4th Cir. 2020). In 2020, in *United States v. Miselis*, the U.S. Court of Appeals for the Fourth Circuit narrowed the statute by invalidating the components that made urging, encouraging, and promoting riots as impermissible under the First Amendment, though the components targeting conduct were left intact. See 972 F.3d at 525–26 (determining that a federal statute proscribing advocacy of a riot was overbroad).

² See Forgey, *supra* note 1 (“We all have to understand that the words that were spoken by the president meant something, not just to my client And they had a right to rely on the words of their president that was strewed forth worldwide.” (quoting Albert Watkins, attorney for Jacob Chansley)).

Chansley later pleaded guilty to a felony charge of obstructing an official proceeding and was sentenced to nearly three and a half years in prison.³

In his speech on the Ellipse prior to the riot, President Trump encouraged his supporters to “stop the steal” by marching down Pennsylvania Avenue to the Capitol, where both houses of Congress gathered to certify the 2020 Electoral College votes.⁴ The address never called for outright violence.⁵ Over a period of hours, rioters battered several Capitol security officers during the attack, and Capitol Police shot one protestor while she tried to enter the House floor, among other fatalities.⁶ For his role in inspiring the violence and his failure to call in the National Guard or release a statement demanding that his supporters leave the Capitol, President Trump faced impeachment for a historic second time, on a single charge of “incitement of insurrection.”⁷

The House Select Committee to Investigate the January 6th Attack on the U.S. Capitol, in its final report published in December 2022, emphasized the impact of President Trump’s speech on the rioters.⁸ In particular, the report notes that some in the audience took President Trump’s ad-libbed remarks that the protestors must “fight like hell” not as mere figures of speech, but rather as

³ See Press Release, U.S. ATT’Y’S OFF. D.C., Arizona Man Sentenced to 41 Months in Prison on Felony Charge in Jan. 6 Capitol Breach (Nov. 17, 2021), <https://www.justice.gov/usao-dc/pr/arizona-man-sentenced-41-months-prison-felony-charge-jan-6-capitol-breach> [<https://perma.cc/MTQ3-G4HC>] (stating that Chansley pleaded guilty to the charges against him).

⁴ Brian Naylor, *Read Trump’s Jan. 6 Speech, a Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [<https://perma.cc/5WJH-U5JJ>] (quoting former President Donald Trump).

⁵ See *id.* (“You have to show strength and you have to be strong. We have come to demand that Congress do the right thing” (quoting former President Donald Trump)). Indeed, although President Trump reiterated the need to fight and confront the “egregious assault on our democracy,” he also indicated that his supporters should be peaceful. *Id.*

⁶ See Chris Cameron, *These Are the People Who Died in Connection with the Capitol Riot*, N.Y. TIMES, <https://www.nytimes.com/2022/01/05/us/politics/jan-6-capitol-deaths.html> [<https://perma.cc/C56Y-GSGY>] (Oct. 13, 2022) (detailing the fatalities that occurred during or because of the January 6th Capitol riot, including those of several Capitol Police officers who died in the days immediately following the assault).

⁷ See Nicholas Fandos, *Trump Impeached for Inciting Insurrection*, N.Y. TIMES (Apr. 22, 2021), <https://www.nytimes.com/2021/01/13/us/politics/trump-impeached.html> [<https://perma.cc/4QA6-7TAT>] (noting that President Trump is the first president to have been twice impeached). In a speech following the impeachment vote, then-House Minority Leader Kevin McCarthy stated that President Trump “bears responsibility” for the attack. *Id.* (quoting Kevin McCarthy). However, the Senate acquitted President Trump a month later, with a bipartisan 57-member vote in support of conviction falling short of the required two-thirds majority for removal from office. See Nicholas Fandos, *Trump Acquitted of Inciting Insurrection, Even as Bipartisan Majority Votes ‘Guilty’*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/us/politics/trump-impeachment.html> [<https://perma.cc/R3E2-XWQA>] (describing President Trump’s acquittal by the Senate, which fell short of the two-thirds supermajority required to convict despite a majority of Senators believing he was culpable).

⁸ See SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. DOC. NO. 117-663, at 71 (2d Sess. 2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf> [<https://perma.cc/W6F3-V6PE>] (“When you catch somebody in a fraud, you’re allowed to go by very different rules.”) (quoting former President Donald Trump).

a directive.⁹ Although the Committee's findings also lay out a conspiracy to commit insurrection, the report presents the speech on the Ellipse as key evidence of President Trump's role in the attack.¹⁰ In particular, the fact that President Trump's supporters suggested that they would not have engaged in violence had the president ordered them to stop demonstrated the substantial impact that his words had in emboldening the protestors.¹¹

Since then, President Trump has faced a series of suits related to his conduct during and preceding the attack.¹² Of note is *Trump v. Anderson*, a case originating in the Colorado state courts regarding whether Section 3 of the Fourteenth Amendment barred President Trump from appearing on the 2024 presidential ballot in the state.¹³ On March 4th, in a thirteen-page per curiam opinion, the U.S. Supreme Court ruled that the Section 3 power is reserved to Congress rather than the states, and thus the states cannot remove him from the ballot; it did not address whether President Trump had engaged in a disqualifying insurrection.¹⁴

Though the Supreme Court punted on the question, this Note explores a key weakness of the current test for incitement under the First Amendment: the presumption that any such speech would be facially obvious, and thus simple to detect and handle.¹⁵

Part I of this Note analyzes the current state of incitement law in the United States, as well as exploring how linguistic philosophy may be helpful in

⁹ See *id.* at 73 (quoting criminal defendant Dan Huttie at his trial for assaulting an officer during the riot, who said that he and the other rioters were "invited" by President Trump and were thus not at the Capitol illegally).

¹⁰ See *id.* at 656 (quoting Proud Boys member Joe Biggs, who said he was there to support the president).

¹¹ See *id.* at 594 (describing President Trump's inactions during the riot); see also Eliza Relman, Oma Seddiq & Jake Lahut, *Trump Tells His Violent Supporters Who Stormed the Capitol 'You're Very Special,' but Asks Them 'to Go Home,'* BUS. INSIDER (Jan. 6, 2021), <https://www.businessinsider.com/trump-video-statement-capitol-rioters-we-love-you-very-special-2021-1> [<https://perma.cc/C5NR-27B6>] (describing how the rioters were willing to leave the Capitol after a televised, pre-taped address by President Trump asked them to do so, hours into the event).

¹² See, e.g., Indictment at 1–2, *United States v. Trump*, No. 23-cr-00257-1 (D.D.C. 2023) (considering criminal liability against President Trump for election interference related to the January 6th riots).

¹³ See *Anderson v. Griswold*, 543 P.3d 283, 332 (Colo. 2023) (holding that President Trump's actions on and before January 6th constituted a violation of the federal Insurrection Clause), *rev'd sub nom.* *Trump v. Anderson*, 144 S. Ct. 662 (2024) (per curiam). Respondent did not draw out a speech argument, instead arguing that President Trump both implicitly and explicitly participated in the insurrection on January 6th. Brief on the Merits for Anderson Respondents at 22, *Anderson*, 144 S. Ct. 662 (No. 23-719). As amici curiae, constitutional law scholars argued that the Supreme Court previously found that incitement "inheres in particular words used in particular contexts," pushing against President Trump's argument that the incitement doctrine is context-independent. Brief of Amici Floyd Abrams et al. Suggesting Affirmance at 18–19, *Anderson*, 144 S. Ct. 662, (No. 23-719) (quoting *Counterterm v. Colorado*, 600 U.S. 66, 76 (2023)).

¹⁴ *Anderson*, 144 S. Ct. at 671.

¹⁵ See *infra* notes 143–160 and accompanying text.

understanding how speech works, particularly when context is considered.¹⁶ Part II of this Note attempts to reconcile *Brandenburg* with modern propaganda and speech-act theories.¹⁷ Finally, Part III argues that the *Brandenburg* test, as currently applied, is inadequate to deal with such coded speech, and proposes a more uptake-sensitive view of speech to better accommodate the ways in which incitement may manifest and cause harm.¹⁸

I. SHOUTING “FIRE” IN A CROWDED THEATER: INCITEMENT UNDER THE LAW

In 1969, in *Brandenburg v. Ohio*, the U.S. Supreme Court abandoned fifty years of precedent by articulating a new legal standard for incitement.¹⁹ Incitement is speech advocating for the audience to engage in imminent lawless conduct against a third party.²⁰ Incitement differs from mere advocacy in the intended *result* of the speech, with the former having the specific goal of inspiring the listeners to engage in unlawful conduct.²¹ The *Brandenburg* test singles out speech that is “directed to . . . producing imminent lawless action and is likely to . . . produce such action” as unprotected incitement.²² The *Brandenburg* test thus has three prongs: intent by the speaker for the result to occur, the imminency of the result, and the illegality of the result.²³ Where the

¹⁶ See *infra* notes 19–119 and accompanying text.

¹⁷ See *infra* notes 120–160 and accompanying text.

¹⁸ See *infra* notes 161–226 and accompanying text.

¹⁹ See 395 U.S. 444, 447 (1969) (per curiam) (setting a new standard for unprotected incitement). The case dealt with a Ku Klux Klan leader’s broadcast remarks leading to his conviction under an Ohio statute prohibiting criminal syndicalism. *Id.* at 444–46. The Court ruled that the statute was unconstitutionally overbroad because it prohibited otherwise-protected speech on the basis of its content and was thus subject to strict scrutiny. See *id.* at 448–49 (describing the statute as punishing protected speech and thus falling within the “condemnation” of the First Amendment); *Strict Scrutiny*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining strict scrutiny as a heightened level of judicial review under which the government must demonstrate a “compelling interest” in the issue the law is designed to remediate).

²⁰ *Brandenburg*, 395 U.S. at 449. Incitement is distinct from other flavors of unprotected speech, including fighting words and true threats. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (describing “fighting words” as those likely to induce a violent response from the person directed toward); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (describing “true threats” as those made to seriously communicate an intent to cause harm to the person to whom the speech is directed); *Incitement*, BLACK’S LAW DICTIONARY, *supra* note 19 (defining incitement as “[t]he act of persuading another person to commit a crime”). In 2023, in *Counterman v. Colorado*, the Court expanded this understanding to encompass a defendant’s “subjective understanding” that a message transmitted online would likely be received as threatening. 600 U.S. 66, 69 (2023).

²¹ See *Brandenburg*, 395 U.S. at 447 (differentiating between mere advocacy and incitement not on the vigor or virulence of the advocacy, but on its ultimate goal).

²² See *id.* (fashioning a more stringent test for incitement based on the principle that mere risk of harm is insufficient to render the speech unprotected (citing *Dennis v. United States*, 341 U.S. 494, 507 (1951) (plurality opinion))).

²³ See *id.* (suggesting that the intent prong relates to the actual advocacy behind the speech, while imminency relates to the foreseeability that the speech will result in actual harm).

speaker's goal is that her words will inspire others to engage in lawless action, if the other *Brandenburg* preconditions are met, the speech is legally no longer "mere advocacy" and may be proscribed.²⁴

Section A of this Part explores the evolution of the doctrine from *Schenck v. United States* through *Brandenburg*.²⁵ Section B considers *Brandenburg* and its progeny following the interring of the "clear and present danger" test from *Schenck*.²⁶ Section C evaluates the Supreme Court's perspective on speech and speech-acts through the lens of its broader First Amendment jurisprudence.²⁷ Finally, Section D considers relevant linguistic philosophy, specifically as it pertains to propaganda and speech-act theory, to demonstrate the continued vitality of this issue.²⁸

A. The Evolution of the Incitement Doctrine: From *Schenck* to *Brandenburg*

When speech is determined to be incitement, it loses First Amendment protection and becomes prosecutable.²⁹ As with many laws placing limitations on the First Amendment right to free speech, laws against incitement are subject to strict scrutiny; the government must show a compelling interest and a policy narrowly tailored to achieve that interest in order to overcome the presumption of protection.³⁰ This heightened standard of review is very speech-protective, placing a substantial burden on the government to justify its efforts to prohibit certain speech.³¹

²⁴ See *id.* at 448–49 (elevating "mere advocacy" to "incitement" if and only if the speaker intends for the illegal result to arise and there is a true danger that it will happen as a direct result of the speaker's words).

²⁵ See *infra* notes 29–46 and accompanying text.

²⁶ See *infra* notes 47–57 and accompanying text.

²⁷ See *infra* notes 58–81 and accompanying text.

²⁸ See *infra* notes 82–119 and accompanying text.

²⁹ See *Brandenburg*, 395 U.S. at 447 (ruling that the First Amendment prevents states from proscribing advocacy of violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

³⁰ See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (holding that, to satisfy strict scrutiny, the government must identify a specific problem and create a solution designed to address that problem, and no more).

³¹ See *Holder v. Humanitarian L. Project*, 561 U.S. 1, 21–22, 26 (2010) (permitting a government speech restriction where the government was able to show a compelling interest, specifically in averting terrorism). Strict scrutiny is a high standard that is difficult for the government to overcome; however, in 2010, in *Holder v. Humanitarian Law Project*, the U.S. Supreme Court ruled that the government satisfied the strict scrutiny standard in a case dealing with the provision of material support to recognized terrorist organizations. See *id.* at 22, 28 (upholding the constitutionality of a statute that expressly prohibited providing "material support" to identified terrorist organizations (quoting 18 U.S.C. § 2339B(a)(1))). The Court found that the government met the strict scrutiny requirements based on the strength of the federal interest in averting terrorism. See *id.* at 32 (noting the importance of the government's terror-prevention efforts, not only to prevent terrorism at home but to maintain strong connections with allies); see also *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444–45 (2015) (holding that the judiciary's interest in avoiding a perception of bias by prohibiting elected judges

Before *Brandenburg*, in 1919, in *Schenck v. United States*, the U.S. Supreme Court first articulated a “clear and present danger” test,³² which stripped First Amendment protections from speech that posed a threat that real danger would follow.³³ In *Schenck*, the Court found that interstate mailers sent to draft-eligible men during World War I encouraging them to avoid the draft were unprotected by the First Amendment.³⁴ The Court specifically held that during wartime, political speech that may be permissible at other times may be deemed impermissible if it interferes with government interests.³⁵ *Schenck* and its progeny thus gave the government greater power to proscribe speech based on its political content in order to punish perceived or actual dissent, even where no tangible actions were taken or likely to be taken.³⁶

In 1969, in *Brandenburg v. Ohio*, the U.S. Supreme Court faced its first meaningful incitement case not involving overtly anti-government speech.³⁷ The case dealt with a Ku Klux Klan leader’s video-recorded speech at a rally promising “revengeance” against the Black and Jewish communities should

from soliciting campaign donations satisfied strict scrutiny); *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (holding that the interest in protecting minors from sexual abuse was a sufficiently compelling interest to justify prohibiting the creation and distribution of child sex abuse materials, such as child pornography).

³² See 249 U.S. 47, 52 (1919) (establishing the “clear and present danger” test for incitement); see also *Gitlow v. New York*, 268 U.S. 652, 667–68 (1925) (ruling that a state may proscribe speech which would advocate its overthrow by illegal means). This canon of cases largely dealt with communist and socialist advocacy and anti-war sentiments. See, e.g., *Debs v. United States*, 249 U.S. 211, 212–13 (1919) (upholding criminal penalties for communist advocacy).

³³ See *Schenck*, 249 U.S. at 53 (permitting a criminal prosecution under the 1917 Espionage Act to go forward after determining that the socialist speech at issue was not protected by the First Amendment).

³⁴ See *id.* at 52–53 (holding that during wartime, words that may be protected at other times may prove such a “hindrance” to the national interest as to justify holding them out as unconstitutional).

³⁵ See *id.* (suggesting that, because liability could be applied if it was found that the mailers hindered the draft or broader war effort, the risk created by those words made them subject to criminal penalty); see also *U.S. Participation in the Great War (World War I)*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/united-states-participation-in-world-war-i/> [<https://perma.cc/W854-DLNM>] (suggesting that the initiation of the draft created pressure for the government to justify the country’s involvement in an overseas war).

³⁶ See, e.g., *Gitlow*, 268 U.S. at 668 (upholding a state statute prohibiting advocacy of the government’s overthrow); *Frohwerk v. United States*, 249 U.S. 204, 208, 210 (1919) (upholding a statute criminalizing conspiracy to obstruct the draft through means that included encouragement to avoid the draft); *Debs*, 249 U.S. at 212–13 (upholding criminal penalties for advocating for communism); *Schenck*, 249 U.S. at 52 (upholding convictions of anti-war advocates encouraging draft-eligible men to avoid the draft). In each of these cases, there was minimal risk of immediate violence following dissemination, as the publications were disseminated widely rather than to a specific audience. See *Gitlow*, 268 U.S. at 668 (upholding a state statute prohibiting political advocacy); *Frohwerk*, 249 U.S. at 208 (same); *Debs*, 249 U.S. at 212–13 (same); *Schenck*, 249 U.S. at 52 (same).

³⁷ See 395 U.S. 444, 445–46 (1969) (per curiam) (describing the speech as being targeted at specific religious and racial groups in retaliation for government action on civil rights rather than directed at the government itself).

the federal government continue pursuing desegregation.³⁸ The speech encouraged marches in St. Augustine, Florida and “on Congress” on the Fourth of July.³⁹ Brandenburg was prosecuted under the Ohio Criminal Syndicalism statute, which prohibited advocating for violence or unlawfulness.⁴⁰ The Supreme Court of Ohio, *sua sponte*, dismissed Brandenburg’s appeal for lack of a constitutional question, after the intermediate appellate court upheld the conviction without authoring an opinion.⁴¹ Given a dearth of information on the record, the U.S. Supreme Court evaluated the text of the Ohio statute and determined that it violated the First Amendment by failing to make a distinction between “mere advocacy” and “incitement to imminent lawless action.”⁴²

The three-prong test adopted in *Brandenburg* requires that speech be intended to incite imminent illegal action, where such action is likely to occur because of the speech.⁴³ Speech only loses its First Amendment protections if these three prongs of intent, imminence, and likelihood are satisfied.⁴⁴ *Brandenburg* insists on a differentiation between “mere advocacy” and “incitement to imminent lawless action,” creating a much higher bar for speech to qualify as incitement than the “clear and present danger” test.⁴⁵ This curtails the government’s power to punish political speech with which it disagrees.⁴⁶

³⁸ *Id.* at 446 (quoting a speech given by the appellant).

³⁹ *Id.* (quoting a speech given by the appellant).

⁴⁰ *Id.* at 444–45.

⁴¹ *See id.* at 445 (describing the Ohio Supreme Court’s dismissal of the appeal on its own and its description of the case as lacking a constitutional question); *Sua Sponte*, BLACK’S LAW DICTIONARY, *supra* note 19 (defining “*sua sponte*” as a court acting “on its own motion,” instead of that of a party). The U.S. Supreme Court indicated in its opinion that it accepted the case because it believed it had “probable jurisdiction” over the issue. *See Brandenburg*, 395 U.S. at 445.

⁴² *See Brandenburg*, 395 U.S. at 448–49 (describing the Ohio statute as, on its face and as applied, prohibiting assembling with others for the purpose of sharing a particular message, rather than criminalizing specific conduct arising out of that assembly).

⁴³ *See id.* at 447 (articulating the tripartite test).

⁴⁴ *See id.* (holding that while the speech itself was not criminal, it could be subject to criminal prosecution due to falling outside of First Amendment protection).

⁴⁵ *Compare Brandenburg*, 395 U.S. at 447–49 (requiring intent, incitement to unlawful action, and imminency), with *Schenck v. United States*, 249 U.S. 47, 52 (1919) (requiring only a threat to a government interest).

⁴⁶ *See Brandenburg*, 395 U.S. at 448–49 (ruling that, because the speech did not meet all three criteria, it was constitutional and thus could not be prosecuted). Compared to the “clear and present danger” test, the *Brandenburg* test has more stringent requirements and is more agnostic about the content of the speech. *Compare Brandenburg*, 395 U.S. at 448 (creating a stringent tripartite test that is agnostic about the target of the speech), with *Schenck*, 249 U.S. at 52 (indicating a principal concern with speech that harms the government itself, rather than speech that may pose harm to a specific social group). *See also* Alix Bruce, Note, “*Enough’s Enough: Protest Law and the Tradition of Chilling Indigenous Free Speech*,” 8 AM. INDIAN L.J. 53, 106 (describing how broad anti-riot laws may have a chilling effect on organizations advocating for change, such as those protesting against pipeline projects). Thus, forcing statutes themselves to be narrowly constructed ensures that protests cannot be criminalized merely because of the content at issue. *See id.* (noting that broad anti-riot statutes that criminalize conduct like publicizing a protest may stifle nonviolent forms of political speech).

B. *Brandenburg and Its Progeny*

The Court's brief per curiam opinion in *Brandenburg* did not provide a full roadmap for how courts should apply its tripartite test or interpret each of its three components.⁴⁷ Subsequent cases provided the contours for the test, specifically looking into the "directed to" and "imminency" prongs.⁴⁸ In 1973, in *Hess v. Indiana*, the U.S. Supreme Court ruled that, for the purposes of "imminen[ce]," a statement not directed at a particular audience cannot constitute the type of advocacy of imminent lawlessness that *Brandenburg* targets due to a lack of causality.⁴⁹ The words, by themselves, cause no harm if no one is around to hear and act on them.⁵⁰

Next, in 1982, in *NAACP v. Claiborne Hardware Co.*, the U.S. Supreme Court further determined that the First Amendment generally protects incite-

⁴⁷ See *Brandenburg*, 395 U.S. at 447 (requiring, but not defining, intent, imminency, and likelihood of the desired unlawful conduct).

⁴⁸ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914–15 (1982) (determining that the principal concern of the incitement doctrine is violent lawlessness, rather than the scope of all actions that can be criminalized); *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (per curiam) (tightening the causality requirement present in the imminency prong of *Brandenburg*).

⁴⁹ See *Hess*, 414 U.S. at 107–08 (ruling that imminency requires that the speech be directed at specific listeners rather than addressed generally, and that the target audience be likely to respond to the speech in the manner directed). This case dealt with a protestor at an anti-war rally stating that "[w]e'll take the fucking street." *Id.* at 107 (quoting the appellant's speech). The Court determined this was insufficient to constitute incitement under *Brandenburg* because it was not directed at a particular audience, meaning it was unlikely to result in any imminent lawlessness. See *id.* at 107–08 (suggesting that a specific audience, rather than a general one, must be the target of the speech); see also *Packingham v. North Carolina*, 582 U.S. 98, 104–05 (2017) (interpreting the imminence prong to require a speed which precludes reflection by the audience). But see *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978) (holding that there is no First Amendment defense to a charge that an individual's publications advocating against payment of taxes incited people to avoid paying federal taxes in violation of federal law). *Buttorff* may be distinguished from the *Brandenburg* line of incitement cases given the obvious compelling interest for the federal government in the administration of the federal revenue and the constitutional entitlement of Congress to collect taxes. See *Buttorff*, 572 F.2d at 624 (noting that the strength of the government interest in government revenue is clear); see also *United States v. Schultz*, 529 F. Supp. 2d 341, 356 (N.D.N.Y. 2007) (rejecting a First Amendment defense against a charge of incitement to tax nonpayment). In 2023, the Supreme Court held that "encouraging" undocumented immigration into the country could be prosecuted, on the basis that the underlying conduct targeted by the statute is already federally unlawful. *United States v. Hansen*, 599 U.S. 762, 766 (2023) (quoting 8 U.S.C. § 1324(a)(1)(A)(iv)). But see Lauren D. Allen, Note, *Illegal Encouragement: The Federal Statute That Makes it Illegal to 'Encourage' Immigrants to Come to the United States and Why it is Unconstitutionally Overbroad*, 60 B.C. L. REV. 1205, 1234–36 (2019) (arguing that 8 U.S.C. 1324(a)(1)(A)(iv) is unconstitutionally overbroad by regulating protected speech and imposing criminal liability).

⁵⁰ See *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring) (arguing that while "overt acts" may be punished, mere ideas may not be proscribed); see also *Hess*, 414 U.S. at 108 (ruling that speech which was arguably advocating for further anti-war protests in the future was not incitement because it was directed "at some indefinite future action").

ment to *nonviolent* lawlessness, but not violence.⁵¹ At issue was a boycott aimed at racist policies that included abstention from white-owned businesses.⁵² There, the Court upheld liability for boycott participants who engaged in violent behavior, including arson while reversing liability against individuals who merely participated in or advocated for the economic boycott.⁵³

Since *Claiborne*, the Supreme Court has not had an occasion to apply—or revisit—the *Brandenburg* test.⁵⁴ Nonetheless, in 2010, in *Holder v. Humanitarian Law Project*, the U.S. Supreme Court established a corollary rule—without relying on or applying *Brandenburg* outright—that the First Amendment does not protect providing material support to recognized foreign terrorist organizations, given the strength of the federal government’s interest in preventing terrorism.⁵⁵

These three cases thus demonstrate the limits of the *Brandenburg* test: it does not protect incitement to violent lawlessness made to a specific audience and does not protect support to terrorist organizations.⁵⁶ Beyond these limits,

⁵¹ See 458 U.S. at 914–15 (differentiating between advocacy of nonviolent criminality and violent criminality and concluding that the *Brandenburg* test is generally only concerned with the latter). This case specifically dealt with a “politically motivated” multiyear boycott of white-owned businesses resulting from racially discriminatory policies, which included both nonviolent components as well as violence in the form of shooting at the homes of Black individuals who patronized the businesses. *Id.* at 914. Petitioners were held liable by the Mississippi Supreme Court for tortious interference with these businesses, with the court determining that the presence of some violent acts rendered the entire boycott illegal. See *NAACP v. Claiborne Hardware Co.*, 393 So. 2d 1290, 1301 (Miss. 1980) (making no distinction between the nonviolent lawlessness of engaging in a boycott and the violent lawlessness of arson and threats of injury), *rev’d*, 458 U.S. 886 (1982).

⁵² *Claiborne*, 458 U.S. at 905.

⁵³ See *id.* at 914–15 (holding that while the First Amendment did not protect advocating for violence against violators of the boycott, it did protect advocating for the boycott itself).

⁵⁴ See *Thompson v. Trump*, 590 F. Supp. 3d 46, 111–12 (D.D.C. 2022) (noting that, because the Supreme Court rarely applies the *Brandenburg* test, case law on how to apply it to specific contexts, including President Trump’s speech on January 6th, is scant).

⁵⁵ See 561 U.S. 1, 21–22, 28 (2010) (creating a bright-line rule under which federal statutes aimed at terrorism may prohibit speech where that speech would jeopardize the federal interest in combatting terrorism). The organization’s stated goal was to provide support and expert assistance to two designated terror organizations to assist them in utilizing humanitarian, non-violent means of conflict resolution. *Id.* at 21–22. The government alleged that this action violated the Patriot Act’s material support statute, 18 U.S.C. § 2339B, which prohibits providing property, funds, and services, as defined in § 2339A, to terror organizations. *Id.* at 14. Although the Court indicated that a “heightened standard” of review may be applicable given the involvement of speech in such conduct, it indicated that the government’s overwhelming interest in preventing terrorism would be sufficient to overcome strict scrutiny. See *id.* at 21, 28 (declining to apply *Brandenburg* outright and instead focusing on the competing interests of the government and Humanitarian Law Project). However, the Court made it clear that the First Amendment continues to protect membership in such an organization. See *id.* at 17–18 (contrasting membership with material support and ruling that there is no First Amendment defense for the latter).

⁵⁶ See *Holder*, 561 U.S. at 22 (creating a bright-line rule excluding material support for terror organizations from First Amendment protection); *Claiborne*, 458 U.S. at 915 (holding that the First Amendment specifically does not protect advocacy to violent lawlessness); *Hess v. Indiana*, 414 U.S.

however, *Brandenburg*'s protectiveness of speech—even speech likely to cause harm—remains intact.⁵⁷

C. How the Court Views Speech

In *Brandenburg*, the Supreme Court did not articulate a clear understanding of when speech constitutes incitement based on the speaker's intent.⁵⁸ Justice William O. Douglas offered what amounts to the Court's closest approximation of a theory of incitement by emphasizing the speaker's enthusiasm for a particular result.⁵⁹ It is this desire by the speaker for a particular outcome—that is, the speaker's intent—that differentiates permissible abstract advocacy from incitement to imminent lawlessness.⁶⁰

One reason for this distinction rests in the First Amendment's protection of political speech.⁶¹ The Court generally views such speech as central to American civic life and presumes that the First Amendment exists to protect debate about matters of public importance.⁶² In *Brandenburg*, the Court specifically noted that the Ohio statute was censorious of political speech, given that any speech about the form or function of the government is, by its very nature,

105, 108–09 (1973) (per curiam) (requiring that statements be targeted at a particular audience to satisfy the imminency prong of the *Brandenburg* tests).

⁵⁷ See *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572, 582 (S.D.N.Y.) (holding that an advertisement by Hamas MTV purportedly assigning religious value to “killing Jews” was not facially calling for violence and that it is not clear who the ad, which would have been placed on the back of New York City buses, was “targeting in its purported advocacy”), *vacated as moot*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105 (2d Cir. 2016) (per curiam). Thus, even speech that may be seen as encouraging violence, if made generally rather than to an audience, is protected. See *id.* (considering the possibility that speech describing antisemitic violence may lead to harm but determining that the possibility of the speech itself causing that harm was too remote for the advertisement to be barred). The Second Circuit Court of Appeals affirmed a lower court decision dissolving the injunction against the Metropolitan Transportation Authority after the Authority changed its advertising standard to be a limited public forum, thus giving it greater discretion over which ads to display. *Am. Freedom Def. Initiative*, 815 F.3d at 107–08.

⁵⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (describing only advocacy “directed to” imminent illegal action, rather than articulating a specific mens rea requirement).

⁵⁹ See *id.* at 453 (Douglas, J., concurring) (“The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief and conscience.” (citing *Am. Commc’n Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 446, 449 (1950) (Black, J., dissenting))).

⁶⁰ See *id.* (describing enthusiasm for the illegal result as the defining characteristic of incitement). Justice Douglas made clear that “action” can be a form of First Amendment expression, using examples of tearing up the Constitution or a family Bible to express a point of view as non-prosecutable protected speech. See *id.* at 454–55 (critiquing the Court’s decision to criminalize burning a draft card in opposition to the Vietnam War (citing *United States v. O’Brien*, 391 U.S. 367, 382 (1968))).

⁶¹ See *Holder*, 561 U.S. at 42 (Breyer, J., dissenting) (“[S]peech and association for political purposes is the kind of activity to which the First Amendment ordinarily offers its strongest protection . . .”).

⁶² See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (articulating the famous principle that discourse on public issues must be “uninhibited, robust, and wide-open”).

political.⁶³ The Court cited *Dennis v. United States*, a 1951 case in which the Court held that although communist advocacy was properly impermissible under the Smith Act, there existed a broader right to engage in social and political debate.⁶⁴

In 1964, in *New York Times Co. v. Sullivan*, the U.S. Supreme Court articulated this viewpoint with respect to the freedom of the press, holding that freedom of expression on matters of public importance is a settled matter of First Amendment jurisprudence.⁶⁵ *Sullivan* thus stands for the proposition that political speech, even that which opposes a government interest, deserves stringent protections.⁶⁶ In 1957, in *Roth v. United States*—which predates *Brandenburg* by over a decade—the U.S. Supreme Court held that the protection of political viewpoints is fundamental to American democracy.⁶⁷ Indeed, even in the *Schenck* line of cases, which generally sought to suppress certain political views, concurring and dissenting justices advocated for robust protections for political speech.⁶⁸ These cases thus make clear that the Court views political speech as being uniquely privileged in the public forum, justifying the high bar that *Brandenburg* places on its suppression.⁶⁹

⁶³ See *Brandenburg*, 395 U.S. at 448–49 (describing the statute, which targeted political and industrial reform efforts, as repugnant to the First Amendment).

⁶⁴ See *Dennis v. United States*, 341 U.S. 494, 502 (1951) (plurality opinion) (arguing that the purpose of the Smith Act was not to erase uninhibited discussion of political issues, but to curtail actions that would harm governmental interests). The Smith Act of 1940 was later consolidated into Title 18 and now restricts its punishment of advocacy to that which calls for violence, including assassination of elected officials. See 18 U.S.C. § 2385 (prohibiting the advocacy of the violent overthrow of the government, including through speech and publication of pamphlets, where the speaker has the purpose of assisting in bringing about such actions); *Brandenburg*, 395 U.S. at 448–49 (ruling that a statute specifically proscribing efforts aimed at “political reform” violated the First Amendment).

⁶⁵ See 376 U.S. at 269, 280 (protecting newspapers from libel actions brought by public figures unless the target of the libel could show “actual malice,” on the basis that public figures have sufficient means to rebut any defamatory statements). The Court further quoted Judge Learned Hand’s suggestion that the marketplace of ideas, where all ideas are freely debated and the best ideas—or those with the most support—prevail, defines American free speech ideals. See *id.* at 270 (suggesting that more speech, rather than less speech, is better for enabling the public to ascertain the truth (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

⁶⁶ See *id.* at 270 (adopting an expansive marketplace of ideas theory for political speech).

⁶⁷ See 354 U.S. 476, 484 (1957) (describing the importance of First Amendment speech protections to ensure the ability of the people to affect change).

⁶⁸ See *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (stating that fear of ideas is insufficient to curtail speech and that there must be fear of actual and imminent harm), overruled by *Brandenburg*, 395 U.S. 444; see also *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (suggesting that only “the emergency that makes [the speech] immediately dangerous” is sufficient to override the First Amendment’s prescription that Congress must not abridge freedom of speech).

⁶⁹ See *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion) (requiring content-based restrictions on political speech to be subjected to strict scrutiny); see also *Brandenburg*, 395 U.S. at 449 (making it more difficult for the government to proscribe disfavored speech, even where that speech poses potential risks, because of the importance of the right to free speech).

The deference given to the intent, rather than to the impact, of speech is also consistent with the First Amendment's division between conduct and speech.⁷⁰ In 1968, in *United States v. O'Brien*, the U.S. Supreme Court held that, while the First Amendment protects political speech and symbolic speech, where speech and nonspeech elements are both at issue, restrictions on the nonspeech elements may justify "incidental" restrictions on the speech.⁷¹ *O'Brien* shows that the First Amendment is concerned with expression rather than mere conduct.⁷² Incitement is thus unique as a doctrine because it requires speech as well as conduct or imminent risk of conduct by third parties; without such risk, the high threshold for incitement is not satisfied because the harm is too remote.⁷³

Given the importance of intent in determining whether speech rises to the level of incitement, the language used in *Brandenburg* is important.⁷⁴ *Brandenburg's* "directed at" language may be best understood as requiring specific intent.⁷⁵ The Model Penal Code, however, describes intentionality as a subjective mental state equivalent to the "purpose" of the actor.⁷⁶ In 2009, in *United*

⁷⁰ See *Brandenburg*, 395 U.S. at 447 (using a "directed at" framework in lieu of an explicit intent requirement); see also *United States v. Miselis*, 972 F.3d 518, 532 (4th Cir. 2020) (describing incitement as "advocacy directed and likely to produce imminent lawless action"); Nat'l Org. for Women, Inc. v. Scheidler, 897 F. Supp. 1047, 1084 (N.D. Ill. 1995) (describing incitement as "speech that calls for or tends to produce or incite violence").

⁷¹ See 391 U.S. 367, 376 (1968) (holding that anything less than pure speech may be subject to greater restrictions). This case dealt with whether tearing up a draft card in opposition to the Vietnam War was protected under the First Amendment as expressive conduct. *Id.* at 369. The Court determined that, given Congress's independent ability to administer the draft under its Article I war powers, Congress could proscribe such conduct without violating the guarantee of freedom of speech. See *id.* at 376 (determining that, because of the government interest in an orderly draft process, and Congress's ability to do so by any means available under its constitutional powers, expressive conduct may be restricted as long as the statute is not aimed at the expressive message, but the conduct itself).

⁷² See *id.* at 376 (extrapolating that, given the non-absolute protections for even political expressive conduct, mere conduct that is not communicative falls outside the ambit of First Amendment protection).

⁷³ See *Brandenburg*, 395 U.S. at 447 (holding that the advocacy must be directed to producing imminent lawless action so be proscribed, which is distinct from the speaker also serving as the actor). This is distinct from both true threats and fighting words, where the speaker is also the putative actor. See *Virginia v. Black*, 538 U.S. 343, 362–63 (2003) (holding that speech made with the intent of placing the target in fear of harm by the speaker or another is not constitutionally protected); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 572 (1942) (holding that speech which "by their very utterance" inflicts injury on the target, such as by calling them a "fascist," is not constitutionally protected).

⁷⁴ See *Brandenburg*, 395 U.S. at 447 (holding that the advocacy must be directed to producing imminent lawless action, which is distinct from the speaker also serving as the actor).

⁷⁵ See *id.* (requiring that the speaker intend to instigate the target lawless conduct); see also *Specific Intent*, BLACK'S LAW DICTIONARY, *supra* note 19 (defining "specific intent" as the actor having "[t]he intent to accomplish the precise criminal act that one is later charged with").

⁷⁶ See MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1962) (describing the levels of mens rea). "Purposely," the most culpable mental state, is described as the action and result being the actor's "conscious object." *Id.* § 2.02(2)(a). "Knowingly" requires that the prohibited result will arise with "practical[] certain[ty]" from the actor's conduct. *Id.* § 2.02(2)(b). To act "[r]ecklessly" requires the

States v. Fullmer, the U.S. Court of Appeals for the Third Circuit ruled that, when making a determination on whether a piece of speech constitutes a true threat, the court should consider all of the circumstances in which the speech was made, rather than merely the “words in isolation.”⁷⁷ That is, the speaker’s intent may be shown by context and circumstance and need not be to threaten, incite, or otherwise commit a particular speech-act.⁷⁸

Thus, although *Brandenburg* may not explicitly require intent, its “directed to” language generally captures the principle that the speaker’s words are designed to inspire the target’s illegality.⁷⁹ In other words, advocacy is always about intent, a desire to affect some outcome or change.⁸⁰ The question about incitement is simply what that advocacy is oriented toward: for incitement, it must be imminent lawless action.⁸¹

actor to “consciously disregard[]” a known risk, such that it involves a “gross deviation” from the ordinary standard of care. *Id.* § 2.02(2)(c). Finally, “[n]egligently” requires that the actor failed to perceive a risk she should have known, resulting in harm. *Id.* § 2.02(2)(d).

⁷⁷ See 584 F.3d 132, 154 (3d Cir. 2009) (permitting evaluation of not merely the communications that formed the basis of the charge, but also ancillary communications and information that provided background about the speaker’s intent). In *Fullmer*, the defendants had founded a group, Stop Huntingdon Animal Cruelty (SHAC), to protest the use of animal testing by Huntingdon Life Sciences. *Id.* at 138–39. Defendants were charged with conspiracy to violate the Animal Enterprise Protection Act because of their communications targeting both Huntingdon and individual employees. See *id.* at 137, 139 (quoting the group’s stated purpose as encouraging “direct action” to stop the company’s animal testing activities).

⁷⁸ See *id.* at 157 (ruling that a website seeking to coordinate illegal protests against an animal testing facility and its employees rose to the level of incitement under *Brandenburg* because the protestors’ goal was to disrupt the facility’s lawful functioning, which occurred through third-party actors). The court reached this determination by evaluating the organization’s stated purpose, the views of its organizers, and the actual speech posted to the website at issue. See *id.* (allowing the entirety of SHAC’s public postings and other communications to be considered as instructive of the group and individual defendants’ intent); see also *United States v. White*, No. 08-CR-00054, 2010 WL 438088, at *7 (W.D. Va. Feb. 4, 2010) (holding that, for the purposes of a true threat, the Supreme Court’s test from *Virginia v. Black* “requires only a specific intent to communicate the threat to the recipient, and not a specific intent to threaten”), *aff’d in part, vacated in part* 670 F.3d 498 (4th Cir. 2012), *abrogated by* 810 F.3d 212 (4th Cir. 2016).

⁷⁹ See *Brandenburg*, 395 U.S. at 447 (finding that the speech being “directed to” inspiring the audience to engage in imminent lawless action suggests an expectation that the speaker wish for that action to occur as a result of their speech).

⁸⁰ See *id.* (indicating that the advocacy being “directed to” a particular outcome means that the outcome is the advocate’s wish or purpose for making the speech); *Advocacy*, BLACK’S LAW DICTIONARY, *supra* note 19 (defining “advocacy” as “[t]he art of pleading for or actively supporting a cause or proposal”). The “active” component suggests intent or desire on the part of the advocate consistent with the requirements of the incitement test. See *Brandenburg*, 395 U.S. at 447 (requiring the speaker to desire, in some way, the illegal outcome toward which they are inspiring others to act).

⁸¹ See *Brandenburg*, 395 U.S. at 447 (ruling that incitement is specifically oriented toward imminent unlawful actions). Courts have interpreted “imminent” as quick enough that the actors did not have time to rationally reflect on what they were doing prior to engaging in the called-for conduct. See, e.g., *Packingham v. North Carolina*, 582 U.S. 98, 103–04 (2017) (suggesting that space for both listening and reflecting on what one heard is an essential principle of the First Amendment’s public forum doctrine, which enshrines the notion that certain public places are free for use by speakers).

D. Using Your Words: A Philosophical Approach

How words are used complicates the incitement analysis: the speech at issue may be clear or unclear, may carry hidden meanings or connotations, or may be nonsensical.⁸² Philosophy of language—speech-act theory—is a helpful lens for understanding what incitement is at a more formal level.⁸³ Subsection 1 of this Section will introduce two competing speech-act theories.⁸⁴ Subsection 2 of this Section will briefly consider propaganda in a liberal democracy as an example of the societal risks of deploying coded speech.⁸⁵

1. Speech-act Theory and Speaker Intent

Language relies on conventions to function, and words may have different meanings given a speaker's tone, their context, and the relationship between the speakers.⁸⁶ "Speech-acts," or speech that by its utterance constitutes an action, such as a contract, marriage, or assault, are particularly susceptible to audience misinterpretation or reinterpretation.⁸⁷ Speech-acts need some uptake, or understanding and response, by a listener in order to go beyond being mere speech.⁸⁸ A given statement, depending on where it is spoken, to whom it is said, and the tone with which it is said, could be a joke, a suggestion, or incitement.⁸⁹ The context in which the speech is made is thus necessary for determining the type of speech-act.⁹⁰

Other courts adopt a particular window of time, such as twenty-four hours, during which conduct may be considered "imminent." *See, e.g., Nat'l Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087 (N.D. Ill. 1995) (ruling that "immediately" means fast enough that the audience does not have time to reflect prior to acting, which the court interpreted as a twenty-four-hour timeframe).

⁸² *See* Jeff Speaks, *Theories of Meaning*, STANFORD ENCYC. OF PHIL., <https://plato.stanford.edu/archives/spr2021/entries/meaning/> [<https://perma.cc/FBV5-U4Y6>] (June 27, 2019) (suggesting that the content of a piece of speech determines what it refers to; however, where the content is unclear, determining the referent is more difficult absent contextual clues).

⁸³ *See infra* notes 92–99 and accompanying text.

⁸⁴ *See infra* notes 86–99 and accompanying text.

⁸⁵ *See infra* notes 100–119 and accompanying text.

⁸⁶ *See* Rebecca Kukla, *Performative Force, Convention, and Discursive Injustice*, 29 *HYPATIA* 440, 440–41 (2014) (describing the contextual cues by which a listener will determine how the speaker is using her words); *see also* JASON STANLEY, *HOW PROPAGANDA WORKS* 172 (2015) (suggesting that the "regularity" of a given community—that is, knowledge of how it tends to act and react—is necessary for a speech-act to be completed because the community will be able to satisfy the speech-act's requirements).

⁸⁷ *See* Kukla, *supra* note 86, at 443 (articulating the importance of uptake, or social response, for a speech-act to be effective).

⁸⁸ *See id.* (showing that speech-acts are not accomplished merely because the speaker utters particular words).

⁸⁹ *See id.* (illustrating how uptake functions). Kukla uses the example of suggesting marriage to a dinner partner. *Id.* If they are a couple, it could constitute a marriage proposal, but if they are not acting as a couple, it is more likely to be starting a conversation about the future more generally, or to be taken as a joke. *Id.* Thus, for the uptake of a piece of speech to succeed, the context in which it is

A key question is the extent to which the speaker's intent should be treated as dispositive, as compared to the audience's response.⁹¹ One theory holds that the speaker's intent is the key to determining whether a speech-act is completed.⁹² If the audience's response is inconsistent with the speaker's intent, then the speech-act fails.⁹³ On this view, intent and reaction are separable elements to a speech-act: if an incitement effort is met with laughter, it was a failed incitement effort rather than a successful joke.⁹⁴

A more recent theory, however, is unconcerned with the speaker's intent.⁹⁵ There is no "misfire" if the audience's response and the speaker's intent are inconsistent; the fact that the speech is acted upon is sufficient for there to be a successful speech-act.⁹⁶ Further, the audience's response is contempora-

made is an important consideration. *See id.* (demonstrating the context-sensitivity of completed speech-acts).

⁹⁰ *See id.* at 444 (showing how audience familiarity with what the speech-act purports to do is necessary for it to succeed). One example is of a marriage ceremony: if it is made using the appropriate rituals and everyone behaves afterwards as if a marriage has taken place, then the sufficient social force exists to constitute a marriage. *Id.* If, however, nobody, including the couple, behaves as if they have been married, one might conclude it was a performance rather than a marriage. *Id.*

⁹¹ *See infra* notes 92–99.

⁹² *See* J.L. Austin, First Lecture Delivered at Harvard University (1955), in *HOW TO DO THINGS WITH WORDS* 1, 9 (J.O. Urmson ed., 1962) (advancing a speech-act theory under which the only successful speech-acts are ones in which the speaker's intent to effectuate an act is properly understood by the audience).

⁹³ *See* J.L. Austin, Second Lecture Delivered at Harvard University (1955), in *HOW TO DO THINGS WITH WORDS*, *supra* note 92, at 12, 14–15 (requiring the "procedure" invoked to be "executed by all participants both correctly and completely"). Where the utterance "misfires," the attempt to invoke a certain act fails. *See id.* at 16 (explaining how failure by the audience to respond correctly to speech means that a speech-act has not been completed).

⁹⁴ *See* Austin, *supra* note 92, at 9 ("Surely the words must be spoken 'seriously' so as to be taken 'seriously' [.]"). Thus, with respect to the "burn down the Capitol" example previously presented, if the speaker is communicating the message in such a way that it appears to the audience they are joking, yet the audience were to react as if the speaker had been serious and engaged in the suggested conduct, the speaker would not have been liable for incitement because their words were not spoken "seriously." *See id.* (explaining that it stands to reason an audience will take language as serious if the speaker intends it to be taken as such). That is, the manner in which the speech is made—whether it seems the speaker is sincere about effectuating a speech-act—is necessary for determining whether one has been completed. *See id.* (suggesting that the speaker's motivation is determinative when assessing speech-acts).

⁹⁵ *See id.* (noting how if the speaker's intent is misinterpreted, the result is simply a different successful speech-act).

⁹⁶ *See* Kukla, *supra* note 86, at 446 (demonstrating how different social acts call for different responses from the audience, and a response from the audience to Act B may succeed in completing B, even if the speaker sought to accomplish Act A). The article specifically deals with "discursive injustice," or the idea that speakers—particularly women—may be treated as if the force of their words is irrelevant, such as when saying "no." *See id.* at 444, 446 (demonstrating how the speaker's identity may impact her ability to have her meaning appropriately taken up by the audience). The trouble is not that the speech-act of declining has been thwarted, but rather that some injustice has occurred by not properly taking up the speaker's meaning. *See id.* at 446 (suggesting that the speaker faces some harm from having her speech not understood correctly: practically, it may lead to the

neous with the speech.⁹⁷ There is no time for reflection built into the speech-act, and both the speaker's force and audience's uptake are necessary conditions for the speech-act to succeed, even if they are at cross-purposes.⁹⁸ Thus, if a speaker saying "go burn down the Capitol" intends it as an act of incitement, but the audience begins laughing, an unintended speech-act has been successfully completed: a joke.⁹⁹

2. The Dangers of Propaganda as Coded Speech

Propaganda, a type of political speech which hides the true meaning of words, is uniquely problematic because it shuts off the capacity for reasoned deliberation upon which the First Amendment rests.¹⁰⁰ Such speech may include dog whistles, where words have a second, cloaked meaning designed to elicit certain responses from certain listeners.¹⁰¹ Because the facial meaning of the words is not incendiary, the speaker has plausible deniability against an incitement charge.¹⁰² The impact of such speech depends on both the speaker's underlying motivation and the listener's ability to recover the hidden, intended meaning based on their own beliefs.¹⁰³

Propaganda in a liberal democracy often presents itself as hypocritically serving worthy political ideals while simultaneously undercutting them.¹⁰⁴ Demagoguery is antidemocratic propaganda that utilizes code words and rhetoric to mislead the public and achieve an end that would be repugnant to a liber-

speaker not being taken seriously in the future, and philosophically it denigrates the speaker's status as a speech-actor).

⁹⁷ See *id.* at 444 (suggesting that the speaker's intent, rather than being a distinct component of the speech-act, is part of the context for the event itself).

⁹⁸ See *id.* at 454 (illustrating how these conventional contexts are what give speech-acts their performative force; for example, a question cannot be answered until after the speech-act occurs, because the context demands that the asker finish the question).

⁹⁹ See *id.* at 444 (explaining how, if the social response to the speech-act is different than the intended one, then a different speech-act has been committed than the intended one).

¹⁰⁰ See STANLEY, *supra* note 86, at 48 (offering a theory of propaganda in liberal democracies).

¹⁰¹ See R. Henderson & Elin McCready, *How Dogwhistles Work*, 2017 NEW FRONTIERS A.I., at 231, 231, https://link.springer.com/chapter/10.1007/978-3-319-93794-6_16 [<https://perma.cc/3T9S-NF6S>] (describing dog whistles as terms that send different messages to an outgroup as compared to an ingroup, where the message to the ingroup tends to be "taboo, controversial, or inflammatory").

¹⁰² See *id.* at 232 (offering the example of "inner-city" as a "thin veil" to describe Black communities, with the hidden meaning or subtext that such communities, by virtue of their racial composition and the negative racial prejudices attached to Black individuals, are undesirable).

¹⁰³ See *id.* at 238 (describing how the persona of the speaker allows "enrichment" of the statement to include other hidden or coded meaning, where a common belief between the speaker and listener is necessary).

¹⁰⁴ See STANLEY, *supra* note 86, at 68 (describing demagoguery as propaganda resting on "[un]worthy political ideals" despite presenting itself as being in service of worthy goals) (emphasis omitted).

al democracy.¹⁰⁵ Demagoguery may rely on falsehoods rather than honest explanations in order to mislead listeners.¹⁰⁶

“Undermining propaganda” contains a contradiction between the underlying ideal and stated goal, such that it tends to erode the very thing it purports to support.¹⁰⁷ This type of propaganda inherently runs counter to the liberal democratic ideal of reasoned debate and decision-making, even though the rhetoric seeks to advance the overall goals of democracy, by making appeals to emotion rather than logic.¹⁰⁸ Because it operates to undermine the values of democracy,

¹⁰⁵ See *id.* at 82–83 (describing how propaganda may be commonly deployed in democracies). Stanley uses the example of the “fiscal cliff,” an expression describing going over the debt ceiling, as something that misled the public by making it appear as though falling off the “cliff” would have been problematic by raising the federal deficit when, in actuality, it would have reduced the federal deficit. See *id.* at 83 (suggesting that the use of this phrase was designed to mislead the public about the consequences of “going over the ‘cliff’”). The public was thus unable to adequately understand or discuss the situation, as both Republicans and Democrats had used the idea of the widening deficit to elicit certain feelings from their constituents. *Id.* at 83–84. Presenting a deficit issue as a “cliff” thus created the presumption by the public of a threatening or dangerous situation. See *id.* (citing polling data that found that the public misunderstood what going over “the cliff” would actually do to the economy); see also Veep: C***gate (HBO television broadcast May 29, 2016) (“No one understands the economy; literally, no one.”); Jason Stanley, Opinion, *Demagoguery and the Demagogue*, N.Y. TIMES, <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2015/10/12/democracy-and-the-demagogue/> [<https://perma.cc/L39G-C734>] (Oct. 13, 2015) (suggesting that politicians may simply swap words that would raise red flags, such as racial epithets, with more benign language in order to achieve an antidemocratic goal without appearing to be antidemocratic).

¹⁰⁶ See STANLEY, *supra* note 86, at 86 (underscoring the risks of propaganda as “set[ting] the stage for . . . irrational . . . deliberation”). Stanley notes that in the “fiscal cliff” example, given the complexities of the economy in general and the federal deficit more specifically, the public is more apt to be misled because they will generally be unable to deduce the correct answers on their own. See *id.* (suggesting that the need to rely upon those in power may embolden them to mislead the public and create the risk that the public will have no ability to engage in healthy debate by sabotaging the discourse). Civic rhetoric differs in that it brings perspectives that may otherwise be ignored into the public sphere and therefore allows for their consideration. See *id.* at 110, 115 (explaining the difference between demagoguery and rhetoric, as well as how, in contexts defined by inequality, civic rhetoric can be useful and even necessary in a democracy). Stanley uses W.E.B. Du Bois’ 1926 essay *Criteria of Negro Art* as an example, with Du Bois advocating for the use of art as propaganda to humanize Black individuals to the white public. *Id.* at 110–11. Stanley, however, notes that at the time Du Bois was writing, society did not meet expectations of reasonableness by restricting Black people from public discourse. *Id.* Du Bois’ words may thus be rhetoric that would improve public reason by adding to the debate and may thus be better understood as “aspirational” rhetoric. See *id.* at 111–12 (differentiating between such rhetoric and propaganda on the basis of the underlying motivation for the speech, particularly whether the misleading quality is designed to subvert the ability of listeners to reason).

¹⁰⁷ See *id.* at 53 (explaining how words that denote classically American values, such as liberty, may be undermined if the speech is deployed in a way that would undermine liberty). For example, the phrase “liberty from fear” may be used as a pretext for increasing incarcerations; in that case, given that it would literally function to advocate taking away liberty from individuals, it undermines “liberty” as a concept. See *id.* (illustrating how this undermining principle operates).

¹⁰⁸ See *id.* (suggesting that “overload[ing] various affective capacities,” such as use of nostalgia, sentiment, and fear, will override the audience’s ability to rationally consider the message). Stanley references philosopher John Rawls’ conception of “reasonableness.” *Id.* at 81, 87–89. Rawls’s understanding of this value presupposes that these values are universally understood, understandable to a

undermining propaganda is inherently harmful when introduced to the public sphere because it hides its deleterious meaning behind benign language.¹⁰⁹

Demagoguery and undermining propaganda both harm public discourse and democracy by exploiting the ambiguity present in human speech, thus hiding the speech's true meaning and allowing faulty ideological beliefs to flourish.¹¹⁰ Speakers do not always communicate what they mean with formal specificity.¹¹¹ By hiding the true meaning of speech in the political arena, however, demagoguery and undermining propaganda contribute to "flawed ideological beliefs."¹¹²

These beliefs cannot be reasoned against and are immune to counterargument.¹¹³ Learning that the belief is false is insufficient to lead the one who

wide audience, and that individuals possess a capacity for self-correction and self-reflection. JOHN RAWLS, *A THEORY OF JUSTICE* 356–57, 366 (rev. ed. 1999) (noting that "rationality" requires a fixity of meaning for words and the ideals they represent, such that they have "constant sense[s]" about which no one would be mistaken, and that if the actor is mistaken, they will be self-reflective enough to adjust their conduct); *see also* STANLEY, *supra* note 86, at 53 (suggesting that, although employment of emotional techniques like stoking fear and resentment may be a component of undermining propaganda, it is not necessary as long as the speech undermines the value it purports to uphold).

¹⁰⁹ *See* STANLEY, *supra* note 86, at 53 (suggesting that hiding the ball on the audience may lead to their accepting the harmful speech and undermining values they would otherwise choose not to undermine). Given the theory put forward by Rawls, such speech undermines these values by placing the individual's caprices, biases, or sentiments ahead of a broader conception of goodness oriented toward common social goals. *See* RAWLS, *supra* note 108, at 356 (assuming that the meanings of words correlating to values like "justice" and "equality" will have a "constant sense" that would be universally understood; if they do not, the theory falls apart).

¹¹⁰ *See* STANLEY, *supra* note 86, at 129, 170 (describing how these statements erode reasonableness and how these unspoken norms, including tone and inferences based on context, contribute to meaning-making); *see also* Charles Taylor, *Degenerations of Democracy*, in *DEGENERATIONS OF DEMOCRACY* 18, 39 (2022) (describing how use of language like "liberal elites" creates an us-versus-them paradigm that is harmful to democracy and suggests that those "liberal elites" are not truly part of the people that make up society). The words "liberal elites," of course, do not by themselves carry a negative or harmful connotation—it is only when deployed in a harmful manner that the words become harmful. *Id.*; *see also* STANLEY, *supra* note 86, at 129 (suggesting that such statements, despite being facially neutral, may undermine democratic reasoning).

¹¹¹ *See* STANLEY, *supra* note 86, at 171 (suggesting that it is impossible for "ideal conceptions" to be "practically possible," because discourse is guided by norms and thus contains inherent ambiguities that prevent speech from containing absolute certainties (quoting philosopher John Rawls)).

¹¹² *See id.* at 129 (suggesting that these beliefs in turn change the power balance between speakers and audiences, as the audience or speaker may possess a flawed ideological belief that a certain group is unworthy of "reasonable consideration"). For example, former Alabama governor George Wallace prefaced his infamous "segregation now . . . segregation tomorrow . . . segregation forever" with his insistence that he was speaking "[i]n the name of the greatest people that ever trod this earth." *See* JAN-WERNER MÜLLER, *WHAT IS POPULISM?* 21 (2016) (describing how populists will purport to speak "for the people" while really only advocating for a select population). This rhetoric—claiming to speak on behalf of "real America[ns]"—rests on a bedrock belief of "moralized . . . antipluralism" that suggests that only some of "the people" are *the* people, a democratically divisive view Wallace was encouraging his supporters to adopt. *Id.* at 20–21 (quoting former Alabama governor George Wallace).

¹¹³ *See* STANLEY, *supra* note 86, at 188–89 (describing how the constitutive aspect of these beliefs makes it difficult for the belief-holder to hear counterarguments).

subscribes to it to abandon it.¹¹⁴ In the political sphere, this over-commitment to ideology may result in the abandonment of shared democratic character in deference to one's ideological identity.¹¹⁵ Such propaganda may take the form of coded speech—speech whose meaning is not facially obvious to all listeners, but only to members of an ingroup that understands the true meaning of the speech.¹¹⁶ Thus, the identity-fixing function of political parties—particularly in an era of increasing polarization—is apt to give rise to this shift in discursive meaning that is sufficient for the same words to mean different things to different people.¹¹⁷

Given this background, it follows that no one comes into a conversation or the public sphere without context, shaped by their knowledge and values, which are in turn shaped by their identities, as affirmed by comparison and contrast to others.¹¹⁸ This context shapes a speaker's understanding of the conversation and their contributions to it, and thus that context may be deployed to create indirect meanings.¹¹⁹

¹¹⁴ See *id.* at 189–92 (suggesting that the desire of the belief-holder for the belief to be normative-ly true, and the staking of their identity on the belief, makes reasonable discourse with those who do not hold the belief, or challenge it, difficult).

¹¹⁵ See *id.* at 264 (describing democratic character as inconsistent with perceiving certain codes of values, including religious and political affiliations, within a prescribed hierarchy such that some are truer or more correct than others). This hierarchical ordering is precisely what Wallace's "segregation now" speech accomplished: an implicit idea that "the greatest people" are a limited subset, specifically his supporters, and that they were standing up against the "tyranny" of a more inclusive and democratic society. See MÜLLER, *supra* note 112, at 21 (describing how Wallace invoked certain tropes to declare who was and was not a part of the "real America," thus giving license to exclude individuals (quoting former Alabama governor George Wallace)).

¹¹⁶ See STANLEY, *supra* note 86, at 182 (describing beliefs that become constitutive of identity and thus make critical reasoning on issues counter to that belief difficult).

¹¹⁷ See *id.* at 182–83 (suggesting that when beliefs become constitutive of identity, they preclude critical reasoning by being difficult to abandon and less resistant to rational revision, thus affecting the belief-holder's judgment).

¹¹⁸ See *id.* at 131 (explaining that conversational norms require "common ground," which may be fractured when identities are reductively restricted to single ideologies (quoting philosopher Robert Stalnaker)). For example, although being anti-abortion may be an anti-feminist viewpoint insofar as it affects access to healthcare, the decision by the 2017 Women's March organizers to clearly establish that the platform was pro-choice alienated women who were anti-abortion by suggesting they were not the right type of woman. See Sabrina Tavernise, *Is It Possible to Be an Anti-Abortion Democrat? One Woman Tried to Find Out*, N.Y. TIMES (Oct. 16, 2018), <https://www.nytimes.com/2018/10/16/us/missouri-democrats-abortion-republicans-voters.html> [<https://perma.cc/24KN-JJDU>] (discussing the challenges of ideological platforms which attempt to have broad appeal). The need to maintain one's ideological bona fides in order to fit in with the group—even when one does not support all of the group's viewpoints—is likely, as a result, to do more harm than good. See Emma Green, *Women Are Not a Monolith*, THE ATLANTIC (Jan. 19, 2019), <https://www.theatlantic.com/politics/archive/2019/01/fights-over-womens-march-and-march-life/580816/> [<https://perma.cc/SYQ7-33SR>] (describing the Women's March as attempting to fit all women into a specific ideology).

¹¹⁹ See STANLEY, *supra* note 86, at 131 (offering as an example that in 2014, if Barack Obama said "I am the president of the United States," the context made it true; if he said that in 2007, or if a different person said it in 2014, it would not have been true because of the specific context).

II. WHAT DID YOU SAY? FITTING *BRANDENBURG* INTO SPEECH THEORY

Words do things: they may be used to plead, order, encourage, dissuade, advocate, or explain.¹²⁰ When oriented toward illegal outcomes, they are no different.¹²¹ Nevertheless, it is not just what the words themselves do that matters; the linguistic conventions that convey the words' meaning to the audience are also significant.¹²² Section A of this Part evaluates whether, according to basic speech-act theory, incitement qualifies as a speech-act under which both intent and audience reaction are necessary.¹²³ Section B of this Part considers the relationship between propaganda and incitement and assesses to what extent the courts have grappled with propaganda-as-incitement.¹²⁴

A. Incitement as a Speech-Act

Incitement, under the law, is not merely words, but words that do something specific: encourage imminent lawlessness.¹²⁵ Thus, incitement may be properly considered a speech-act.¹²⁶ Given the *Brandenburg* test's requirement that the speech be "directed to" encouraging imminent lawlessness, the classical theory, under which the speaker's intent is dispositive, is the best model for understanding how incitement should be understood as a speech-act.¹²⁷ On this

¹²⁰ See Austin, *supra* note 92, at 6 (describing the ways in which speakers use words in everyday speech to effectuate real-world actions).

¹²¹ See *id.* (suggesting that to utter a sentence, in certain circumstances, is not to merely *describe* doing it, but to *actually* do it); see also *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam) (depriving speech that advocates for imminent illegality of First Amendment protections).

¹²² See STANLEY, *supra* note 86, at 48 (describing propaganda as speech that makes reasonable debate difficult by hiding the harmful qualities of the speech behind facially benign language). This form of speech is harmful because it distorts the embedded norms of natural communication by making it difficult for a reasonable listener, with basic knowledge of those norms, to comprehend the speech's true meaning. See *id.* at 99–100 (suggesting that the commitment to the belief means that they are no longer impartial and capable of satisfying the preconditions of public reason or the necessary view that others in society are themselves reasonable).

¹²³ See *infra* notes 125–142 and accompanying text.

¹²⁴ See *infra* notes 143–160 and accompanying text.

¹²⁵ See *Brandenburg*, 395 U.S. at 449 (singling out speech that causes incitement as not constitutionally protected).

¹²⁶ See *id.* at 447 (permitting only speech which results in, or is likely to imminently result in, criminal conduct to be proscribed, where the speech has had the effect of engaging in criminality itself); see also 18 U.S.C. § 2385 (criminalizing speech that advocates for the violent overthrow of the government, where the utterance of the speech itself constitutes commission of the offense).

¹²⁷ See *Brandenburg*, 395 U.S. at 447 (implying that "directed to" is adopting a specific intent requirement); see also Austin, *supra* note 92, at 9 (describing a speech-act theory where a successful speech-act—that is, one that succeeds in doing something in the world—requires the speaker's intent to have been properly understood and acted upon by the audience). Because this theory is more concerned with the speaker's intent as constitutive of the speech being given meaning, rather than focusing on the audience's reaction and what happens after the words are spoken, it is better suited to a criminal context because it incorporates a stronger sense of *mens rea*. See *Brandenburg*, 395 U.S. at 447 (suggesting that the speaker's intention is what matters, rather than the real-world results of an

view, if the audience does not appropriately take up the speaker's intent, the audience's interpretation does not transform it into a new speech-act: there is no turning incitement into stand-up comedy.¹²⁸ A sincere stand-up comedy routine similarly cannot be transformed into incitement merely because the audience responds unlawfully.¹²⁹

This theory better tracks criminal mens rea, as it ensures that speakers are not liable for the unintended consequences of their words by acknowledging the independent will and culpability of the audience members as actors.¹³⁰ However, the audience's response is not irrelevant even under this theory: if the audience does not react to the speech, there can be no imminent lawless action and thus no incitement.¹³¹

The Supreme Court previously considered this necessary relationship between speaker and audience.¹³² In 1973, in *Hess v. Indiana*, the U.S. Supreme Court ruled that saying "We'll take the fucking street later," in the context of an anti-war protest, did not constitute incitement because the only audience for the speech was several police officers.¹³³ Because the speaker did not direct the speech at a particular audience, and because the only people in the vicinity

erroneous response by the audience); cf. Kukla, *supra* note 86, at 444 (suggesting that a successful speech-act, albeit an unintended one, can still be completed if the speaker's intention, or purpose for speaking, is misunderstood by the audience).

¹²⁸ See Austin, *supra* note 92, at 9–11 (suggesting that if the speech is intended as a poem, it ought to be taken up as such by the listeners, rather than as a joke).

¹²⁹ See Austin, *supra* note 93, at 16 (suggesting that such a situation, where the verbal formula of joking is not achieved, would constitute a "misfire[]," as the audience does not correctly understand the speaker's purpose for making the speech).

¹³⁰ See *Brandenburg*, 395 U.S. at 447 (extrapolating that, because of the "advocacy" requirement, a speech not advocating for imminent lawless action that nevertheless had that result would fail the three-prong incitement test). While the Model Penal Code includes less-culpable mental states such as negligence, the *Brandenburg* test requires specific intent on the part of the speaker. See *id.* (requiring the speech be "directed to" unlawfulness, implying mental states of purposely or knowingly under the Model Penal Code); MODEL PENAL CODE § 2.02(2) (AM. L. INST. 1962) (describing the levels of mens rea).

¹³¹ See Austin, *supra* note 92, at 5–6 (asserting that the listener must react appropriately to a speaker for the speech-act to be completed). For example, if a listener does not react to an order to close the window, there was no order. See *id.* (explaining how appropriate audience uptake is necessary to complete the correct speech-act, and how a failure of uptake dooms the speech-act).

¹³² See *Hess v. Indiana*, 414 U.S. 105, 106–08 (1973) (per curiam) (overturning a conviction for incitement due to a lack of meaningful audience relationship); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 70 F. Supp. 3d 572, 582 (S.D.N.Y.) (ruling that a remote threat of harm stemming from generalized speech is insufficient for a colorable incitement concern), *vacated as moot*, 109 F. Supp. 3d 626 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105 (2d Cir. 2016) (per curiam).

¹³³ See 414 U.S. at 106–08 (suggesting that the audience must be one likely to act immediately on the speech, rather than a general or hostile audience). Whether Hess said "later" or "again" was unclear from the stipulated facts, though the majority determined that regardless of which word was actually said, both indicate that any illegal action would occur at some "indefinite future time" insufficient to satisfy the imminency prong in *Brandenburg*. See *id.* at 107–08 (suggesting that without an audience primed to act immediately, there can be no real threat of imminent lawlessness because of the speech).

were police officers, there was insufficient risk that the speech would result in imminent lawless action.¹³⁴ Justice William H. Rehnquist, however, disagreed that the statements constituted “counsel for present moderation” or a vague statement of future action, given the uncertainty that within a crowd of over a hundred people, no one would have interpreted it as an “exhortation” to resume protesting in defiance of the police.¹³⁵

Similarly, in 2015, in *American Freedom Defensive Initiative v. Metropolitan Transportation Authority*, the District Court for the Southern District of New York ruled that proposed advertisements on the back of New York City buses purporting to parody a Hamas campaign did not constitute incitement.¹³⁶ The court held that the advertisements, which described a jihad of “[k]illing Jews” and asking “[w]hat’s yours?,” did not have a specific audience sufficient to give rise to a meaningful risk of imminent lawless action against Jewish individuals.¹³⁷ The court also noted that there was a lack of evidence that the advertisements would be sufficient to trigger a violent reaction from an individual who was not already predisposed to commit such unlawful acts.¹³⁸

¹³⁴ See *id.* at 108 (indicating that neither the police nor the two protestors believed that the speech was directed at them). Though two witnesses also heard what Hess said, they indicated that he was not speaking louder than anyone else at the protest, and that they did not believe he was encouraging the protestors to return to the street. *Id.* at 107. Because of this, the court determined that there was no meaningful advocacy. See *id.* at 108–09 (suggesting that meaningful advocacy requires a cooperative or receptive audience to act on or further discuss the object of the advocacy).

¹³⁵ See *id.* at 111 (Rehnquist, J., dissenting) (suggesting that it was unclear from the record that none of the hundred-plus protestors in earshot of Hess would have heard the speech and determined it was a directive to get back to the protest immediately).

¹³⁶ See 70 F. Supp. 3d at 582 (determining that speech discussing violence that may be parody, and which lacks a specific and targeted audience, does not constitute incitement under *Brandenburg*). The advertisement, quoting “Hamas MTV,” said “Killing Jews is Worship that draws us close to Allah.” *Id.* at 574. Immediately below, it read, “That’s His Jihad. What’s yours?” *Id.* The Metropolitan Transportation Authority (“MTA”) declined to display the advertisement, citing its standard of prohibiting advertisements that would “incite or provoke violence,” in this case, against the city’s Jewish citizens. *Id.* at 574–75.

¹³⁷ See *id.* at 582 (emphasis omitted) (describing the contention that the advertisement was intended to incite violence against Jewish individuals as “thoroughly unpersuasive”). Specifically, the court indicated that because the audience was undefined, there was no likelihood of incitement. See *id.* (indicating that the nature of the audience is an important analytic point to consider in the context of an incitement charge). However, a probable audience of individuals likely to commit such actions “presumably . . . would not need a bus advertisement” to remind them of that commitment. *Id.*

¹³⁸ See *id.* (contrasting the risk of extremist Muslim violence by supporters of Hamas against the unlikelihood that a random individual on the street would see the advertisement and be moved to violence). Though beyond the scope of this Note, it is worth commenting that such speech likely would not constitute a true threat under *Virginia v. Black*, as the speech was not targeting particular individuals. See 538 U.S. 343, 357, 363 (2003) (holding that cross-burning with the motivation to intimidate could be proscribed as a true threat). Further, the Supreme Court has largely dispensed with the notion of “group libel,” or the principle that speech that denigrates a group may be unconstitutional. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992) (holding that a hate crime code that singled out certain vulnerable groups for protection could not withstand strict scrutiny because it was facially content-based). Thus, the harm caused by the speech in and of itself is irrelevant to the First

These two cases thus demonstrate the centrality of the audience in the determination of what constitutes incitement under the law.¹³⁹ Specifically, *Hess* indicates that the audience must be both specific and likely to react to the speech.¹⁴⁰ *American Freedom Defense Initiative* similarly draws an important contour around the nature of the audience and the likely impact of the speech on them: an undefined audience was unlikely to be moved by the speech, whereas those likely to be moved by it would not need something as transient as a back-of-the-bus advertisement to encourage them.¹⁴¹ Incitement as a speech-act thus requires some relationship between the speaker and audience, such that the audience is aware that they are the targets of the speech, and such that lawless action will at least be a plausible result of conveying the speech to them.¹⁴²

B. Incitement as Propaganda

The original canon of cases considering incitement dealt with generally facially obvious speech—including the defendant’s promise of “revengeance” against the Black and Jewish communities in *Brandenburg*.¹⁴³ This obviousness is consistent with the pre-*Brandenburg* “clear and present danger” test announced in *Schenck*, which generally dealt with explicit political advocacy perceived as threatening American interests.¹⁴⁴ In these cases, the speech’s meaning was not hidden, and any reasonable listener would understand the force of the speaker’s words.¹⁴⁵ The reasons for a seeming shift away from explicit calls for unlawfulness to more hidden exhortations may be manifold,

Amendment incitement analysis. See, e.g., *id.* (determining that even the most odious and harmful speech is protected if the statute proscribing it singles it out in particular).

¹³⁹ See *Hess*, 414 U.S. at 106–08 (indicating that whether the speech is directed at a particular audience is a necessary consideration); *Am. Freedom Def. Initiative*, 70 F. Supp. at 582 (indicating that the audience’s likelihood of reacting unlawfully to the speech is a necessary consideration).

¹⁴⁰ See *Hess*, 414 U.S. at 107–08 (suggesting that even if the police were the intended audience, law enforcement is so unlikely to engage in imminent lawless action because of the speech that there was no likelihood that unlawful activity would result).

¹⁴¹ See *Am. Freedom Def. Initiative*, 70 F. Supp. 3d at 582 (noting that the proposed advertisement would be unlikely to impact those most likely to react to it violently).

¹⁴² See *Hess*, 414 U.S. at 107–08 (requiring that the target audience to be both present and likely to respond favorably to the speech’s advocacy of illegality); *Am. Freedom Def. Initiative*, 70 F. Supp. 3d at 582 (same).

¹⁴³ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 446–47 (1969) (per curiam) (where “revengeance,” taken in context with statements from a nearly-identical Ku Klux Klan film suggesting that Black Americans should “be returned to Africa” and Jewish Americans should be “returned to Israel,” was reasonably construed by the Court and viewers as referencing violence against the groups).

¹⁴⁴ See *Schenck v. United States*, 249 U.S. 47, 51 (1919) (describing the leaflets as encouraging draft-eligible men to “not submit to intimidation” and “assert [their] opposition to the draft”).

¹⁴⁵ See, e.g., *Brandenburg*, 395 U.S. at 446–48 (noting that the threats of “revengeance” by the Ku Klux Klan were facially obvious threats of physical violence nonetheless protected by the First Amendment); *Schenck*, 249 U.S. at 48–49, 51 (noting that the encouragement to avoid the draft during World War I, in violation of the 1917 Espionage Act, was facially obvious incitement to violate the Act).

ranging from increased surveillance to concerns about third party censorship on social media and other internet platforms.¹⁴⁶

In any event, the result of this shift toward coded speech is to obfuscate the speaker's meaning by using words that may have benign or even positive connotations in their proper context.¹⁴⁷ As such, this speech takes on characteristics of propaganda by hiding the speaker's intent behind facially banal language.¹⁴⁸ Where propaganda is oriented around unlawfulness, it may constitute incitement, as long as it satisfies the technicalities of the *Brandenburg* test.¹⁴⁹

In 2007, in *Morse v. Frederick*, the U.S. Supreme Court ruled that schools could properly prohibit speech ostensibly advocating for drug use.¹⁵⁰ Justice John Paul Stevens, dissenting, believed that the message—"BONG HiTS 4 JESUS"—was not advocacy at all and that arguments that it constituted incitement were a "strained reading of [a] quixotic message."¹⁵¹ Given the ambi-

¹⁴⁶ See Amelia Tait, *Are TikTok Algorithms Changing How People Talk About Suicide?*, WIRED (May 27, 2022), <https://www.wired.com/story/algorithms-suicide-unalive/> [<https://perma.cc/2UNU-WBDC>] (speculating that efforts to avoid censorship on the social media app TikTok, which flags content related to suicide, have led to more guarded and euphemistic descriptors for suicide being used on the app, including the word "unalive"). Though this topic is interesting, its exploration is beyond the scope of this Note, other than the baseline observation that greater linguistic care may be used by speakers seeking to describe taboo topics without risk of censorship, and the corollary that speakers may also use such care to describe illegality in the hopes of avoiding detection. See, e.g., *id.* (noting the use of new words to describe suicide to exploit limitations in the TikTok algorithm).

¹⁴⁷ See *id.* (exploring the use of euphemisms and benign code words to avoid censorship detection).

¹⁴⁸ See Henderson & McCready, *supra* note 101, at 231 (describing dog whistles as using obfuscated speech to communicate one message to an ingroup without that meaning being obvious to outgroup members); see also STANLEY, *supra* note 86, at 231 (describing the risks of propaganda as distorting the ability of the reasonable listener to understand what the speech is truly communicating).

¹⁴⁹ See *Brandenburg*, 395 U.S. at 447 (requiring that any lawless action be "imminent" in order for advocacy of that action to constitute incitement). *Brandenburg* is facially agnostic about what the speech must say; while this Note argues that it fails to capture the nuances of coded speech, nothing in the test itself requires the speech to be a clear call to violence. See *id.* (failing to define what unlawful conduct the test is principally concerned with). Thus, speech which is not clear can, if the test is satisfied, constitute incitement, as the requirements of *Brandenburg* may be viewed as more technical than substantive. See *id.* (placing requirements on the spatial and temporal relationship between the speech and action, but not on the speech itself).

¹⁵⁰ See 551 U.S. 393, 403, 410 (2007) (determining that, in a K-12 education context, speech advocating for illicit drug use need not rise to the level of imminent illegality in order to be properly proscribed if it poses a "substantial disruption" to the school's activities (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969))); see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 680 (1986) (ruling that a school may proscribe sexual speech as non-passive, disruptive speech). Relying on *Bethel*, the court in *Morse* determined that the banner, despite ostensibly being "nonsense," contained the type of speech warranting intervention by the school because it could reasonably be construed as advocacy of illicit drug use. See *Morse*, 551 U.S. at 401 (determining that given the speech's ambiguity, the principal's decision to punish the student was reasonable).

¹⁵¹ See *id.* at 444-45 (Stevens, J., dissenting) (noting that even if there was advocacy of illegal drug use, it was "at best subtle and ambiguous").

guity surrounding what the speech was doing, Justice Stevens suggested that the tie should go to the runner and vindicate the student.¹⁵²

In 2002, in *McCoy v. Stewart*, the U.S. Court of Appeals for the Ninth Circuit upheld a writ of habeas corpus for a former gang member who was convicted in state court of participating in gang violence by advising members on how to run their operation.¹⁵³ The case is notable in that the challenged speech—which included advice on “tagging,” or spray-paint graffiti, and “court[ing]-in,” or recruiting new members—included coded speech.¹⁵⁴ However, the presumable knowledge law enforcement had regarding the language used by gangs likely supported the prosecutor’s decision to bring the charge; while “tagging” and “court[ing]-in” may not have the requisite meaning to the general public, police tasked with fighting gang crime could be expected to understand the lingo.¹⁵⁵

As a practical matter, however, prosecutions of speech under *Brandenburg* generally involve speech with an explicit meaning.¹⁵⁶ In 2021, in *United States v. Hunt*, the U.S. District Court for the Eastern District of New York denied a motion for acquittal against an individual charged with inciting violence against members of Congress in connection with the Capitol riots.¹⁵⁷ The defendant made incendiary statements on the right-wing social media sites Bitchute and Parler, as well as posts to his personal Facebook page, some of

¹⁵² See *id.* at 434 (suggesting that even if the sign itself was ambiguous as to whether the student was actually advocating for use of illegal drugs, the majority paid insufficient weight to the student’s stated motivation and the context under which the sign was made). The student admitted to writing the sign for the purpose of getting attention from television crews following the Olympic torch relay through the town. *Id.* at 401 (majority opinion).

¹⁵³ See 282 F.3d 626, 632–33 (9th Cir. 2002) (ruling that mere association with hopeful gangsters, and discussion of his own experiences as a member of a gang, were insufficient to rise to the level of incitement).

¹⁵⁴ See *id.* at 630–33, 630 n.4 (cautioning against a finding that a discussion of criminal activity with potential criminals is, itself, illegal as incitement). The Ninth Circuit held that the context in which the speech was made—at a backyard barbecue—supported the petitioner’s contention that his speech was not made in furtherance of criminal activities, but instead to share his own experiences with wannabe gang members. See *id.* at 631–33 (noting that petitioner’s conviction “strays dangerously close to a finding of guilt by association”).

¹⁵⁵ See *id.* at 630 (presuming that the police knew of the true meaning behind the language used and thus had a basis for assuming that, at a minimum, petitioner was referencing illegal conduct).

¹⁵⁶ See, e.g., *United States v. Hunt*, 573 F. Supp. 3d 779, 783 (E.D.N.Y. 2021) (describing a case in which statements not targeted at illegality would not have, by themselves, supported a prosecution), *aff’d*, 82 F.4th 129 (2d Cir. 2023); see also David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 23 (1994) (noting that there are “relatively few decided cases involving coded incitement,” in part because when the court is able to “break the code,” applying the incitement doctrine becomes relatively easy).

¹⁵⁷ See 573 F. Supp. 3d at 815 (ruling that mere “object[ion] to the policy” underlying 18 U.S.C. § 115(a), which criminalizes threatening injury against a federal officer, is insufficient to make out a colorable First Amendment defense).

which called explicitly for people to shoot members of Congress.¹⁵⁸ However, other statements were more rhetorical in nature, including allusions to Nazism and white supremacy which, by themselves, likely would not have supported the underlying charge.¹⁵⁹ Thus, whether the *Brandenburg* test is equipped to cope with this type of speech is generally unsettled, as few cases have pushed to define what level of facial obviousness is required.¹⁶⁰

III. FILLING THE SILENCE: TWO MODIFICATIONS IN APPLYING THE *BRANDENBURG* TEST

Given the U.S. Supreme Court's intent-based approach to looking at incitement as a speech-act, the *Brandenburg* test is unequipped to address propaganda-as-incitement.¹⁶¹ Because this speech tends to hide its true meaning, divining the speaker's intent becomes difficult.¹⁶² This Part proposes two solutions to this problem and argues that an approach considering the speaker-audience relationship will provide the best framework for addressing coded incitement.¹⁶³ Section A recommends applying greater context sensitivity when making the determination about whether the speaker truly intended to incite imminent lawless action.¹⁶⁴ Section B suggests a more uptake-sensitive approach to making this determination, considering how the audience responds to the speech—and how the speaker reacts—to determine the true intent.¹⁶⁵ Section C ultimately urges the courts to adopt the audience-focused approach to

¹⁵⁸ See *id.* at 783–85 (describing the defendant's statements over a period of several months after the 2020 election that called for violence against members of Congress, including calls for President Trump to execute Senator Chuck Schumer, Congresswoman Alexandria Ocasio-Cortez, and former Speaker of the House Nancy Pelosi). The defendant also published a video to his Bitchute account—a right-wing video sharing platform designed to be largely free from censorship—entitled “Kill Your Senators” two days after the January 6th Capitol riot. *Id.* at 784–85.

¹⁵⁹ See *id.* at 790–91 (holding that certain statements that did not specifically call for targeted violence could be considered, but not as part of the prosecution's case-in-chief). These statements included “88” as a coded reference to “Heil Hitler,” and “kill the juice” in reference to “kill the Jews,” as well as describing the election as “stolen” and “rigged” and members of Congress of both parties as “treasonists.” *Id.* at 791.

¹⁶⁰ See *id.* at 783–85 (displaying how incendiary comments, including, in context, possible threats to commit white supremacist violence, did not form part of the government's case-in-chief, presumably for failure to be sufficiently clear as incitement to imminent lawlessness or true threats); see also Crump, *supra* note 156, at 23 (discussing the practicalities behind why there are generally so few incitement cases based on coded speech).

¹⁶¹ See R. George Wright, *Re-Reading the Riot Act*, 13 ALA. C.R. & C.L. L. REV. 79, 86–87 (considering whether harm should instead be the benchmark for analyzing incitement under the Anti-Riot Act instead of the speaker's intent, given that harm may still result regardless of the speaker's intent).

¹⁶² See Crump, *supra* note 156, at 23 (defining “coded” speech as speech where a facially benign word is substituted for one that would render the statement as incitement under the *Brandenburg* test precisely because such speech may allow wrongdoers to “escape liability”).

¹⁶³ See *infra* notes 167–211 and accompanying text.

¹⁶⁴ See *infra* notes 167–184 and accompanying text.

¹⁶⁵ See *infra* notes 185–211 and accompanying text.

provide important clarity on the speaker's purpose and make the essential determination of whether a piece of speech was incitement.¹⁶⁶

A. Looking to the Law: A Contextual and Circumstantial Approach

This evidentiary approach looks at the context and circumstances under which the speech is made and calls for greater consideration of the speaker's speech and conduct to determine their "desire" for the targeted unlawful conduct.¹⁶⁷ The goal is to *unmask* the speaker's intent and prevent them from being able to hide behind obfuscated meaning.¹⁶⁸

There is case support for this approach: in 2009, in *United States v. Fullmer*, the U.S. Court of Appeals for the Third Circuit held that courts should consider the "totality of the circumstances" when evaluating if speech amounts to a true threat.¹⁶⁹ Specifically, courts must consider the reaction of the listeners when determining whether the speech is a threat or merely political hyperbole.¹⁷⁰ Though the court in *Fullmer* considered whether *Brandenburg* applied to website posts organizing protests and sharing "Terror Tactics," it determined that, because the actions were generally lawful, the doctrine did not apply; there was thus no occasion to consider the intent prong of *Brandenburg*.¹⁷¹

Nonetheless, while the test for true threats differs from that for incitement, given that both deal with unprotected speech, courts could reasonably

¹⁶⁶ See *infra* notes 212–226 and accompanying text.

¹⁶⁷ See Clay Calvert, *First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer*, 51 CONN. L. REV. 117, 142–43 (arguing that courts should embrace a broader view of what evidence may be relevant to determining whether a speaker committed incitement).

¹⁶⁸ See Henderson & McCready, *supra* note 101, at 231 (describing how dog whistles function by allowing the speaker to have plausible deniability by communicating, in the same breath, one message to an ingroup and another to an outgroup).

¹⁶⁹ See 584 F.3d 132, 154 (3d Cir. 2009) (permitting consideration of uncharged communications, as well as their degree and scope, to assist the jury in determining whether the speech was an unprotected threat).

¹⁷⁰ See *id.* at 155–56 (indicating that evidence showing "coordinat[ion] and control[.]" including website postings and personal participation in illegal action, would prove a sufficient nexus between the speaker's goals and subsequent unlawful action by third parties).

¹⁷¹ See *id.* at 154–55 (determining that posting about past illegal protests, providing protest tips, and collating publicly available information, including the addresses of Huntingdon employees, was not unlawful). The court, however, held that incitement to commit electronic civil disobedience through advocating for all-black faxes to be sent to the target company, and attempts to slow down the servers, did run afoul of *Brandenburg*, as visitors to the site were explicitly encouraged to engage in such actions. See *id.* at 155 (ruling that, as such forms of online protest are illegal, directing others to engage in them constituted incitement). Given that the threats to employees were more significant than the electronic civil disobedience, the court's analysis of *Brandenburg* as applied to those rested on the same grounds as that for true threats: looking specifically at how the web postings served as "tools to further their effort." See *id.* at 155–56 (considering intent only to the extent it was necessary to show that the direct and obvious advocacy of the online civil disobedience satisfied the first prong of the *Brandenburg* test).

apply the “totality of the circumstances” approach to the incitement doctrine.¹⁷² The analysis would more strongly consider the speech’s context to aid in determining the speaker’s intent.¹⁷³ To the extent *Brandenburg* does this by requiring imminency, it is limited to spatiotemporal concerns: whether the speech is taking place close enough to the object of concern that the unlawful action can be carried out without time for reflection.¹⁷⁴ These contextual considerations may aid in assessing the speaker’s seriousness in calling for the action, as it will more probably occur when the audience believes the speaker is sincere.¹⁷⁵

Additional context clarifies the speaker’s intent, such as their tone: a speaker who intones seriously would have a harder time, as a function of linguistic convention, arguing that they were making a joke.¹⁷⁶ Further, evidence surrounding the speaker’s activities and convictions—such as social media posts or internet searches—would assist in determining the speaker’s state of mind leading up to the speech, and thus shed light on their intent during the speech.¹⁷⁷

Though this approach may be useful, it runs the risk of punishing—or at least appearing to punish—pure speech by focusing more on the speaker’s state of mind rather than any resultant unlawful conduct.¹⁷⁸ In denying a motion to acquit in 2021, in *United States v. Hunt*, the U.S. District Court for the Eastern District of New York ruled that a jury could consider contextual evi-

¹⁷² See *Watts v. United States*, 394 U.S. 705, 707–08 (1969) (per curiam) (adopting the view that only an “apparent” willingness to carry out a stated threat is needed to show intent (quoting *Ragansky v. United States*, 253 F. 643, 645 (7th Cir. 1918))). That is, if the threatened conduct is plausible, a true threat has been uttered and the speaker may be penalized. *Id.*

¹⁷³ See *id.* at 706, 708 (ruling that a statement apparently threatening to shoot President Lyndon B. Johnson if drafted into the Vietnam War was “political hyperbole” because the speaker was unlikely to be in a position to carry out that threat, even if he was serious, and because the context of the speech was opposition to the war).

¹⁷⁴ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (considering imminency based on practical concerns about whether the incited action can indeed be carried out posthaste); see also *Nat’l Org. for Women, Inc. v. Scheidler*, 897 F. Supp. 1047, 1087 (N.D. Ill. 1995) (defining “[i]mmediately” as “within a period which does not give time for reflection”).

¹⁷⁵ See *Scheidler*, 897 F. Supp. at 1087 (reasoning that, if a speaker incites lawless action in an environment where it can be imminently carried out, such as close by the target of the action, they are likely more serious about the action being carried out).

¹⁷⁶ See *Kukla*, *supra* note 86, at 440–41 (describing how “conventions and rituals” for appropriate responses are necessary for speech to have force).

¹⁷⁷ See *United States v. Fullmer*, 584 F.3d 132, 154 (3d Cir. 2009) (reasoning that the “totality of the circumstances” could encompass this type of evidence, consistent with the Federal Rules of Evidence); see also FED. R. EVID. 404(b)(2) (allowing evidence of past acts to be introduced to prove “motive, . . . intent, preparation, [or] plan”).

¹⁷⁸ See *Brandenburg*, 395 U.S. at 447, 449 (indicating that the key difference between mere advocacy and incitement is the resulting action and that only the latter is actionable because “mere words” generally cannot be punished). Further, it is axiomatic in criminal law that mere thoughts, without action, cannot be punished. See, e.g., MODEL PENAL CODE § 5.03(5) (AM. L. INST. 1962) (requiring an overt act to be committed for a conspiracy to be punished; without action taken to target the further crime, the mere agreement is not criminal).

dence against a defendant charged with threatening the lives of Congresspeople.¹⁷⁹ Hunt raised precisely this argument—that consideration of his views by the jury would lead to him being punished for them—with respect to inferences drawn about the sincerity of his white supremacist beliefs in connection with the January 6th, 2021 Capitol riot.¹⁸⁰ Taken only with respect to intent, however, use of additional context will likely be helpful to prove the first prong of the *Brandenburg* test—the speaker’s motivation and state of mind—while leaving the other requirements relating to the result of the speech intact.¹⁸¹

With respect to President Trump’s speech on January 6th, 2021, this approach would allow prior statements to be considered, including the repeated refrain that the election was stolen and his refusal to concede.¹⁸² This belief suggests a seriousness on behalf of President Trump as a speaker, as well as a

¹⁷⁹ See 573 F. Supp. 3d 779, 812 (E.D.N.Y. 2021) (noting that making a determination on competing evidence about the sincerity of the defendant’s anti-Semitic and white supremacist views was “precisely within the jury’s province” as finders of fact), *aff’d*, 82 F.4th 129 (2d Cir. 2023). The defendant was charged with violating 18 U.S.C. § 115(a)(1)(B) after the Federal Bureau of Investigation’s National Threat Operations Center received an anonymous tip regarding a Bitchute video entitled “Kill Your Senators.” *Id.* at 784–85.

¹⁸⁰ See *id.* at 811–12 (suggesting that the introduction of ancillary evidence about his political and social views had tainted the jury against him). The court instructed the jury in this case that it could not convict based solely on views that it found odious, but that it could use that evidence as “context” for evaluating the criminally charged statements threatening members of Congress. See *id.* at 806, 812 (permitting, for example, law enforcement officials’ responses to the speech to be used for the limited context of determining whether the threat was believably real). Additionally, the final jury instructions in the case indicated that uncharged statements regarding Hunt’s beliefs and opinions could be used only to determine “motive, knowledge, absence of mistake, or lack of accident.” Jury Instructions at 10, *Hunt*, 573 F. Supp. 3d 779 (No. 21-CR-00086), 2021 WL 1718706. Similarly, the jury was explicitly instructed that it could not find Hunt guilty merely out of disagreement with his political views, though the evidence of those views could again be used to determine motive or intent. *Id.*

¹⁸¹ See *Crump*, *supra* note 156, at 53, 55 (calling for a “case-by-case approach” to unmasking coded speech by balancing eight evidentiary factors, including the actual words used, the “pattern of the utterances,” and the context—including the audience). The evidentiary factors considered are (1) The actual words uttered or symbols used, which should be “heavily emphasized” but not treated as dispositive; (2) the “pattern of the utterance,” or extent to which the “code” employed can be “cracked” from its context or use; (3) the context, including the audience and surrounding communications, which is “all-important” as a method for determining the actual risk created by the speech; (4) whether the resultant illegality, and its potential seriousness, can be predicted ahead of time by the speaker; (5) the degree to which the speaker is aware of, or recklessly disregards, the risks of illegality by the audience, which considers the extent to which the speaker is aware of the risk and thus more likely to be clearly calling for it; (6) whether the same or a similar substantive message could have been expressed without using language likely to lead to illegality; (7) whether disclaimers, which would counteract encouragement of action, are uttered by the speaker; and (8) whether the utterance has other value or is on a matter of public concern, where utterances serving “lesser objectives” are less correspondingly protected. *Id.* at 53–67.

¹⁸² See Dan Barry & Sheera Frenkel, ‘Be There. Will Be Wild!’: Trump All but Circled the Date, N.Y. TIMES, <https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html> [https://perma.cc/CMD4-MXF8] (July 27, 2021) (describing tweets by President Trump leading up to the speech on the Ellipse on January 6th encouraging his supporters to gather to “stop the steal”).

conviction behind his words, that points toward intent.¹⁸³ Taken in concert with the formal nature of a presidential speech, these prior statements suggest that President Trump, at a minimum, truly intended that his supporters should disrupt the certification of the Electoral College vote counts.¹⁸⁴

B. Looking to Philosophy: An Audience-Focused Approach

This audience-focused approach could be described, pithily, as looking at how the audience reacted to the speech and whether the speaker liked what they saw.¹⁸⁵ This approach is more consistent with speech-act theory by considering not just what the speaker says, but how the audience understands it.¹⁸⁶ The first step of this approach would be to consider the audience itself, including its composition.¹⁸⁷ Are these the type of people who would tend to take the speaker seriously, such as supporters or fans?¹⁸⁸ Or is the audience agnostic or

¹⁸³ See Naylor, *supra* note 4 (providing a transcript of the speech, allowing for a direct comparison between the speech and the resultant action).

¹⁸⁴ See *id.* (quoting President Trump's exhortations that his supporters should "stop the steal"). According to the Department of Justice's website tracking charges brought because of the events of January 6th, 2021, over 1,000 defendants have been criminally charged in connection with that day's events. See U.S. ATT'Y'S OFF. D.C., *Capitol Breach Cases*, <https://www.justice.gov/usao-dc/capitol-breach-cases> [<https://perma.cc/3TLV-TUCQ>] (listing charges brought against hundreds of defendants in the case). Thus, even if President Trump did not intend for his supporters to behave violently, the mere act of encouraging them to "stop the steal" on January 6th, 2021, was targeted to federally illegal conduct. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (proscribing only speech "directed to" imminent lawless action). While the conduct is not *per se* violent under the analysis from *Claiborne*, given the government's interest in orderly proceeding of official business, it is likely to fall within the same exceptions as incitement to tax avoidance. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914–15 (1982) (generally differentiating between violent and nonviolent illegal conduct under *Brandenburg* and limiting the scope of incitement to violent unlawfulness); *United States v. Buttorff*, 572 F.2d 619, 624 (8th Cir. 1978) (holding that there is no First Amendment defense to a charge of incitement to tax avoidance because of the government's interest in funding the federal revenue).

¹⁸⁵ See Calvert, *supra* note 167, at 142–43 (arguing that courts should consider the speaker's understanding of the audience's mindset and the speaker's knowledge of how audiences have responded to similar speech made by them in the past when determining whether speech constitutes incitement). Calvert limits his analysis to considering whether the audience is likely to be violent, looking at a case accusing President Trump of inciting violence against a protestor at a campaign rally by telling his supporters to "go 'get 'em.'" *Id.* at 139.

¹⁸⁶ *Id.* at 142–43; see also Kukla, *supra* note 86, at 443 (indicating that appropriate audience response, based on context, is essential to completing a speech-act).

¹⁸⁷ See Kukla, *supra* note 86, at 446 (discussing how the audience's knowledge of social conventions and rituals related to speech is necessary for a speech-act to be completed).

¹⁸⁸ See *id.* at 443–44 (demonstrating that audience familiarity with both the speech-act and the context in which it is made is necessary for it to succeed). The composition of the audience will thus be important in informing its knowledge of the relevant social conventions and the responses expected of a given piece of speech, as different audiences will have different degrees of the requisite social understanding. See *id.* (showing the importance of social understanding to respond correctly to the speech and effectuate the act).

hostile to the speaker, which would suggest less willingness to act on the speaker's words?¹⁸⁹

The first type of audience, by virtue of their relationship with the speaker, is not only more likely to take the speaker at their word, but to be members of an ingroup that would be aware of hidden meanings.¹⁹⁰ For example, "stop the steal," despite arguably being a nonsense phrase without an object, had a clear meaning to President Trump's supporters that is not facially obvious from the words themselves.¹⁹¹ This meaning derives from how President Trump used the words.¹⁹² It is the audience members' reactions to the speech that give it meaning and transform it into an action: if they react as if they were ordered or encouraged to commit unlawfulness, that reaction helps reveal the speaker's hidden intent.¹⁹³

This approach mirrors to an extent the *Brandenburg* test, which itself requires some action by the audience, or at least imminent likelihood of action.¹⁹⁴ The audience is an essential aspect of incitement, as without listeners to act upon the speech, there can be no incitement.¹⁹⁵ Allowing the audience's reaction to speech to clarify the speaker's intent is thus consistent with the *Brandenburg* test promulgated by the Supreme Court.¹⁹⁶ Because the case itself does not provide clarity on whether the incitement prong may inform the intent prong, and because intent may generally only be proven circumstantial-

¹⁸⁹ See *id.* at 446 (suggesting that the audience's relationship to the speaker, in terms of whether they are cooperative or not, impacts whether the targeted speech-act is successful).

¹⁹⁰ See *id.* (considering the example of a female manager, in which one audience would be willing to take her as authoritative and effectuate her orders while another would not take her as authoritative and thus treat her orders as requests or suggestions).

¹⁹¹ See Barry & Frenkel, *supra* note 182 (suggesting that, were the exhortations to "stop the steal" and "save America" mere figures of speech, they would not have resulted in the actions on January 6th, 2021).

¹⁹² See *id.* (suggesting that there was no ambiguity about what "stop the steal" meant to the Capitol rioters, given how President Trump had deployed the term).

¹⁹³ See Kukla, *supra* note 86, at 446 (using the same example of an order, where if the employees, given the same context, react as if they have been ordered to do something, that supports the idea that the speaker intended to order them). While this theory is agnostic about the speaker's intent, given that the speech-act may be different than the one intended depending on the uptake, the speaker's intent is still necessary to determine whether the right speech-act was committed, or an erroneous one. See *id.* (indicating that it is only possible to know that the speech-act of ordering failed because it was the speaker's intent to do so).

¹⁹⁴ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (requiring that action by the audience occur or be imminent for the speech to properly qualify as incitement).

¹⁹⁵ See *id.* at 449 (holding that, because the audience did not immediately react to the Ku Klux Klan's speech by engaging in criminal activity, any danger resulting from the speech was too attenuated from the speech itself, despite the fact that other Ku Klux Klan members were likely the most apt audience for such criminality to occur).

¹⁹⁶ See *id.* at 447 (failing to specify how the component parts of the test should be understood in relationship to each other besides requiring advocacy "directed to" illegality as a predicate, which leaves unclear whether the actual incitement may inform an understanding of intent).

ly, considering the sincerity of the audience's reaction provides insight into the relationship between speaker and audience.¹⁹⁷

The second step of this approach is to then consider the speaker's reaction: are they confused, horrified, or frustrated?¹⁹⁸ A negative reaction would suggest that the audience did not properly take up the speaker's meaning, and the speech-act is thus unsuccessful.¹⁹⁹ If the speaker, however, appears satisfied with the response, or even is agnostic to it, that would suggest that the audience properly interpreted the speaker's intent, and thus the intended speech-act was successful.²⁰⁰

This approach may appear, at least facially, to contradict the traditional notion of intent as a subjective, internal state.²⁰¹ Certainly, the audience's reaction is generally not dispositive, as a matter of law, as a basis to silence speakers.²⁰² Despite this, in 2016, in *Draego v. City of Charlottesville*, the U.S. District Court for the Western District of Virginia declared that the audience's reaction may not be used as "a basis to silence the speaker."²⁰³ Given the difficulties in assessing intent—and the potential for speakers to cloak their intent in facially benign language—this position is an error.²⁰⁴

¹⁹⁷ See *id.* (leaving unclear whether intent may be inferred from the response of the audience); see also Kukla, *supra* note 86, at 454 (remarking on the "queering of the path from input to output" as not a function of illocutionary breakdown, but a means of assessing the "performative force" of the speech-act).

¹⁹⁸ See Calvert, *supra* note 167, at 142–43 (arguing that a speaker's knowledge of not only their audience's mindset, but also the audience's past reaction to the same or similar words, is instructive in understanding what the speaker intended to accomplish through their words); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion) (holding that audience reaction to speech is not a "secondary effect" and thus not a basis for proscribing speech, in a context where speech aimed at foreign embassies ran the risk of offending those foreign states).

¹⁹⁹ See Kukla, *supra* note 86, at 446–47 (suggesting that if the manager, as speaker, was frustrated that her employees were not doing as ordered, it would indicate that she intended to order them, rather than make a suggestion or request of them).

²⁰⁰ See *id.* (suggesting that if, however, the manager was satisfied that her apparent order was being taken in a laxer fashion, it would suggest she did not intend to order her employees to do something).

²⁰¹ See MODEL PENAL CODE § 1.13(11)–(16) (AM. L. INST. 1962) (describing the levels of mens rea as internal states that give rise to an actor's motivation for committing an offense); see also FED. R. EVID. 404(b) (implicitly accepting the proposition that intent can rarely be proven directly by permitting past act evidence to be admitted for such a purpose).

²⁰² See *Draego v. City of Charlottesville*, No. 16-CV-00057, 2016 WL 6834025, at *18 (W.D. Va. Nov. 18, 2016) ("[T]he reaction of listeners is neither a basis to silence the speaker nor reason—except in 'rare' and obviously-criminal circumstances—to infer that he wished to incite a disturbance . . .").

²⁰³ See *id.* (failing to adequately consider the necessity of audience response for many types of speech-based offenses). The vague understanding of "'rare' and obviously-criminal circumstances" provides little guidance on what would constitute a setting in which the audience's response could serve as a basis for inferring the speaker's intent. See *id.* (contrasting "vile" and "vulgar" speech, which creates a risk of a disturbance, against speech that creates an "obviously-criminal" disturbance).

²⁰⁴ See *id.* (appearing to take at face value the notion that the audience response can rarely, if ever, be legally instructive of the speaker's intent). But see Meredith Regan, Note, *All the World Wide*

As proposed, the audience's reaction would not constitute a basis for shutting down the speaker, but rather for assessing the speaker's intent.²⁰⁵ Intent can rarely be proven directly, and allowing the audience's response and the speaker's response to the audience's subsequent conduct to serve as circumstantial evidence of state of mind is not inconsistent with traditional methods of determining intent.²⁰⁶

As applied to President Trump's speech on January 6th, 2021, the audience's reaction to the speech is obvious: They did indeed go to the Capitol and disrupt the counting of the Electoral College votes, directly because they had been instructed to march to the Capitol and "stop the steal."²⁰⁷ They had a specific understanding of the speech's meaning and acted upon it.²⁰⁸ Further, President Trump, for hours, did not do anything to stop the melee: he delayed calling the National Guard and refused to issue a statement instructing his supporters to stop until several hours passed and the situation was, at least somewhat, under control.²⁰⁹ Once President Trump made the statement, however, his supporters began to leave the Capitol, demonstrating a particular relationship of obedience between the mob and the president.²¹⁰ This reaction by the

Web Is a Stage: Free Speech, Expressive Association, and the Right to Choose Your Audience, 53 B.C. L. REV. 1119, 1133 (2012) (suggesting that the right of a speaker to determine who they wish to speak to is suggestive of their motivations). For example, one is less likely to discuss illegal activity if they are aware law enforcement is part of their audience. See Regan, *supra*, at 1133 (demonstrating that the composition of an audience has an impact on the speaker's willingness to speak, and the content of their speech). But see *Draego*, 2016 WL 6834025, at *18 (suggesting that how an audience reacts to speech is unrelated to the speaker's intent for speaking to that particular audience).

²⁰⁵ See Calvert, *supra* note 167, at 144 (arguing that this knowledge of the audience's state of mind can instruct intent without being dispositive of it, though it assists in making it more likely that the speaker intended a particular outcome, and that such an outcome was likely to occur). However, Calvert notes that two approaches—one considering the instances of past violence because of the speaker to a similar audience to infer risk of present incitement, and one considering the gap in time between the past violent instances and current speech—are unaccounted for in the *Brandenburg* test and may be met by mitigating factors like law enforcement being present during the speech. See *id.* at 144–45 (arguing that these contextual factors are useful for evaluating the risk of the target conduct and the speaker's awareness of the risk, where greater awareness supports a finding of intent in the present speech).

²⁰⁶ See *United States v. Fullmer*, 584 F.3d 132, 154 (3d Cir. 2009) (reasoning that the "totality of the circumstances" in which the speech is made would naturally include the speaker's reaction to their audience).

²⁰⁷ See Forgey, *supra* note 1 (describing how the audience understood what President Trump asked them to do on January 6th, 2021).

²⁰⁸ See *id.* (indicating the importance of President Trump's speech to his supporters in the lead-up to the January 6th riot).

²⁰⁹ See SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, FINAL REPORT, H.R. DOC. NO. 117-663, at 594 (2d Sess. 2022), <https://www.govinfo.gov/content/pkg/GPO-J6-REPORT/pdf/GPO-J6-REPORT.pdf> [<https://perma.cc/W6F3-V6PE>] (describing President Trump's actions during the riot and his failure to summon the National Guard or otherwise take action to quell the rioting).

²¹⁰ See Forgey, *supra* note 1 (describing the rioters' obedience to President Trump and what they perceived—as they say, not unreasonably—to be his wishes). In a televised, pre-recorded statement

audience—and President Trump’s nonchalant response—supports the idea that the audience reacted in the intended manner and that President Trump’s intent was to inspire his supporters to “stop the steal” and prevent certification of the Electoral College votes on January 6th, 2021.²¹¹

C. The Virtue of a Speech-Act Theory of Incitement

Should the U.S. Supreme Court, in the inevitable appeals from the January 6th Capitol riot prosecutions, take up an incitement case, it should adopt an audience-centered approach.²¹² Doing so would resolve the case at bar and adapt the current incitement doctrine to better accommodate coded calls for unlawfulness.²¹³ Further, an evidentiary approach considering contextual information about the speaker is not only consistent with current practices, but also occurs routinely as juries are tasked with making credibility and fact determinations.²¹⁴ While those considerations are important, they do not amount to the necessary re-contextualization of the incitement doctrine.²¹⁵

The virtue of the speech-act theory of incitement—one which focuses primarily on the relationship between the speaker and audience rather than merely looking at the speaker’s underlying motivation—is that it better reflects the unique nature of incitement as a crime.²¹⁶ Incitement does not happen in a

hours into the riot, President Trump infamously reiterated his claims of election fraud before telling his protestors to leave. *See* Relman, *supra* note 11 (quoting President Trump as having told his supporters “[w]e love you; you’re very special”).

²¹¹ *See* Forgey, *supra* note 1 (ultimately suggesting that President Trump wanted his supporters to violate federal law and disrupt the certification of the Electoral College votes, and that his audience was more than willing to do what he asked).

²¹² *See* Crump, *supra* note 156, at 57, 64 (considering both whether the audience is likely to act on the speaker’s words, and whether the speaker may reasonably foresee an unlawful reaction and is reckless or indifferent to the risk created by their words).

²¹³ *Compare* McCoy v. Stewart, 282 F.3d 626, 630 (9th Cir. 2002) (assuming that, despite the coded nature of the language used, police would be aware of the substantive content communicated), *with* United States v. Hunt, 573 F. Supp. 3d 779, 790–91 (E.D.N.Y. 2021) (permitting jury consideration of coded hate-speech in a case connected to the January 6th, 2021 Capitol riot), *aff’d*, 82 F.4th 129 (2d Cir. 2023). These cases demonstrate that current incitement doctrine is equipped, at best, to deal with coded speech only in an ad-hoc way, despite the potential for such speech to be material incitement. *See* McCoy, 282 F.3d at 630, 632 (determining that coded speech was not a barrier to prosecution); Hunt, 573 F. Supp. 3d at 790–91 (determining that coded speech may be insufficient to carry a prosecution).

²¹⁴ *See* FED. R. EVID. 404(b)(2) (permitting evidence of character or state of mind for the purpose of showing intent, motive, or for any purpose other than putting the defendant’s character on trial); *see also* Hunt, 573 F. Supp. 3d at 812 (indicating that it is the jury’s role, as finders of fact, to make vital credibility determinations).

²¹⁵ *See* Hunt, 573 F. Supp. 3d at 785 (implying that, because prosecutions under current incitement doctrine are only brought when the speech at issue is a facially obvious call for unlawfulness, more coded forms of incitement often fall through the cracks).

²¹⁶ *See* Kukla, *supra* note 86, at 443 (describing the importance of audience response to the speech for it to constitute an act; if the audience fails to react, there is no speech-act). If the audience is unfamiliar with what the speech-act purports to do—that is, the speaker’s purpose for speaking—

vacuum and requires the right kind of audience, one likely to listen to the speaker and react unlawfully.²¹⁷ It is unlikely that speakers would wish to be widely perceived as antidemocratic, nor is it likely that they would deploy language that facially has that effect.²¹⁸ Thus, the use of coded language enables speakers to articulate that antidemocratic or taboo message without setting off any red flags in a reasonable audience.²¹⁹

Merely using coded language, however, does not mean that the speaker's purpose or desired end for speaking changed.²²⁰ Thus, the speaker wants an audience that will understand their purpose and react favorably.²²¹ The relationship between the speaker and audience—that they are the right kind of audience—is essential to the speaker's words being given the intended meaning and the speaker's purpose being understood.²²² Words do not have meaning unless they are understood by the audience to whom they are directed.²²³ Whether a court interprets President Trump saying “stop the steal” as related to baseball or elections is far less relevant than what his audience believed he meant.²²⁴

the intended speech-act will not be successfully completed. *See id.* at 444 (indicating that the speaker's intent is just one factor in completing a speech-act); *see also* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (requiring that the audience react to the speech unlawfully, or be able to do so imminently, to satisfy the final two prongs of the incitement test). *But see McCoy*, 282 F.3d at 631–32 (holding that while the speech advocating for gang activities being coded was not a barrier to bringing the prosecution, the speech's context meant that illegality was not likely to imminently result).

²¹⁷ *See* Kukla, *supra* note 86, at 443 (discussing audience uptake as a necessary component of a speech-act); *see also* *Hess v. Indiana*, 414 U.S. 105, 106–07 (1973) (per curiam) (indicating that the audience must be one likely to act unlawfully as a result of the speech's encouragement; a hostile or general audience is insufficient).

²¹⁸ *See* Stanley, *supra* note 105 (suggesting that avoiding figures of speech that would facially appear antidemocratic in favor of benign speech that has been deployed with the same connotation and purpose is a common tactic in democratic propaganda).

²¹⁹ *See id.* (noting how propaganda is deployed in diverse democracies to sow division while appearing not to); Henderson & McCready, *supra* note 101, at 231 (describing dog whistles, a technique in propaganda, as terms designed to send one generally “taboo” or disfavored message to an ingroup, while leaving the outgroup in the dark about the true purpose of the speech).

²²⁰ *See* Henderson & McCready, *supra* note 101, at 231 (describing how coded speech enables speakers to convey their true meaning without making it obvious to those they would not wish to be in their audience).

²²¹ *See* Regan, *supra* note 204, at 1133 (indicating that speakers have a right to choose their audience and that they will tend to choose an audience likely to be receptive to their speech).

²²² *See* Kukla, *supra* note 86, at 446 (describing how an audience may, based on context and their own perception of the speaker, misinterpret what the speaker is attempting to accomplish); *see also* Austin, *supra* note 93, at 15–16 (indicating that if the audience fails to correctly respond to the speaker, the attempt to invoke a certain act fails).

²²³ *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 167 (2012) (“Context is a primary determinant of meaning.”). Though Scalia and Garner wrote in the context of statutory interpretation, the fact that context is essential to determining meaning is true of all speech. *See id.* (providing a broadly applicable principle).

²²⁴ *See id.* (suggesting that the context or set of circumstances giving rise to a piece of speech are necessary to give it its proper meaning). Thus, the expression “stop the steal,” by itself, is meaningless

Ultimately, because a speaker deploying coded speech to advocate for illegal conduct is trying to reach a particular audience, the proper test is not what the *court* thinks the speaker meant, but what the *audience* believed the speaker meant.²²⁵ Applying this reasoning will redound to a more honest assessment of the speaker's purpose while also rooting out efforts to veil the true meaning of incitement behind linguistic tricks designed to subvert detection.²²⁶

CONCLUSION

Words have meaning: they can cause tangible harm, and incitement is unprotected under the First Amendment precisely because of this possibility. The speech employed by President Trump, while arguably not facially incitement under the *Brandenburg* test, demonstrates the challenge posed by a doctrine unequipped or unable to catch all the ways in which speech may incite others. Thus, the incitement doctrine must be modified, at least in its application, to encompass a greater understanding of the role played by the relationship between the speaker and audience in leading to violence and lawlessness, and

and only derives particular meaning from the context. *See id.* (applying Scalia and Garner's reasoning to President Trump's refrain). In baseball, for example, it would refer to directing a player to prevent an opponent from advancing to an unearned base. *See Stolen Base (SB)*, MLB, <https://www.mlb.com/glossary/standard-stats/stolen-base> [<https://perma.cc/D7H4-JGXV>] (defining the term "steal" in the context of Major League Baseball). As applied to criminal law, it could mean to stop a literal theft of property. *See, e.g.*, 10 U.S.C. § 921(a) (defining "larceny and wrongful appropriation" under federal law as wrongfully taking property from its true owner with intent to deprive the owner of her possession, either permanently or temporarily). However, as applied to President Trump's use of the expression, the phrase described his belief that President Joseph Biden fraudulently won the election. *See, e.g.*, Charles Homans, *How 'Stop the Steal' Captured the American Right*, N.Y. TIMES, <https://www.nytimes.com/2022/07/19/magazine/stop-the-steal.html> [<https://perma.cc/Z6MD-U36R>] (July 28, 2022) (describing protestors, on the day that the election was called for President Biden, repeating the refrain "Stop the Steal"). Pennsylvania State Representative Douglas Mastriano described the election as marked by "lie[s]" and "*cheating*" on behalf of Democrats, indicating the very clear and narrow use of the phrase "stop the steal" in the context deployed by President Trump and his supporters. *See id.* (making it clear that President Trump's supporters understood the phrase "Stop the Steal" as relating specifically to the 2020 election).

²²⁵ *See Hess v. Indiana*, 414 U.S. 105, 107–08 (1973) (per curiam) (indicating that the audience's understanding of the speech is important). There, though the actual audience was the police who were in the process of arresting Hess, the intended audience of protestors in the vicinity indicated that they did not believe he was inciting them to immediately "take the . . . street" and continue the course of illegal conduct. *Id.* at 107 (quoting petitioner's statements); *see also* Joshua Azriel & Jeff DeWitt, "*We Fight Like Hell*": *Applying the Brandenburg Test to Trump's Speech Surrounding the Siege at the U.S. Capitol*, CRIM. L. PRAC., Feb. 1, 2022, at 23, 47 (describing both President Trump's speech and tweets as containing an "explicit exhortation for supporters to join him in marching to the Capitol to stop the certification," and singling out Vice President Pence as a coward). The fact that President Trump was silent for nearly two hours "could reasonably be interpreted as tacit approval for the criminal conduct." *Id.*

²²⁶ *See* Henderson & McCready, *supra* note 101, at 231–32 (describing how the deployment of dog whistles in speech offers the speaker "plausible deniability" if those not intended to be in the know infer their true meaning, as they offer a facially-benign shield for the speaker's true meaning).

how that relationship can help inform an analysis of the speaker's intent. Though this Note uses the January 6th Capitol riots as a core example, the broad applicability of a speech-act theory of incitement and its accompanying remedy would help limit the harm that the current permissive incitement doctrine can cause by ensuring that speakers may not easily hide behind facially benign or nonsense words while using those words to elicit violence and lawlessness.

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