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Constitutional Law: *United States v. Viefhaus* and the Demise of the Libertarian Philosophy in Free Speech Jurisprudence

Stephanie D. Wade

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Only by a dedicated preservation of the freedom of the First Amendment can we hope to preserve our Nation and its traditional way of life.[1]

— Hugo Black
Supreme Court Justice, 1937-1971

I. Introduction

The United States Court of Appeals for the Tenth Circuit handed down a decision on February 16, 1999, that further muddled the line between "pure speech," which is protected by the First Amendment, and "threatening speech," which falls outside First Amendment protection. In a unanimous opinion written by Judge Briscoe, the three-judge panel confirmed the conviction of white supremacist James Viefhaus, Jr.[2] In July 1997, a jury convicted Viefhaus on three counts: (1) use of a telephone to make a bomb threat, in violation of 18 U.S.C. § 844(e); (2) conspiracy to use a telephone to make a bomb threat, in violation of 18 U.S.C. § 371; and (3) possession of an unregistered explosive device, in violation of 26 U.S.C. § 5861(d).[3] The trial gained much publicity in the Oklahoma and national press, primarily because Viefhaus's codefendant, Carol Howe, became a key defense witness in the trial of Terry Nichols for the 1995 bombing of the Alfred P. Murrah building in Oklahoma City.[4]

Viefhaus's conviction rested on an answering machine message recorded by Viefhaus in which he related a threat, made by a third party, to bomb fifteen cities.[5] Viefhaus did not appeal his conviction for possession of an explosive device.[6] Instead, he appealed the conviction for using a telephone to make a bomb threat, claiming the prosecution of such a charge violated the First Amendment.[7] Citing *Watts v. United States*,[8] Viefhaus claimed the government could not constitutionally prosecute him for his words because they did not convey a true threat.[9]

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1. Braden v. United States, 365 U.S. 431, 444 (1961) (Black, J., dissenting).
2. Viefhaus v. United States, 168 F.3d 392 (10th Cir. 1999), *cert. denied*, 527 U.S. 1040 (1999).
3. *Id.* at 395.
4. David Harper, *Viefhaus Shunned by High Court*, TULSA WORLD, July 1, 1999, at 14, *available at* 1999 WL 5405471.
5. *Viefhaus*, 168 F.3d at 395.
6. *Id.*
7. Brief for Appellant at 9, Viefhaus v. United States, 168 F.3d 392 (10th Cir. 1999) (No. 97-5207).
8. 394 U.S. 705 (1969).
9. Brief for Appellant at 12, *Viefhaus* (No. 97-5207).

The Tenth Circuit's decision in this case represents one of many decisions over the last three decades that has eroded the Supreme Court's expansive interpretation of the First Amendment developed during the Warren era. The Warren Court exemplified the libertarian trend in free speech jurisprudence, which is now on the decline.[10] In the Warren era, the Supreme Court handed down landmark First Amendment cases such as *Brandenburg v. Ohio*,[11] *Watts v. United States*,[12] *Noto v. United States*,[13] and *Scales v. United States*.[14] In each of these cases, the Court attempted to draw a clearer line between speech that the government has a legitimate interest in prohibiting and speech that is beyond the reach of government because of First Amendment protection. This line of cases greatly expanded the scope of First Amendment protection by disallowing the criminal prosecution of pure speech, unless that speech is "brigaded" with action.[15]

The Tenth Circuit, however, has curtailed the breadth of First Amendment protection with decisions like *Viefhaus*.[16] This note argues that the Tenth Circuit's decision in *Viefhaus* is incongruous with the Supreme Court's interpretation of the First Amendment. First, this note addresses the Supreme Court's interpretation of the First Amendment as it relates to threats. Second, it presents the relevant decisions of the various circuits regarding threatening speech. Third, the note analyzes the decision handed down in *Viefhaus*. Finally, the note presents an approach to "threatening speech" cases that more closely conforms with the expansive interpretation given to the First Amendment by the Supreme Court.

II. The Supreme Court and Threatening Speech

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ."[17] Despite the absolute language of this amendment, the Supreme Court has never interpreted this language to prohibit all laws restricting speech. Instead, the Court has carved out narrow exceptions that allow governments, in limited situations, to legitimately proscribe speech,[18] reasoning that the government has a legitimate interest in protecting its citizens from breaches of the peace[19] and imminent lawless action and violence.[20]

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10. 2 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 612-38 (7th ed. 1991).

11. 395 U.S. 444 (1969).

12. 394 U.S. 705 (1969).

13. 367 U.S. 290 (1961).

14. 367 U.S. 203 (1961).

15. *See, e.g., Brandenburg*, 395 U.S. at 447; *Watts*, 394 U.S. at 708.

16. 168 F.3d 392 (10th Cir. 1999).

17. U.S. CONST. amend. I.

18. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (upholding a state's right to ban certain obscenity); Brandenburg v. Ohio, 395 U.S. 444 (1969) (allowing proscription of speech that incites imminent lawless action); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that "fighting words" are beyond the protection of the First Amendment).

19. *Chaplinsky*, 315 U.S. at 571-72.

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

The Court has directly addressed the issue of whether the First Amendment protects the maker of violent threats in only two cases. The first of these cases was *Watts*, decided in 1969. During the height of Vietnam War unrest, eighteen-year-old Robert Watts spoke in opposition to the war at a political rally at the Washington Monument.[21] Watts claimed that he would never go to Vietnam and that if anyone made him carry a rifle, the first man he would "want to get in his sights [would be] L.B.J."[22] The lower court convicted Watts of threatening to take the life of the President in violation of 18 U.S.C. § 871(a).[23] The Supreme Court reversed this conviction, holding that the First Amendment protected Watts's speech in this situation.[24] The Court reasoned that Watts's speech was not a "true threat" but was merely political hyperbole within the protection of the Constitution.[25]

This short, per curiam opinion did little to enlighten future courts as to what exactly constitutes a "true threat." The Court suggested three factors that determine whether language conveys a punishable threat: (1) the context in which the speech is made; (2) whether the statement is conditional; and (3) the reaction of the listeners.[26] The Court reaffirmed its commitment to the protection of speech, even when that speech is crude, offensive, caustic, vituperative, and abusive.[27] Offering only this limited guidance, the Court left later courts to develop the "true threat" doctrine.

The Court revisited threatening speech in the civil context in 1982 in *NAACP v. Claiborne Hardware Co.*[28] In this case, Mississippi merchants brought suit against Charles Evers and the NAACP for damages resulting from a civil rights boycott of their businesses.[29] Among other allegations, the plaintiffs alleged that the defendants used threats and intimidation to keep African Americans from violating the boycott.[30] The trial court concluded that Evers threatened to "discipline" boycott violators and "break [their] damn neck[s]" if they violated the boycott.[31] (The court also found that such acts of violence actually occurred.[32]) Nonetheless, the Supreme Court held that the First Amendment protected this speech, and that the State could not impose civil liability for damages flowing from such threats.[33] The Court reasoned that to be effective, an advocate "must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common

21. Watts v. United States, 394 U.S. 705, 706 (1969).
22. *Id.*
23. Title 18 U.S.C. § 871(a) provides in pertinent part, "Whoever knowingly and willfully . . . makes any threat against the President . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both."
24. *Watts*, 394 U.S. at 708.
25. *Id.*
26. *Id.*
27. *Id.*
28. 458 U.S. 886 (1982).
29. *Id.* at 886.
30. *Id.*
31. *Id.* at 902.
32. *Id.* at 904-07.
33. *Id.* at 918.

cause."[34] Additionally, the Court suggested that it could impose liability only if the threats had actually been carried out.[35] The Court concluded that the merchants presented no evidence, apart from the speeches themselves, that Evers actually authorized any violence.[36] Therefore, Evers could not be held liable for damages to the businesses.[37]

The *Claiborne* Court relied most heavily on the incitement cases, *Brandenburg* and *Noto*, rather than on the "true threat" doctrine in *Watts*.[38] Nevertheless, the decision in *Claiborne* reaffirmed the Court's interest in extending the scope of the First Amendment rather than restricting it. *Claiborne* specifically indicates that even when the right of free speech conflicts with the right to be free from fear of bodily injury, the right to free speech will prevail.[39] Interestingly, none of the circuits have cited *Claiborne* in cases involving threatening speech. Because the Supreme Court has denied certiorari to all other cases addressing threatening speech, circuit courts have been allowed to develop the threatening speech doctrine in a different manner than the Supreme Court dictated in *Claiborne*.

III. "True Threats" and the Circuit Courts of Appeals

Each circuit has had an opportunity to address the issue of the permissibility of prosecution of threatening speech. This section, however, will discuss only a representative few. The Second Circuit addressed the issue in 1976 in *United States v. Kelner*.[40] In that case, the government prosecuted the defendant, a spokesman for the Jewish Defense League,[41] under a general federal anti-threat statute.[42] When Yasser Arafat visited New York, the defendant gave a television interview in which he stated that his men had planned in detail Arafat's assassination and intended to make sure Arafat did not leave the country alive.[43] During the interview, Kelner wore military fatigues, brandished a revolver, and guaranteed that his assassination plot would succeed.[44] The defendant appealed his conviction, claiming that he did not communicate any threat to Arafat and that the statements made were not threats, but were mere political hyperbole protected by the First Amendment.[45]

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34. *Id.* at 928.
35. *Id.*
36. *Id.* at 929.
37. *Id.*
38. *Id.* at 927-29.
39. *Id.* at 927-28.
40. 534 F.2d 1020 (2d Cir. 1976).
41. *Id.* at 1020.
42. Kelner was convicted pursuant to 18 U.S.C. § 875(c), which prohibited threats transmitted in interstate commerce to kidnap or injure another person. *Kelner*, 534 F.2d at 1020.
43. *Id.* at 1021.
44. *Id.*
45. *Id.* at 1022.

The court held that the anti-threat statute required only intent to communicate the threat to the victim, not specific intent or present ability to carry out the threat.[46] Addressing the constitutional argument, the Second Circuit adopted *Watts* and held that the threat must be conveyed with a gravity of purpose and likelihood of execution to remove it from constitutional protection.[47] In upholding the conviction, the court reasoned that the defendant made unequivocal and unconditional threats against Arafat's life.[48] Threats of this nature, the Court reasoned, are so interlocked with violent conduct that they are beyond the pale of constitutional protection.[49]

The analysis in *Kelner* holds true to *Watts* by affirming that only "true threats" may be punished. The court engaged in a lengthy consideration of the impact such application would have on the First Amendment and fashioned a narrow rule to accommodate the strong national commitment to unencumbered expression. Other circuits, however, have not as carefully considered the impact of their decisions on freedom of speech.

In *Shackleford v. Shirley*,[50] the Fifth Circuit denied habeas relief to a man convicted under a Mississippi harassment statute.[51] The defendant phoned his former supervisor and said that the next time the supervisor came by defendant's car lot, he would be "toting an ass-whipping."[52] The defendant appealed, arguing that his speech could not be punished within the bounds of the Constitution.[53] The court approvingly cited *Kelner* and *Watts*, holding that threats are only punishable when unambiguous and made with such immediacy that they convincingly express an intent of being carried out.[54] However, the court insisted that *Watts* only extended to political speech and public dialogue.[55] As Shackleford's speech fell outside the realm of political speech, his statement did not receive First Amendment protection.[56]

While the Supreme Court may not have intended to protect this type of threat when drafting the *Watts* opinion, the Court clearly expressed its belief that the First Amendment protected such language in *Claiborne*.[57] Unfortunately, the *Shackleford* opinion does not address the principles pronounced in *Claiborne*. Unlike the Second Circuit, the Fifth Circuit chose to read *Watts* as speech limiting, rather than appropriately recognizing *Watts* as a radical leap in the area of free speech.[58]

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46. *Id.* at 1023.
47. *Id.* at 1026.
48. *Id.* at 1027.
49. *Id.*
50. 948 F.2d 935 (5th Cir. 1991).
51. MISS. CODE ANN. § 97-29-45 (1972) (providing in relevant part, "It shall be unlawful for any person or persons . . . to make a telephone call, with intent to terrify, intimidate, or harass, and threaten to inflict injury or physical harm to any person at the called number or to his property.").
52. *Shackleford*, 948 F.2d at 937.
53. *Id.*
54. *Id.* at 939.
55. *Id.* at 938.
56. *Id.* at 938-39.
57. *See supra* notes 23-40 and accompanying text.
58. Before *Watts*, people were convicted under the presidential-threat statute for such innocuous

Most recently, the Sixth Circuit affirmed the dismissal of an indictment against a college student for threatening to rape a fellow student. In *United States v. Alkhabaz*,[59] the defendant sent e-mails to a friend, describing his desire to violently sexually abuse a female classmate.[60] The District Court for the Eastern District of Michigan dismissed the indictment, holding that the threats contained in the e-mail did not constitute "true threats" under 18 U.S.C. § 875(c).[61] The Sixth Circuit affirmed, finding a threat punishable only when the threat conveys an intent to injure for the purpose of furthering a goal through intimidation.[62] While the court claimed it did not need to reach the First Amendment issue,[63] First Amendment concerns clearly drove the court's narrow interpretation of the anti-threat statute.[64] This construction of the statute provides a high degree of speech protection, in line with *Watts* and *Kelner*.

The Tenth Circuit has given considerably less protection to free speech. The precedents on which the Tenth Circuit relied to uphold Viefhaus's conviction are inconsistent with the commands of the First Amendment as interpreted by the U.S. Supreme Court in *Watts* and *Claiborne*. In 1984 the Tenth Circuit upheld the conviction of a psychiatric patient who threatened the life of President Reagan.[65] In *Welch v. United States*, the defendant, while under care at a mental hospital, stated that if Reagan were in town he would get a rifle, shoot him, and would "'do a better job than Hinckley [had done].'"[66] When later questioned about these statements by the Secret Service, the defendant reiterated the threats.[67] Notably, the defendant was on medication for his mental condition at the time of the statements.[68] On appeal, the defendant claimed that because he made the statements in order to express his dislike of Reagan's budget cuts, his conviction violated the First Amendment.[69] In rejecting the appellant's argument, the court seized upon the "political context" argument of *Watts*.[70] The court interpreted *Watts* to apply only to political discussions and rallies.[71] Additionally, the court adopted a test whereby

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statements as, "Wilson is a wooden-headed son of a bitch. I wish Wilson was in hell," Clark v. United States, 250 F. 449 (5th Cir. 1918), and holding a sign saying "Hang Roosevelt," United States v. Apel, 44 F. Supp. 592 (N.D. Ill. 1942).

59. 104 F.3d 1492 (6th Cir. 1997).

60. *Id.* at 1497-1501.

61. *Id.* at 1493.

62. *Id.* at 1495.

63. *Id.* at 1493.

64. The court cited *Kelner* approvingly, and favorably read the lower court opinion, reported at 890 F. Supp. 1375 (E.D. Mich. 1995), which rested its dismissal on First Amendment grounds. *Alkhabaz*, 104 F.3d at 1495.

65. Welch v. United States, 745 F.2d 614 (10th Cir. 1984).

66. *Id.* at 615-16.

67. *Id.* at 616.

68. *Id.*

69. *Id.* at 618.

70. *Id.*

71. *Id.*

a threat is considered punishable if a reasonable person would consider it a serious expression to injure.[72]

The court cited as support for this "reasonable person" standard the concurrence of Justice Marshall in *Rogers v. United States*, another presidential-threat case.[73] In *Rogers*, the Court disposed of the case on nonconstitutional grounds.[74] Justice Marshall, concurring, addressed the First Amendment issue and specifically expressed the impropriety of this objective "reasonable person" standard.[75] Despite the Supreme Court's apparent disapproval, the Tenth Circuit adopted the reasonable person standard that Justice Marshall concluded would have "substantial costs in discouraging the uninhibited, robust, and wide-open debate that the First Amendment is intended to protect."[76]

Even more problematic to free speech values is the Tenth Circuit's decision in *United States v. Crews*.[77] In *Crews*, another psychiatric patient threatened President Reagan.[78] While residing as a patient in the psychiatric wing of a veterans' hospital, the defendant watched a program on nuclear war and the ramifications of America's nuclear policy.[79] The defendant became agitated over the program, requested sedatives, and claimed that "'[i]f Reagan came to Sheridan [, Wyoming], [he] would shoot him.'"[80] When Secret Service agents later interviewed him, the defendant denied making the threat, but stated that it "would be in the best interest of this nation if that red-necked, bigoted, war-mongering, mother fucker were shot."[81] The defendant appealed his conviction, asserting, inter alia, that his statement was protected speech under the First Amendment.[82] The Tenth Circuit, in a mere two paragraphs, rejected this argument, asserting that the question of whether the speech was political was a question for the jury.[83] The court cited *Kelner* but did not proceed with the analysis required by *Kelner* to determine whether that speech was punishable.[84] *Kelner* concedes that the issue of whether a threat is a "true threat" is ultimately a question for the jury, but *Kelner* requires the court to address the constitutional issue as a threshold question.[85] Ultimately, the court stood on its opinion in *Welch* and refused to overturn the conviction.[86]

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72. *Id.* at 619-20.
73. 422 U.S. 35 (1975).
74. *Id.* at 36.
75. *Id.* at 48 ("[T]o permit the jury to convict on no more than a showing that a reasonably prudent man would expect his hearers to take his threat seriously is to impose an unduly stringent standard in this sensitive area.").
76. *Id.*
77. 781 F.2d 826 (10th Cir. 1986).
78. *Id.* at 829.
79. *Id.*
80. *Id.*
81. *Id.* at 830.
82. *Id.* at 831.
83. *Id.* at 832.
84. *Id.*; *see also supra* notes 36-38, 48-51 and accompanying text.
85. *See* United States v. Kelner, 534 F.2d 1020, 1028 (2d Cir. 1976).
86. *Crews*, 781 F.2d at 832.

These two decisions of the Tenth Circuit effectively gut *Watts* and the speech-protective philosophy behind *Watts*. The Tenth Circuit justifies the two decisions by reasoning solely that the government has a compelling interest in protecting the President.[87] Yet, this interest also existed in *Watts*. The Supreme Court believed, however, that when interpreting a statute that punishes pure speech, it "must be interpreted with the commands of the First Amendment clearly in mind."[88]

IV. United States v. Viefhaus

A. Facts

Against this backdrop, James Viefhaus never had a chance at reversal in the Tenth Circuit. On December 8, 1996, Spokane, Washington journalist William Morlin dialed the "hotline" number of the Aryan Intelligence Network. This hotline served as the propaganda dissemination site for the two-member National Socialist Alliance of Oklahoma.[89] During this call, Morlin heard a message recorded by James Viefhaus. This message resulted in Viefhaus's conviction.

The message ran approximately five minutes and began by welcoming callers to the "voice of the white revolution," offering bumper stickers for sale, and giving callers addresses and phone numbers where they could obtain additional information on the white-pride movement.[90] The message continued with a long political diatribe about the need to fight to preserve the white racial culture by creating a separate Aryan nation.[91] Viefhaus's speech ended with a call for action:

> It is time for all white people to realize that the current system of government is beyond repair. Our revolution is not about fixing this system, but to absolutely destroy it, by any means necessary. Only then can we build an Aryan society for our children and grandchildren. The first major step in solidifying the revolutionary mentality is to understand that there are only two classes in life, those who support our cause and the enemy. As in the case of the bombing of the Murrah Federal Building, the revolutionary understands and accepts no matter how painful that innocent people must be considered expendable if necessary, in order to successfully complete any action. The revolutionary must be ruthless, so motivated, dedicated, and intelligent enough to operate as a chameleon in this occupied country, creative in target selection, mature, and capable of exceptional judgment. This is a warning to the white race. ZOG [Zionist Occupied Government] is never going to accept or even acknowledge our request, request for

87. *Id.*

88. Watts v. United States, 394 U.S. 705, 707 (1969).

89. Viefhaus and his fiancée, Carol Howe, were the only members of the National Socialist Alliance of Oklahoma.

90. Brief for Appellant at 3, Viefhaus v. United States, 168 F.3d 392 (10th Cir. 1999) (No. 97-5207).

91. *Id.* at 3-5.

> separation, therefore we are left with no choice but to take this country back. This is war . . . racial . . . holy war. As an added ultimatum to those of you who are still unwilling to pick up a sword, a letter from a high ranking revolutionary commander has been written and received demanding that action be taken against the government by all white warriors by December 15th and if this action is not taken, bombs will be activated in 15 pre-selected major U.S. cities. That means December 15, 1996, one week from today. In another words, [sic] this war is going to start with or without you. For all of you out there that have been bragging about being ready and willing to jump in when the time comes, well you better lace up your jump boots. Hail victory and never forget we must secure the existence of our people and a future for white children. Hail the order and please leave your comments after the tone.[92]

After hearing this message, Morlin informed the Federal Bureau of Investigation, which subsequently searched Viefhaus's apartment.[93] During the search, the agents recovered other tape recordings, racist literature, and various chemicals that the government concluded could be turned into a pipe bomb.[94] From these findings, the government indicted Viefhaus and his girlfriend for conspiracy, possession of an unregistered explosive device, and use of a telephone to make a bomb threat.[95] A jury in the District Court for the Northern District of Oklahoma convicted Viefhaus on all three charges.[96] Viefhaus only appealed the conviction for use of a telephone to make a bomb threat and the part of the conspiracy charge that related to the bomb threat.[97]

On appeal, Viefhaus presented two issues of error relating to the constitutional question. First, Viefhaus argued that the trial court erred in failing to address, as a threshold matter, the First Amendment implications of prosecuting him for pure speech.[98] In his brief, Viefhaus cited *Dennis v. United States*,[99] which stated, "[W]hen facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law."[100] The

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92. *Id.*

93. Viefhaus v. United States, 168 F.3d 392, 394 (10th Cir. 1999).

94. Brief for Appellant at 5-6, *Viefhaus* (No. 97-5207). The chemicals apparently belonged to codefendant Howe, and were obtained by her during her work as an informant for the government.

95. 18 U.S.C. § 844(e) (Supp. I 2001). The statute provides in pertinent part:

> Whoever, through use of the . . . telephone . . . willfully makes any threat . . . to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be sentenced for not more than ten years or fined under this title, or both.

Id.

96. *Viefhaus*, 168 F.3d at 395.

97. *Id.*

98. Brief for Appellant at 9, *Viefhaus* (No. 97-5207).

99. 341 U.S. 494 (1951).

100. *Id.* at 512.

Tenth Circuit rejected this argument as inapplicable because Viefhaus did not contest the constitutionality of the statute.[101] The court also cited *Crews* in its determination that the issue of whether the speech was "political" was a question for the jury.[102] Accordingly, the court concluded that a jury must decide the issue of whether the statements made fall into a category of unprotected speech.[103]

In the second issue on appeal, Viefhaus asked the court to rule, as a matter of law, that his speech was political and therefore protected speech, that did not constitute a "true threat."[104] Citing *Watts*, Viefhaus specifically argued four propositions: (1) the statements were made in a political context; (2) the statements were expressly conditional; (3) the statements did not state that Viefhaus intended to bomb anything; and (4) the message was not intended to convey a threat to anyone.[105] Because the court had already determined that the jury must decide whether the speech constituted a "true threat," the court did little to address this issue. The court did define a "true threat" as "'a serious threat as distinguished from words as mere political argument, idle talk or jest.'"[106] Again, the Tenth Circuit adopted the reasonable person standard from *Welch*.[107] The court concluded that a reasonable person could interpret Viefhaus's comments as a "true threat" and declined to upset the finding of the jury.[108]

Addressing the novel factual problem that Viefhaus himself did not make the threat but only repeated the words of a "high ranking revolutionary commander," the court acknowledged the lack of case law on the issue.[109] The court, addressing this issue of first impression, concluded that a reasonable person could infer that the defendant had adopted the third party's intent to injure or kill as his own.[110] Therefore, the defendant would still be guilty of violating the statute.[111] The Tenth Circuit also found, without significant discussion, the conditionality of Viefhaus's threat irrelevant because the contingency remained in Viefhaus's control.[112]

B. Where the Tenth Circuit Went Wrong

In deciding this case, the Tenth Circuit did not exhibit the concern for infringing free speech rights that has characterized the opinions of the Supreme Court and several other circuits. First, the court refused to consider the role of the court in

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101. *Viefhaus*, 168 F.3d at 396.

102. *Id.* at 397.

103. *Id.*

104. Brief for Appellant at 17, *Viefhaus* (No. 97-5207).

105. *Id.* at 19-20.

106. *Viefhaus*, 168 F.3d at 395 (quoting United States v. Leaverton, 835 F.2d 254, 257 (10th Cir. 1987)).

107. *Id.* at 396.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* In *United States v. Leaverton*, the court explained that conditional language can negate a threat, but not if the condition is within the control of the maker of the threat. United States v. Leaverton, 835 F.2d 254, 256 (10th Cir. 1987).

making a threshold inquiry of First Amendment implications. The court misread *Dennis* as applying only to facial challenges to a statute, rather than also to the application of that statute. Further, *Watts* demands that any interpretation of a statute that punishes speech must be done "with the commands of the First Amendment clearly in mind."[113] To accomplish this, the Court suggested three factors to determine the permissible scope of prosecution: context, conditionality, and the reaction of the listeners.[114]

The Tenth Circuit mentioned context and conditionality but then disregarded them as irrelevant.[115] The court failed to consider that both the context and the conditionality of the language made the "threats" so unlikely as to be meaningless. The objectionable language occurred at the end of a long political diatribe in which Viefhaus attempted to sell bumper stickers and asked callers to leave comments.[116] This speech referred to an unknown party who had demanded some unspecified conduct by unnamed "warriors" in order to prevent bombs in unidentified cities.[117] The intended listeners of this speech would not likely take it as a serious threat, as the recording did not even tell listeners what action they must take within the next week to prevent the bombing.[118]

In addressing the *Watts* Court's reverence for First Amendment rights, the *Kelner* court stated that the court must, as a threshold matter, determine that the threat is within the constitutionally permissible scope of the statute.[119] To accomplish this inquiry, the court must determine that the threat is unequivocal, unconditional, and a specific expression of an intent to inflict immediate injury.[120] Additionally, to be constitutionally punishable, the threats must, according to their language and context, convey a gravity of purpose and likelihood of execution.[121]

The court in *Viefhaus* did not first make this inquiry and did not believe it was the function of the court to make this inquiry. In effect, the court decided that if the jury found that the statements fit into the proscription of the statute, the First Amendment was not implicated.[122] Because constitutional questions must be questions of law and not of fact,[123] this decision enhances the role of the jury and abrogates the duty of the court. By shirking its duty, the court allows the jury to punish unpopular speech, without affording the defendant his constitutionally protected freedoms. At trial, the prosecution presented reams of racist literature taken from Viefhaus's apartment, literature that would highly offend most

113. Watts v. United States, 394 U.S. 705, 707 (1969).
114. *Id.* at 708.
115. *Viefhaus*, 168 F.3d at 396.
116. Brief for Appellant at 3-5, *Viefhaus* (No. 95-5207); *see also* text accompanying note 91.
117. *Id.*
118. *Id.*
119. United States v. Kelner, 534 F.2d 1020, 1028 (1976).
120. *Id.* at 1027.
121. *Id.* at 1026.
122. Viefhaus v. United States, 168 F.3d 392, 396-97 (10th Cir. 1999).
123. *Kelner*, 534 F.2d at 1028.

people.[124] Then the court allowed this inflamed jury to determine whether the statements fell within the realm of First Amendment protection. This invasion of the court's province presents manifest dangers. First Amendment guarantees intend to prevent precisely this type of conviction. When the masses may determine what qualifies as punishable speech, the nation's cherished protection of dissidence will soon be lost.

The *Viefhaus* court also clung to the reasonable person standard in assessing whether the evidence of a threat is sufficient to go to the jury. The Supreme Court expressed its distaste for this standard in *Watts*, stating that it had "grave doubts about it[s]" correctness.[125] In *Rogers*, Justice Marshall further questioned the validity of the reasonable person standard in determining whether a statement was a "true threat."[126] Marshall feared that such an expansive construction of threat statutes would create a substantial risk of criminalizing crude, but still constitutionally protected, speech.[127] Marshall worried that the objective person test would, in effect, apply a negligence standard to the criminal defendant and charge him with liability merely for the reaction of his listeners.[128] This construction would do great violence to the values underlying the First Amendment.

Despite the Supreme Court's blatant opposition to this standard, the Tenth Circuit has consistently relied on the reasonable person standard since 1972. In *United States v. Hart*,[129] the Tenth Circuit cited with approval the very case that the Supreme Court expressed grave doubts about in *Watts*.[130] By using the reasonable person standard, the Tenth Circuit exposes criminal defendants to a negligence standard, which is inherently inconsistent with the "willful" requirement established in the threat statute, 18 U.S.C. § 844(e). Additionally, this standard conflicts with the values of the First Amendment by allowing a jury to convict if it believes a reasonable person would see the statement as a threat. This standard simply compounds the problems created by relegating the constitutional questions to the jury for determination as discussed above.

Adding to the problems of this decision, the court glossed over two facts that take *Viefhaus* outside the fact pattern of the typical threat case. First, Viefhaus did not communicate the "threat" to its intended victim. Had the defendant called in bomb threats to buildings in "fifteen preselected cities," this case would have presented few difficulties. Viefhaus, however, did not call anyone at all. He left a recording on an answering machine. The *Viefhaus* court, in a single sentence, dismissed this argument stating that the statute did not mandate that the defendant initiate the call.[131] The *Kelner* court, however, insisted that the similarly worded 18 U.S.C.

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124. *Id.* at 397.

125. Watts v. United States, 394 U.S. 705, 708 (1969).

126. Rogers v. United States, 422 U.S. 35, 42-48 (1975) (Marshall, J., concurring).

127. *Id.* at 44.

128. *Id.* at 47.

129. 457 F.2d 1087, 1090 (10th Cir. 1972).

130. *Id.*; *see also Watts*, 394 U.S. at 707-08 (asserting that the rationale of Ragansky v. United States, 253 F. 643, 645 (7th Cir. 1918) was questionable).

131. Viefhaus v. United States, 168 F.3d 392, 396 (10th Cir. 1999).

§ 875(c) required that the defendant have a specific intent to communicate his threat to the victim, Yasser Arafat.[132] Without this requirement, one could be prosecuted for merely talking on the phone with a friend and stating a desire to blow up a building. While this is not desirable conduct, it is certainly conduct protected by the First Amendment. Additionally, it comes dangerously close to prosecuting mens rea[133] alone, without requiring any overt act. Further, this type of prosecution has been expressly rejected in a long line of Supreme Court cases condemning the punishment of advocacy of violence in order to reach a desirable end.[134]

Second, the court only briefly considered the fact that Viefhaus himself did not originate the threats.[135] The recorded message stated that "a high ranking revolutionary commander" had threatened to set off bombs if his fellow white warriors did not act against the government.[136] This statement apparently referenced a letter by another white supremacist, Willie Ray Lampley.[137] Viefhaus did not make the threat and did not control its being carried out. The *Viefhaus* case makes it permissible to punish one who repeats a threat originally made by another.

Once again, the public must carefully watch anything it says over the telephone to a friend for fear that they might be prosecuted for repeating threats made by others. The court stated that a reasonable person could infer that Viefhaus adopted the statement as his own, yet it cited no authority for this proposition, nor did it explain what evidence could support this inference.[138] This inference by the court runs precisely afoul of a hypothetical raised in *United States v. Alkhabaz*,[139] whereby an attendant of the trial repeats the threat made by the defendant and is therefore prosecuted.[140] In that case, the court concluded that the purpose of anti-threat statutes was to prevent the intended recipient from being intimidated or having his peace of mind disturbed.[141] In the instant case, Viefhaus did not make the threat, nor did he intend to intimidate his callers. Typical callers of the "Aryan Intelligence Network" would expect to hear just such rhetoric.

While Viefhaus's message would certainly offend most Americans, the First Amendment still protects it. In the wake of the Oklahoma City bombing, no jury in the state would have acquitted Viefhaus. For this very reason, the court failed by not addressing the constitutional question before passing it on to the jury.

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132. United States v. Kelner, 534 F.2d 1020, 1023 (2d Cir. 1976).

133. Mens rea is a guilty mind or criminal intent. BLACK'S LAW DICTIONARY 1137 (4th ed. 1968).

134. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that the State may not punish advocacy of violence unless that advocacy incites imminent lawless action); Noto v. United States, 367 U.S. 290 (1961) (holding that abstract teaching of propriety of violence is not punishable); Yates v. United States, 354 U.S. 298 (1957) (holding that advocacy, unrelated to its tendency to produce forcible action, is protected by the First Amendment).

135. *Viefhaus*, 168 F.3d at 396.

136. *Id.* at 394.

137. David Harper, *Tulsan's Case Raises Questions at Appellate Level*, TULSA WORLD, Jan. 23, 1999 at 9, *available at* 1999 WL 5388193.

138. *Viefhaus*, 168 F.3d at 396.

139. 104 F.3d 1492 (6th Cir. 1997).

140. *Id.* at 1496.

141. *Id.*

Unpopular speech is the very type of speech that the First Amendment most zealously protects. The Supreme Court addressed a similar type of speech in *Claiborne*, except there, the defendant was a black man who believed that action must be taken immediately to stop the oppression of his race.[142] The defendant made threats to break the necks of those who did not unite in action against their oppressors.[143] The Supreme Court ratified this speech and ruled that the First Amendment protected it.[144] Justice Stevens asserted that an advocate "must be free to stimulate his audience with spontaneous and emotional appeals for unity in a common cause," even if that includes threats and intimidation.[145] Few would like to equate the speeches of Charles Evers and other civil rights leaders with the rantings of white supremacists. The content of the speeches, however, is quite similar; only the righteousness of the cause differs.

V. A More Reasoned Approach to "True Threats"

Federal courts deciding cases involving anti-threat statutes have received little guidance from the Supreme Court since *Watts*. Federal courts have not relied on the reasoning of *Claiborne* to decide threat cases, probably because *Claiborne* was a civil case and did not interpret an anti-threat statute. However, the Court decided *Brandenburg v. Ohio* in the same term as it decided *Watts*. *Brandenburg* has since come to memorialize the triumph of civil libertarianism in free speech jurisprudence. State and federal courts and the Supreme Court itself have cited *Brandenburg* thousands of times as absolutely prohibiting the punishment of advocacy of violence unless that advocacy is directed to incitement of imminent lawless action.[146] While the scope and influence of *Brandenburg's* speech-protective pronouncements has grown, the significance of *Watts* has declined. While certainly cited in every opinion involving a threat statute, courts have not attached the same reverence for *Brandenburg* protection of threats as they have to its protection of advocacy of violence.[147] Because the Supreme Court has not offered additional guidance on the

142. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).

143. *Id.* at 902.

144. *Id.* at 928.

145. *Id.*

146. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 411 (1989); Hess v. Indiana, 414 U.S. 105, 108 (1973); Herceg v. Hustler Magazine, Inc., 814 F. 2d 1017, 1023 (5th Cir. 1987); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193 (Cal. Ct. App. 1988); People v. Tolia, 631 N.Y.S.2d 632, 637 (N.Y. App. Div. 1995).

147. Unlike threat cases, in incitement cases, courts invariably make a threshold finding as to whether the speech is outside the protection of the First Amendment before passing it on to the jury. *See, e.g., Herceg*, 814 F.2d at 1021 (stating that courts are not free to accept the jury's mixed finding of fact and law and must independently determine whether the speech falls within the unprotected category to sufficiently confine the parameters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited); *see also* Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 766 (1986) (noting that questions of imminence and likelihood in the application of *Brandenburg* are not left even to properly instructed juries, but remain subject to judicial scrutiny).

"true threat" doctrine, the federal courts are likely to continue offering scant protection to language that could be perceived as a threat.

Even if one believes that James Viefhaus should be imprisoned for his utterances, one can hardly deny that the court's reasoning poses constitutional difficulties for the future.[148] Until the Supreme Court agrees to review one of these cases, the circuit courts are likely to continue searching for answers in threat cases. In order to restore the First Amendment to its rightful stature, the courts should consider four factors when deciding a case involving threatening speech.

First, courts should insist on making a threshold finding that the speech is beyond the pale of First Amendment protection before passing it on to the jury. The constitutional question should be squarely within the domain of the judge, as a question of law. By first determining that the threat expresses an unequivocal, unconditional, and immediate threat of harm, the court ensures that the statute is applied in a manner that is consistent with the First Amendment. If, by contrast, the jury makes this decision, the public, rather than the Constitution, effectively determines what speech should be protected. The Bill of Rights exists to keep the whims of the majority from punishing dissidence. If this practice had occurred in other areas, abolitionists, women's suffragettes, and war protestors would surely have been punished in even greater numbers. In light of increasing domestic terrorism, courts have an even greater pressure to ensure that the populace, seeking greater security from political dissidents, does not trample First Amendment rights.

Second, the "reasonable person," or objective standard, must go by the wayside. The fate of a defendant in a threat case should not rest on whether a reasonable person would construe the statement as a threat. This does not work in other areas of criminal law,[149] and should not be allowed when free speech rights are at stake. Instead, courts should adopt a subjective test to determine whether a threat falls within the statute. While difficulties arise in determining what a defendant subjectively intended, the standard has worked well in other areas of criminal law. If the defendant intended the victim of his threat to perceive the statement as a threat, the prosecution encounters no problems. This intent can be proven by circumstantial evidence as it is in other criminal cases. In an area as sensitive as the First Amendment, courts must not allow a standard as weak as the reasonable person standard to determine the fate of defendants.

Third, the courts must read anti-threat statutes literally regarding intent to communicate a threat. In cases such as *Crews*, the defendant expressed his desire to shoot the President to his psychiatric nurse.[150] This threat had little chance of reaching its intended victim or of disturbing the victim's peace of mind. At the very least, a "true threat" must be intended to threaten. It is not legally sound to criminally prosecute people who make implausible outbursts. The Bible may speak

148. It should be noted that Viefhaus would have served exactly the same amount of time for the possession charge as he did for all of the charges combined, as the sentences were to run concurrently.

149. *See supra notes* 75, 125-28 and accompanying text.

150. United States v. Crews, 781 F.2d 826, 829 (10th Cir. 1986).

of God punishing for lust in the heart,[151] but American criminal law punishes only evil acts, not merely evil thoughts.

Finally, the courts should be especially cautious when the prosecuted speech is political in nature. While the First Amendment clearly protects more than just political dialogue, the bedrock of free speech is the desire to promote open political discussion. The Supreme Court has expressed the reverence with which political speech must be treated in *Lehnert v. Ferris Faculty Ass'n*,[152] *Texas v. Johnson*,[153] *Buckley v. Valeo*,[154] *Roth v. United States*,[155] and numerous other opinions. This country was founded by political dissidents who not only threatened to overthrow the government, but succeeded in doing so. While one shudders to think of white supremacists like James Viefhaus taking over the country, precedent like *Viefhaus* results in suppression of even the most laudable dissidents.

VI. Conclusion

The Tenth Circuit has clearly encroached on the arena of protected speech as outlined by the Supreme Court. *Watts* and *Claiborne* reaffirmed the Court's commitment to preserving inviolate, uninhibited, and robust expression. By affirming the conviction of James Viefhaus, the Tenth Circuit endangered the right of citizens to express their opinions, especially unpopular ones. In the wake of the bombing of the Murrah building in Oklahoma City, courts will likely find themselves inclined to follow *Viefhaus* in order to prevent another such catastrophe. The nation has often struggled to find the proper balance between freedom and security, which may present the most difficult task in a constitutional republic. But when wading between Scylla and Charybdis, the courts should always err on the side of more freedom. The nation's history, replete with instances of choosing security over freedom, reveals the abysmal results of this choice. The Supreme Court, in the Warren era, finally righted this balance with the triumph of the civil libertarian philosophy toward free speech rights. The United States maintains its unique position in this world because it not only tolerates, but welcomes dissenters and malcontents. James Viefhaus was nothing but a vocal malcontent with fragile self-esteem and a hateful message. We need not agree with what he believes, but should defend his right to say it.

Stephanie D. Wade

151. *Matthew* 5:28.
152. Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 522 (1991).
153. Texas v. Johnson, 491 U.S. 397, 411 (1989).
154. Buckley v. Valeo, 424 U.S. 1, 14 (1976).
155. Roth v. United States, 354 U.S. 478, 484 (1957).