TOURO COLLEGE
JACOB D. FUCHSBERG LAW CENTER
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Touro Law Review

Volume 30
Number 4 *Annual New York State Constitutional Issue*

Article 8

November 2014

Defining the Line between Constitutionally Protected Speech and True Threats: Can I Be Arrested for Being Annoying?

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DEFINING THE LINE BETWEEN CONSTITUTIONALLY PROTECTED SPEECH AND TRUE THREATS: CAN I BE ARRESTED FOR BEING ANNOYING?

CRIMINAL COURT OF NEW YORK
NEW YORK CITY

People v. Brodeur[1]
(decided July 18, 2013)

I. INTRODUCTION

The United States Constitution states, "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."[2] This proclamation grants all citizens a right to free speech, and case law has demonstrated how this fundamental right cannot be easily abridged. For example, one court held, "[t]he First Amendment of the United States Constitution forbids the silencing of speech merely because it is objectionable or offensive to the listener."[3] Only "well-defined and narrowly limited classes [of speech] . . . including the lewd and obscene, the profane, the libelous, and the insulting or fighting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace may properly be proscribed."[4] New York's Aggravated Harassment statute, which authorizes a limitation on free speech, states:

> [a] person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she . . . [e]ither (a) communicates with a person, anonymously or otherwise, by telephone, by telegraph, or by mail, or by

[1] 969 N.Y.S.2d 774 (Crim. Ct. 2013).
[2] U.S. CONST. amend. I.
[3] *Brodeur*, 969 N.Y.S.2d at 776 (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).
[4] *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

> transmitting or delivering any other form of written communication, in a manner likely to cause annoyance or alarm.[5]

Even though a majority of New York case law holds that New York's Aggravated Harassment Statute is in compliance with the First Amendment, some federal and New York courts have held that the statute is unconstitutional.[6]

The parties in *Brodeur*, complainant Harry Stuckey and defendant Christopher Brodeur, decided to enter into a lease of a loft space in Williamsburg, New York.[7] At this time, Brodeur and Stuckey had known each other for over ten years and had experienced difficulty working with each other in the past.[8] Brodeur was known to be a person with a "propensity for exaggeration of every perceived wrong."[9] Nevertheless, the two leased the space in order to use it for their artistic work, storage, events, and parties.[10] Brodeur originally located the space and raised the initial rent and security required by the landlord.[11] However, Brodeur lacked the full financial resources to satisfy the landlord, so he turned to Stuckey to finance the lease.[12] The lease was executed in January of 2009 without Brodeur's name on the lease.[13]

Shortly thereafter, a dispute arose as to who possessed control of the lease.[14] Stuckey argued that he had sole control since his name was on the lease, while Brodeur believed he was in control of the lease because of his initial undertakings to obtain it.[15] Brodeur attempted to exercise his control when he moved into one of the rooms,

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[5] N.Y. PENAL LAW § 240.30(1) (McKinney 2012).

[6] See *infra* sections III.B, IV.A for cases that held Aggravated Harassment statute unconstitutional.

[7] *Brodeur*, 969 N.Y.S.2d at 776.

[8] *Id.* at 779.

[9] *Id.* at 781. The court also took note of Brodeur's endeavors as "muckraker" because he was arrested numerous times due to protests. Stuckey was well aware of Brodeur's behavioral tendencies because he stated anyone who was a subject of Brodeur's ire was labeled a child molester and a rapist. *Id.*

[10] *Id.* at 776, 779.

[11] *Brodeur*, 969 N.Y.S.2d at 776, 779.

[12] *Id.* at 776. Stuckey agreed to lease the space in the name of a corporation, V. Media Inc., of which he was President. *Id.*

[13] *Id.* at 779.

[14] *Id.* at 776.

[15] *Brodeur*, 969 N.Y.S.2d at 779. Stuckey testified he had control of the lease because he personally guaranteed the corporate obligations to the landlord, which made him personally liable on the rent. *Id.*

and, in turn, Stuckey moved into the premises as well.[16] About one month after the lease was signed, Stuckey removed Brodeur from the premises by the means of self-help and changed the locks to the property.[17]

After Brodeur's ejectment, animosity between the parties spiked when Brodeur stated he would kill Stuckey if Brodeur was not returned to occupancy or given control of the premises.[18] During this time, Brodeur also placed a poster on a door of another residence of Stuckey's, which stated: "Wanted! Call 911 if you see this man! His name is Harry Stuckey and he is a violent drug dealer and child molester/rapist. Call 911."[19] Brodeur was charged with Attempted Aggravated Harassment in the Second Degree because of his verbal threats to kill Stuckey and the written threats of the poster.[20]

The court decided that, in regard to the threats, a mixed question of law and fact would determine Brodeur's guilt under the statute.[21] The court held as a matter of law, Brodeur's verbal statements threatening to kill Stuckey amounted to a true threat.[22] However, the court then analyzed Brodeur's verbal statements under a contextual approach by scrutinizing the rocky relationship of the parties, the evidence of Brodeur's propensity to exaggerate in various situations, and Stuckey's own reaction to the statements to support its finding that the First Amendment protected the verbal threats.[23]

The court concluded the poster was a true threat.[24] As a matter of law, Brodeur's admission that he placed the poster on Stuck-

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[16] *Id.* This caused further friction between the parties because Brodeur did not want Stuckey to occupy the other room as Brodeur wanted to lease out the remaining rooms to raise money for rent. *Id.*

[17] *Id.* at 779.

[18] *Brodeur*, 969 N.Y.S.2d at 779-80. It is important to note the context of the situation in which the comments were made. Several witnesses who heard Brodeur's statements about Stuckey were Board members who the court stated had no legal authority. *Id.* "The testimony of several witnesses was that the "Board" meetings were more akin to parties, with the participants being in various states of intoxication." *Id.* at 780.

[19] *Id.* at 783.

[20] *Id.* at 776. Brodeur was also charged with Stalking in the Fourth Degree (N.Y. PENAL LAW § 120.45(3) (McKinney 2012)) and Harassment in the Second Degree (N.Y. PENAL LAW § 240.26(2) (McKinney 2012)). *Brodeur*, 969 N.Y.S.2d at 776. The stalking charge is not an issue in this article.

[21] *Id.* at 778.

[22] *Id.*

[23] *Id.* at 779-83. For a further discussion of the court's contextual analysis regarding Brodeur's verbal threats, see *infra* section II.D.

[24] *Id.* at 784.

ey's door constituted a true threat.[25] In context, the poster also exemplified a true threat because a reasonable person in Stuckey's position would be alarmed upon viewing the poster because it would put the person in apprehension of harm, and the court stated that Stuckey himself was annoyed and afraid because of the unknown consequences of the poster.[26]

The process of determining whether a person's conduct amounts to a true threat requires a full contextual analysis and an understanding of the implications of limiting a person's speech under the First Amendment. The issue here is not just whether a person is guilty under New York's Aggravated Harassment statute, but, more broadly, how certain acts cross the barrier from protected speech under the First Amendment to unprotected speech subject to criminal penalty.

II. THE COURT'S REASONING

The court in *Brodeur* assumed New York's Aggravated Harassment statute was constitutional on its face, but it recognized the delicate balance between protecting a person's First Amendment right and correctly applying the statute to the situation before it.[27] The court noted that when a person's free speech is at issue, the application of a legitimate restriction on free speech requires an analysis as a matter of law and of fact.[28] For the factual analysis, the court in *Brodeur* brought an objective and subjective contextual approach to determine the true intent of the defendant.[29]

A. Elements of Guilt Under the Statute – What Is a "True Threat"?

"A genuine threat is one that is serious, should reasonably have been taken to be serious, or was confirmed by other words or

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[25] *Brodeur*, 969 N.Y.S.2d at 784.

[26] *Id.* For a further discussion of the court's contextual analysis regarding the poster threats, s*ee infra* section II.D.

[27] *Id.* at 776, 777 ("The evidence in this case raises multiple issues, most importantly the juxtaposition of the statutes at issue with the First Amendment to the United States Constitution and the right of Defendant to free speech.").

[28] *Id.* at 778.

[29] *See infra* section II.C.1-2.

conduct."[30] Further, conduct or speech is considered a true threat if the speaker intends to invoke fear or violence upon the listener.[31] Societal norms and policies carry some weight when considering whether certain speech amounts to a true threat, but just because speech may be objectionable, it does not necessarily mean it is proscribed under the law.[32] True threats are also clear, unambiguous, and immediate; there should not be an element of vagueness or uncertainty for an action to be considered proscribed speech.[33]

B. True Threat Determination Under the Statute – A Mixed Question of Law and Fact

When analyzing whether speech or conduct constitutes a true threat, the court in *Brodeur* looked to federal and state case law to determine its own approach. The court noted that a person's protection under the First Amendment is not abridged when looking at narrowly limited classes of prohibited speech.[34] Proscribable speech is "lewd and obscene, the profane, the libelous, and the insulting or 'fighting words' . . . that may incite an immediate breach of the peace."[35] When conducting an analysis as a matter of law, true threats may be found in numerous phrases that people say throughout their daily lives when looking at the words alone. As the court in *Brodeur* stated, an angry baseball fan shouting "kill the umpire" may be considered a true threat as a matter of law due to the face value of the words.[36] But, when considering the severity of a limitation on a person's First Amendment right, a literal interpretation of an individual's

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[30] *Brodeur*, 969 N.Y.S.2d at 777 (quoting People v. Hernandez, 795 N.Y.S.2d 862, 866 (Crim. Ct. 2005)).

[31] *Id.* (quoting People v. Olivio, 800 N.Y.S.2d 353 (Crim. Ct. 2005)).

[32] *Id.* at 776 (regarding the defendant's burning the American flag at a political demonstration; although the defendant's action was arguably morally condemnable speech, the court found the conduct did not threaten to destroy free speech) (citing *Johnson*, 491 U.S. at 414).

[33] *Id.* (citing People v. Yablov, 706 N.Y.S.2d 591, 595 (Crim. Ct. 2000)).

[34] *Id.*; *see also Chaplinsky*, 315 U.S. at 571-72.

[35] *Brodeur*, 969 N.Y.S.2d at 776 (noting that various courts have also looked at whether the defendant's speech contained "fighting words") (quoting *Chaplinsky*, 315 U.S. at 571-72). Fighting words "are likely to cause a fight. So are threatening, profane or obscene revilings." *Chaplinsky*, 315 U.S. at 573. *See also* Cohen v. California, 403 U.S. 15, 20 (1971) (noting that fighting words are "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.").

[36] *Brodeur*, 969 N.Y.S.2d at 777.

speech may not be the only basis of determination.[37]

C. Context – A Way To Fill in the Gray Area of the Law

Federal and state case law has portrayed different courts applying a contextual analysis in its true threat analysis. Many "lewd" or "obscene" words may fall into the definition of a true threat as a matter of law, but when taken into context, determining the true meaning of obscene speech brings a new level of analysis.[38] In *People v. Dietze*,[39] the New York Supreme Court took a very narrow approach in its application of the statute.[40] In this case, the defendant made various statements calling the complainant a "bitch" and her son a "dog."[41] The defendant also stated that he would "beat up" the complainant one day or night, but this evidence was not enough to place the defendant's conduct within the confines of the statute.[42]

The court first held speech is not forbidden unless it presents a clear and present danger of some serious substantive evil.[43] The court relied on a more descriptive meaning of a "true threat," in which a "substantive evil" seemed to denote a more serious and in-depth definition of a true threat.[44] This definition was considerably narrower than the meaning accorded by the federal courts to a true threat, which was "lewd" and "obscene" speech.[45] Second, the court found a contextual examination facilitated making a well-versed de-

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[37] *Id.*

[38] *Id.* at 778.

[39] 549 N.E.2d 1166 (N.Y. 1989).

[40] *Id.* at 1168, 1173-74.

[41] *Id.* at 1167. The court also noted that the defendant's actions were directed towards the complainant and her son, who were both mentally disabled. *Id.* It also commented that the defendant knew of their mental disabilities, and had been warned by police on a prior occasion to refrain from arguing with them again. *Id.*

[42] *Dietze*, 549 N.E.2d at 1167-70. "There is nothing in the record demonstrating that defendant's statement that she would 'beat the crap out of [complainant] some day or night in the street' was either serious, should reasonably have been taken to be serious, or was confirmed by other words or acts showing that it was anything more than a crude outburst." *Id.* at 54.

[43] *Id.* at 1168.

[44] *Id.* at 1168. ("Speech is often 'abusive'—even vulgar, derisive, and provocative—and yet it is still protected under the State and Federal constitutional guarantees of free expression unless it is much more than that.").

[45] *Chaplinsky*, 315 U.S. at 572.

cision regarding the *true* meaning of a person's speech.[46] Although the defendant's statements contemplated some sort of physical harm to the complainant in the near future, the court found the statements to be unsupported and more of a temporary loss of self-control.[47] Human nature is indicative of how people can "lose their cool" over certain events, so mere outbursts are not meant to be taken seriously.[48] The court in *Dietze* recognized the importance in the constitutional protection of speech and held context was needed to prove the defendant's true intentions.[49]

1. Looking At Context Through the Reasonable Recipient – The Objective Test

Because the surrounding circumstances are critical in providing the context in which the speech occurred, the court in *Brodeur* also included an analysis of whether a reasonable recipient, familiar with the context of the communication, would interpret Brodeur's words or conduct to constitute a true threat.[50] This objective test provided the court with an unbiased analysis of a true threat, free of any party's hypersensitivities.[51] This test was previously applied to the facts in *People v. Mitchell*,[52] in which the defendant called the complainant forty-five times and left her ten voice messages in which he repeatedly threatened to kill her child.[53] The complainant also stated that the defendant pounded on her door for forty-five minutes threatening to kill her if she was with another man.[54] After considering the context, the court determined that the defendant's conduct was a true threat because a reasonable recipient would be alarmed by the repetitive communication, which served no legitimate purpose.[55] Also, as a matter of law, the court reasoned that the calls and messages were le-

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[46] *Dietze*, 549 N.E.2d at 1168-69.

[47] *Id.* at 1169-70.

[48] *Id.*

[49] *Id.*

[50] *Brodeur*, 969 N.Y.S.2d at 777.

[51] *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 623-24 (8th Cir. 2002) (supporting the reasonable recipient approach even though it disregards a person's distinctive sensitivity). "[T]he recipient's reaction still must be a reasonable one even if he or she suffers some unique sensitivity . . . ." *Id.*

[52] No. 26317C–2009, 2009 WL 2929790 (Sup. Ct. Bronx Cnty. July 23, 2009).

[53] *Id.* at *1.

[54] *Id.*

[55] *Id.* at *2, *3.

gally sufficient on their face to constitute a true threat due to the language of the defendant's statements.[56] Therefore, aside from the analysis as a matter of law, the reasonable recipient test proved helpful in the court's contextual inquiry because it provided an objective examination of a true threat.

2. Did the Intended Recipient Believe It Was a Threat? – The Subjective Test

The intended recipient test serves the opposite purpose of the reasonable recipient test because the intended recipient's own reaction to the conduct at issue is analyzed instead of examining whether a reasonable person would be alarmed by the conduct or speech.[57] Although numerous judicial opinions from both New York courts and federal courts tend to apply the objective reasonable recipient test in lieu of the subjective intended recipient test, the court in *Brodeur* applied the intended recipient test along with the reasonable recipient test in order to further analyze the surrounding circumstances of the volatile dispute.[58] The court looked to *United States v. Turner*[59] for the intended recipient analysis. In *Turner*, the court considered whether the defendant's comments on his website, which stated three federal judges should be killed, constituted a true threat.[60] The defendant also posted photographs, work addresses, and room numbers of the judges on his website along with the death threats.[61] Consequently, the judges were extremely alarmed by the substantial number of threats made by the defendant, and one judge stated his immediate reaction to the threats was "somebody was threatening to kill me."[62] The court found the victimized judges' testimony regarding their reaction to the statements as highly relevant and not prejudicial when used to determine whether a true threat was made.[63] Therefore, the intended recipient analysis provided further proof that the defend-

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[56] *Id.* at *3-4.

[57] *Brodeur*, 969 N.Y.S.2d at 778, 781, 782, 783.

[58] *Id.*

[59] 720 F.3d 411 (2d Cir. 2013).

[60] *Id.* at 413, 415-23.

[61] *Id.* at 415-17, 423.

[62] *Id.* at 416 (noting that the judges were reasonably worried because they were well aware that the defendant referred on his website with admiration to Matthew Hale, who was convicted of soliciting the murder of a judge the plaintiff jurists all knew).

[63] *Id.* at 428-29.

ant's conduct had an alarming effect upon the complainants.[64]

D. How a Mixed Question of Law and Fact Determined Brodeur's Protection and Condemnation

The contextual approach applied by the court in *Brodeur* entailed an immense analysis of the objective reasonable recipient test in order to ensure Brodeur's free speech was not unjustly limited.[65] Applying the objective test, the court in *Brodeur* held that a reasonable person in the position of Stuckey would not have taken the verbal threats seriously because a reasonable person would have known of Brodeur's propensity to exaggerate issues in which he was involved.[66] Also, a reasonable person would have known, or should have known, that Brodeur would become enraged at Stuckey's removing him from the premises, especially in the manner Stuckey removed Brodeur.[67] Therefore, a reasonable recipient should have known those verbal threats were mainly outbursts due to Brodeur's persona and the circumstances at hand.[68]

However, when applying the reasonable recipient test to the poster Brodeur placed on Stuckey's door, the court held a reasonable person would find the poster to be threatening.[69] A reasonable person may think he could be arrested at any moment and perhaps suffer physical harm if apprehended by the police.[70] The ultimate difference between the verbal threat and the poster, under the reasonable recipient analysis, was that the reasonable recipient would have known, or should have known, that Brodeur's verbal threats were exaggerated, whereas the poster presented an element of the unknown.[71]

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[64] *Turner*, 720 F.3d at 429 ("[P]roof of the effect of the alleged threat upon the addressee is highly relevant.") (quoting United States v. Davila, 461 F.3d 298, 305 (2d Cir. 2006)).

[65] *Brodeur*, 969 N.Y.S.2d at 777.

[66] *Id.* at 781.

[67] *Id.* at 779-80. (noting that Stuckey removed Brodeur from the premises via self-help and changed the locks to the space).

[68] *Id.* at 780.

[69] *Id*. at 784.

[70] *Brodeur*, 969 N.Y.S.2d 784 (stating that unlike Brodeur's verbal threats, "in contrast to our analysis of Defendant's verbal statements, Defendant's propensity for hyperbole and exaggeration, as known to Stuckey, does not save him from liability for the poster."). After the court concluded its contextual analysis, it found the surrounding events did not support First Amendment protection for Brodeur. *Id.*

[71] *Id.*

Because viewers of the poster unfamiliar with the situation may have taken action and called the police as the sign demanded, the poster ultimately presented a threat to the complainant's privacy[72] and liberty.[73]

While basing a judicial analysis on one person's belief is never a wholly sound process in our judicial system, it appeared to serve a greater contextual purpose in *Brodeur*.[74] Similar to the court in *Turner*, the court in *Brodeur* used the intended recipient test to analyze Stuckey's actual response to Brodeur's conduct.[75] The court in *Brodeur* held the test did not create prejudicial analysis because other elements of the contextual analysis already established the evidence regarding what constituted a true threat.[76] The court also stated that Stuckey found the poster to be threatening because he was alarmed, afraid, and annoyed upon seeing the poster on his door.[77] Therefore, the court believed that Brodeur's intention was to annoy and alarm Stuckey, and further instill fear in Stuckey because of the message on the poster.[78]

III. THE FEDERAL APPROACH

When determining whether a person's questionable conduct is afforded First Amendment protection, federal courts analyze various proscribable conduct and speech statutes. Case law shows certain courts applying a broad approach regarding what speech or conduct is threatening and not protected, while other courts take a more narrow approach in determining what makes certain speech or conduct a true threat.[79]

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[72] See *infra* section IV.A-B for a discussion on privacy interests in relation to application of proscribable speech/conduct statutes.

[73] *Brodeur*, 969 N.Y.S.2d at 784-85.

[74] *Id.* at 779, 781-83.

[75] *Id.* at 781-83. *See Turner*, 720 F.3d at 428-29 (noting the testimony of each victim judge was given great weight by the court).

[76] *Brodeur*, 969 N.Y.S.2d at 778, 781-83.

[77] *Id.* at 784 (noting how the court did not find Stuckey a "wholly credible" witness because he portrayed as much exaggeration as Brodeur displayed, but the court believed Stuckey's testimony concerning his alarm caused by the poster was justified).

[78] *Id.* at 784-85.

[79] *See infra* section III.

A. Does It Sound Like a Threat? It Is a Threat – The Broad Application Approach

The court in *United States v. Bellrichard*[80] applied the objective reasonable recipient test under a contextual true threat analysis to find a broad scope of conduct and speech that was not protected under the First Amendment.[81] The defendant in *Bellrichard* was convicted of sending threatening communications through the mail to various government officials.[82] The court in *Bellrichard* found the reasonable recipient test of a contextual analysis to be sufficient when determining whether one's speech or conduct was appropriately proscribed.[83] In this case, the defendant had a history of sending mailings to local officials regarding issues in which he was interested.[84] One letter, which was addressed to the county attorney, stated, "you will die," and "[i]f they go to prison you'll be dead in less than 7 months—so help me God!"[85] The defendant did not deny that he wrote the letters, but he argued the conduct was protected under the First Amendment.[86] The court did not agree with the defendant and found the defendant's mailings a true threat.[87] The court primarily focused on whether the mailings were a direct threat to the listener.[88] In doing so, the court held that a reasonable person would believe mailings sent to a person's home are a true and direct threat.[89] The contextual analysis, involving the reasonable recipient's belief, led the court to find that the First Amendment did not protect the defendant's mailings.[90]

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[80] 994 F.2d 1318 (8th Cir. 1993).

[81] *Id.* at 1322, 1324.

[82] *Id*. at 1319-21.

[83] *Id*. at 1323-24.

[84] *Id.* at 1320-21.

[85] *Bellrichard*, 994 F.2d at 1322 (regarding the defendant's intention to carry out physical harm on the complainant if two juveniles, in a case he was interested in, were sentenced to an adult prison).

[86] *Id.* at 1322.

[87] *Id.* at 1321-23 ("Bellrichard's communications, viewed in context, would permit a reasonable jury to find that the communication conveys 'a determination or intent to injure presently or in the future.' ") (quoting Martin v. United States, 691 F.2d 1235, 1240 (8th Cir. 1982)). Also, Bellrichard admitted that he wrote the letters, and the specific address on the mailings would show the threats were directed towards the listener. *Id.* at 1321-22.

[88] *Id*. at 1321-23.

[89] *Bellrichard*, 994 F.2d at 1321-23; *see infra* section IV.A (noting that direct threats are connected to an invasion of privacy).

[90] *Bellrichard*, 994 F.2d at 1322, 1324.

B. What Actually Constitutes "Alarming" Speech? – The Narrow Application Approach

In order to protect a person's First Amendment rights, some courts have narrowly applied proscribable speech or conduct statutes only in cases where the conduct fell squarely within the language of the statute.[91] In *Cohen v. California*,[92] the defendant was convicted of the offense of disturbing the peace after he wore a jacket that bore the statement "Fuck the Draft" in a courthouse where women and children were present.[93] The defendant stated that he was aware of the message he displayed because it exemplified his true feelings towards the Vietnam War.[94] On appeal, the Supreme Court applied a thorough contextual analysis.[95] First, the Court held that, as a matter of law, the statement portrayed on the defendant's jacket was considered socially condemnable speech, but in context, "[t]he defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence."[96] The Court employed a narrow analysis when it interpreted the surrounding circumstances and held no person could consider the statement a direct personal threat because the jacket was not addressed to anyone specifically.[97] This narrow approach exemplified how the Supreme Court carefully scrutinized the issue of condemnable speech in relation to the First Amendment.[98] Therefore, a simple public display of unfavorable speech cannot be easily labeled as proscribable speech.[99]

In *United States v. Cassel*,[100] the Ninth Circuit applied the intended recipient test in its contextual true threat analysis in order to narrowly interpret the classes of unprotected speech.[101] The court held that speech may be deemed a true threat upon proof that the

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[91] *See supra* section III.B.

[92] 403 U.S. 15 (1971).

[93] *Id.* at 16.

[94] *Id.*

[95] *Id.* at 21-23.

[96] *Id.* at 16-17.

[97] *Cohen*, 403 U.S. at 20-22 ("Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

[98] *Id.* at 19-21.

[99] *Id.*

[100] 408 F.3d 622 (9th Cir. 2005).

[101] *Id.* at 633.

speaker subjectively intended the speech as a threat.[102] The defendant in *Cassel* was convicted of interfering with a federal sale of land by intimidation because he attempted to dissuade potential buyers from purchasing property near his home.[103] On appeal, the court stated a subjective intent analysis, not a negligence standard, is appropriate to determine if the defendant's speech was protected under the First Amendment.[104] The court in *Cassel* supported its approach when it discussed the jurisdiction's usual application of the objective reasonable person standard and stated, "[it] seems to suggest that the First Amendment permits punishing a threat made with only negligence as to the statement's threatening character."[105] This statement reflects the court's belief that an objective negligence standard cannot justly support the stripping of a person's First Amendment rights.[106] Therefore, the court held that even though a reasonable person standard was acceptable in prior opinions, it may not adequately protect one's speech.[107]

While many courts held proscribable speech statutes constitutional when narrowly interpreted, other courts have found those statutes unconstitutional on their face while conducting a true threat analysis. Although the facts in *Vives v. City of New York*[108] were similar to the facts in *Bellrichard*, the two cases had drastically different holdings.[109] The court in *Vives* held New York's Aggravated Harassment statute was facially unconstitutional to the extent the statute prohibited communications made with intent to annoy or alarm.[110] Similar to the defendant's writings in *Bellrichard*, the defendant in *Vives* sent a politician written materials in which he admit-

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[102] *Id.*

[103] *Id.* at 624-25 (stating that complainant testified "Cassel told him 'that if I [Goodin] tried to build anything on Lot 107, that it would definitely burn. He would see to that. That if I left anything there, it would be stolen, vandalized. He would see to that.' ").

[104] *Id.* at 629-30.

[105] *Cassel*, 408 F.3d at 629.

[106] *Id.* at 631 ("Only intentional threats [that] are *criminally* punishable [are consistent] with the First Amendment.") (emphasis added).

[107] *Id.* at 628-30 (quoting Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1079 (9th Cir. 2002) ("[W]e observed that 'the requirement of intent to intimidate cures whatever risk there might be of overbreadth.' ")). See also *supra* section III.B for a discussion of Vives v. City of New York, 305 F. Supp. 2d 289 (S.D.N.Y. 2003), and *infra* section IV.B for a discussion of vagueness.

[108] 305 F. Supp. 2d 289 (S.D.N.Y. 2003), *rev'd* on other grounds, 405 F.3d 115 (2d Cir. 2004).

[109] *Id.*; *Bellrichard*, 994 F.2d at 1319-21.

[110] *Vives*, 305 F. Supp. 2d at 289.

tedly intended to alarm the recipient with materials concerning the Jewish faith and current world events.[111] If the subjective intent analysis as stated in *Cassel* were applied, the court could have found the defendant guilty of intending to threaten the complainant.[112] However, the primary focus of the court in *Vives* was the evaluation of the statute itself, specifically the court's criticism of the breadth and vagueness of its language.[113] Unlike the court in *Bellrichard*, the court in *Vives* did not place much emphasis on the mailings being addressed and sent to the complainant[114] as a direct and personal true threat.[115]

The court in *Vives* criticized the statute by attempting to apply the language of the Aggravated Harassment Statute to the case before it. The court noted how the complainant and the arresting officer admitted that the materials in the envelope contained nothing threatening *per se*; therefore, the defendant could not have "annoyed" or "alarmed" the complainant with his mailings.[116] Further, the court stated the only materials that constitute a true threat fall into the categories of defamation, incitement, obscenity, or child pornography.[117] The court's criticism showed that the language of the statute created an immense gray area,[118] and that a person may not easily know which kind of conduct is proscribable.[119] Given the ambiguity of the

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[111] *Id.* at 293-94 ("The mailings include Vives's handwritten and typed statements, as well as copies of stories and other items taken from general circulation newspapers. Vives mails the materials to 'people of the Jewish faith with the intent to alarm them about current world events that have been prophesied in the Bible, including the unification of the European countries into a single political and military entity.' "). For more information on the mailings defendant sent, see *Bellrichard*, 994 F.2d at 1320.

[112] *Cassel*, 408 F.3d at 633.

[113] *Vives*, 305 F. Supp. 2d at 299-302.

[114] *Id.* at 294 (noting only the envelope was addressed to the complainant specifically and not the defendant's mailings). In contrast to the defendant in *Vives*, the defendant in *Bellrichard* specifically addressed the county attorney in his postcards. *Bellrichard*, 994 F.2d at 1321-22.

[115] *Vives*, 305 F. Supp. 2d at 294.

[116] *Id.* (noting the arresting officer's complainant report stated the defendant's mailings did not have threatening wording within it. The mailings were mainly political and religious statements and photocopy of a cutout newspaper article).

[117] *Vives*, 305 F. Supp. 2d at 298-99 (citing Ashcroft v. Free Speech Coal., 535 U.S. 234, 246 (2002)).

[118] *Id.*

[119] *Id.* at 300-01 ("The fact that Vives was arrested pursuant to section 240.30(1) for engaging in conduct that is firmly protected by the First Amendment, and that he no longer feels free to put his name and address on his mailings, exemplifies why section 240.30(1) cannot be reconciled with the First Amendment. Section 240.30(1) is therefore unconstitu-

statute as a whole, the court held that no form of analysis, as a matter of law, fact, or both, could determine when one's speech would cross the line from protected to criminal under the statute.[120]

Federal courts have used varying applications of proscribable speech statutes in which some courts found a broad category of unprotected speech or conduct, while other courts went beyond the language of the statute to narrowly limit what conduct is not afforded First Amendment protection.[121] Finally, the court in *Vives* held no method of the true threat analysis could justify a proscribable speech or conduct statute when its language is vague and unconstitutional on its face.[122] Even though there is a split among the federal courts in regard to what speech or conduct is proscribable, this split shows the continuous struggle of the courts to clearly define the line between protected and proscribed speech.

IV. THE NEW YORK APPROACH: HOW A RIGHT TO PRIVACY MAY JUSTIFY A LIMITATION ON THE FIRST AMENDMENT

Regarding the right to free speech, the New York Constitution mirrors the right exemplified in the United States Constitution. "Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the *abuse* of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."[123] While the New York Constitution proclaims every citizen has a fundamental right to free speech, it also declares every person is responsible for the *abuse* of that right.[124] This language specifically reveals the limits on the right to free speech, and it is within the discretion of the New York courts to determine how far to extend this right.[125]

A. PRIVACY INTERESTS IN A CONTEXTUAL ANALYSIS

The majority of New York courts have held the Aggravated Harassment statute constitutional, but only when narrowly interpret-

tional to the extent it prohibits communications, made with the intent to annoy or alarm.").

120 *Id.* at 299-302.

121 *Supra* section III.A-B.

122 *Supra* section III.B.

123 N.Y. CONST. art. I, § 8 (emphasis added).

124 *Id.*

125 *Id.*

ed.[126] The New York approach includes a consideration of a person's right to privacy, along with a contextual true threat analysis in order to determine if certain speech or conduct transfers from protected to proscribed.[127]

In *People v. Smith*,[128] the court analyzed the context of the speech in addition to the defendant's effect on the complainant's privacy interests in order to determine whether the defendant communicated a true threat.[129] In this case, the defendant first called a police officer regarding a complaint that he made, and the officer stated the manner was civil, not criminal.[130] However, the defendant continued to call the station, and within a three hour time period, the defendant had called the officer twenty-seven times.[131] Under a true threat analysis, the court narrowly applied the statute and held that the defendant's conduct fell within the "hard core"[132] of the statute and that any vagueness in the statute's language was not an issue in this situation.[133] While the defendant had initially called the police desk with a legitimate complaint, the court held that the repetition of the phone calls entailed harassing, not legitimate, conduct.[134] The court then analyzed the complainant's privacy interests in addition to the defendant's specific conduct in the situation.[135] Because the defendant's actions served no legitimate communication and constituted a repeated event in a short period of time, the complainant's right to privacy was "invaded in an essentially intolerable manner."[136] Therefore, once the defendant unreasonably invaded the complainant's privacy, the defendant lost his First Amendment protection.[137]

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[126] *See infra* section IV.A.

[127] *See infra* section IV.A; *Cohen*, 403 U.S. at 21-22. Although a consideration of a person's privacy interest is an important factor in New York, some federal opinions discuss privacy concerns in relation to what speech or conduct would constitute a true threat. *Id.*

[128] 392 N.Y.S.2d 968 (App. Term 1977).

[129] *Id.* at 969-71.

[130] *Id.* at 969.

[131] *Id.* 969-70.

[132] *Id.* at 970 ("[I]t is enough to say that 'even if the outermost boundaries of (subdivision one are) imprecise, any such uncertainty has little relevance here, where appellant's conduct falls squarely within the 'hard core' of the statute's proscription.' ") (quoting Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973)).

[133] *Smith*, 392 N.Y.S.2d at 970.

[134] *Id.*

[135] *Id.* at 970-71.

[136] *Id.* (quoting *Cohen*, 403 U.S. at 21).

[137] *Id.* at 970-71.

The New York Court of Appeals in *People v. Shack*[138] also analyzed the complainant's privacy interests to conclude the defendant's conduct was not protected.[139] The defendant in *Shack* called the complainant, his cousin and a psychiatrist, one hundred and eighty-five times between December and May with threatening messages.[140] The court held that "an individual's right to communicate must be balanced against the recipient's right 'to be let alone' in places in which the latter possesses a right of privacy."[141] The court went on to state, "[u]nder some circumstances, the privacy right may 'plainly outweigh' the free speech rights of an intruder."[142] In regard to the defendant's phone calls, the court stated that the complainant had a right to be free from unwanted phone calls, and this reasoning should serve as deterrence for people to not employ the telephone for "unjustifiable motives."[143] Therefore, when substantial privacy interests are invaded, the right to privacy may outweigh a person's right to free speech.

Although a person's right to privacy is given weighty consideration in condemnable speech or conduct cases in New York, the courts may still apply a true threat analysis in these cases. In *People v. Thompson*,[144] the court's contextual true threat analysis coupled with an examination of the complainant's privacy interests led to a more narrow interpretation of what constituted a true threat.[145] In *Thompson*, the defendant called the complainant numerous times in one month and on one occasion called the complainant and stated "I am on my way over there," and, shortly thereafter, the defendant was outside complainant's residence.[146] The court applied a contextual approach under its true threat analysis when it stated plain "annoy-

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[138] 658 N.E.2d 706 (N.Y. 1995).

[139] *Id.* at 706, 710-11.

[140] *Id.* at 709-10 (noting that the messages stated the defendant would set fire to the complainant's father's home and the defendant would call the Michigan licensing board to have complainant's psychologist's license revoked).

[141] *Id.* at 710 (citing Rowan v. United States Post Office Dep't, 397 U.S. 728, 736, (1970)).

[142] *Id.*

[143] *Shack*, 658 N.E.2d at 710-11 (noting the justification for the proscribable speech or conduct statute. The statute may limit a person's free speech, but is constitutional because it is narrowly tailored and protects its citizens from unwanted phone calls) (quoting United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978)).

[144] 905 N.Y.S.2d 449 (Crim. Ct. 2010).

[145] *Id.* at 494, 496-97.

[146] *Id.* at 453.

ing" speech could not be the sole basis for criminal prosecution.[147] In regard to the defendant's phone call, which pointed to the temporal proximity between the communication and the defendant's action upon it, the court narrowly interpreted the statute and held the incident was "facially insufficient to establish that the defendant made a genuine threat with the intent to annoy, threaten or alarm the complainant."[148] Concerning the complainant's privacy interest, the court held that the defendant's phone call did not constitute an invasion of privacy because there was a lack of evidence concerning the frequency and nature of the defendant's calls.[149] For the court, the overall incident was an isolated event rather than an actual threatening situation.[150] Therefore, the facts in *Thompson* represented how a seemingly concrete example of a true threat which is determined to be protected speech when analyzed using a contextual inquiry.[151]

The protection of one's right to privacy is highly relevant in determining which conduct crosses the protected speech or conduct barrier. If a court concluded a person's privacy interests were substantially invaded, it proves how the wrongdoer's conduct was not meant to be protected, enjoyed, or praised. Expectation of the right to privacy is a fundamental belief which many people share and want to protect. First Amendment protection should not extend to the point where it hinders another basic civil liberty.

B. Overbroad Equals Unconstitutional?

Even though the majority of New York State courts have held the Aggravated Harassment statute constitutional, the court in *People v. Dupont*[152] held the statute was unconstitutional as applied to the facts of the case.[153] The defendant in *Dupont* was charged under the

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147 *Id.* at 459.

148 *Id.* at 460-61 (noting that in order to prove a violation of the Aggravated Harassment statute, a communication must have actually occurred, and holding the only communication proven, the defendant's statement that "I'm on my way over there," was not a sufficient communication under the statute).

149 *Thompson*, 905 N.Y.S.2d at 496-97 ("With no further description as to the nature of the calls and/or the complainant's interactions with the Defendant, the Court does not find that the misdemeanor information is facially sufficient to show that the complainant was an unwilling listener.").

150 *Id.* at 461.

151 *Id.* at 494, 496-97.

152 486 N.Y.S.2d 169 (App. Div. 1985).

153 *Id.*

statute after he distributed a magazine, which claimed that his former attorney was a homosexual, and the complainant alleged that it portrayed his professional status in an unappealing light.[154] Although the defendant distributed the magazines around the complainant's town and even left numerous copies in front of the complainant's office,[155] the court did not believe the complainant's privacy interests were invaded, nor was the defendant's conduct proscribed under the statute.[156] The court supported its findings when it compared the defendant's conduct with the conduct of the defendant in *Smith*.[157] The defendant's conduct in *Smith* fell within the hard core of the statute's proscriptions because the repeated phone calls were considered harassing conduct.[158] In contrast, in *Dupont*, the defendant's mere distribution of literature did not invade the complainant's privacy interests or pose a true threat.[159]

Further, the court in *Dupont* challenged the actual language of the statute when it analyzed the statute's constitutionality as applied to the case.[160] The court's concern with the protection of First Amendment rights was apparent, and it stated, "First Amendment freedoms must be given weighty consideration in balancing them against the interests underlying challenged statutes."[161] Similar to the court's concern in *Vives*, the court in *Dupont* was troubled with the vagueness of the statute's language, which addressed, "[a] communication in a manner likely to cause annoyance or alarm."[162] The court broke down the very essence of the statute when it questioned whether the content of the communication, claims of homosexuality, *inter alia*, was condemned, or whether the actual form of the communication, magazine distribution, was proscribed.[163] Also, the court exhibited skepticism about the statute's determination of annoyance—how

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[154] *Id.* at 171-72 (noting the defendant called the complainant on one occasion stating he was coming out with a book soon which was an "exposé of the attorney's alleged homosexual lifestyle, replete with cartoons and pictures.").

[155] *Id.* at 172.

[156] *Id.* at 174.

[157] *Dupont*, 486 N.Y.S.2d at 173-74; *see also Smith*, 392 N.Y.S.2d 968; *see supra* section IV.A.

[158] *Dupont*, 486 N.Y.S.2d at 174.

[159] *Id.* at 174, 175 ("Although it may be argued that the magazine was obscene, this is neither an obscenity prosecution nor an obscenity statute.").

[160] *Id.* at 174-77.

[161] *Id.* at 175.

[162] *Id.* at 172-76 (quoting N.Y. PENAL LAW § 240.30(1) (McKinney 2012)).

[163] *Dupont*, 486 N.Y.S.2d at 174-75.

does one measure annoyance to be compliable with the statute?[164] With these proposed questions on how to reconcile the ambiguity within the statute, the court determined that the application of the statute to this particular defendant's conduct could not be justified under the First Amendment.[165]

V. CONCLUSION

It is evident from case law and modern societal norms that the protection of one's free speech under the First Amendment is a right that will always be fought for, analyzed, and praised. The balance between the law's focus on policing and protecting people from unlawful conduct, and a person's right to exert his or her First Amendment freedom never falls at a perfect equilibrium.

Specifically regarding New York's Aggravated Harassment statute, both federal and New York courts have dealt with the reality of the conflict between the statute and the First Amendment. While cases such as *Vives* and *Dupont* declared the statute facially unconstitutional, other courts articulated a need for a proscribable speech or conduct statute, but held it is narrowly applicable. Although the language condemning "annoying" or "alarming" speech does suggest a level of ambiguity, a contextual true threat analysis will determine whether one's speech or conduct goes beyond a protected act, such as being an "annoying" telemarketer and whether it becomes a proscribable act.

The test set out in *Brodeur* has proven to be the most efficient test, when compared with other cases, to determine whether a person's speech is truly threatening. Not only did the court determine whether the defendant's conduct constituted a true threat as a matter of law, the court also undertook an intensive contextual analysis of fact in order to determine the meaning of the verbal statements and the poster.[166] Unlike some cases previously discussed, the court in *Brodeur* heavily relied on what the intended recipient of the conduct

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[164] *Id.* at 174.

[165] *Id.* at 174-76 ("It cannot be doubted that a statute drawn in so narrow a form as to criminally punish one who describes another as a homosexual . . . would be unconstitutional."). Because there are other civil remedies for the defendant's type of conduct, such as a defamation action, the court held the defendant's conduct was not justified as proscribable speech unprotected by the First Amendment. *Id.*

[166] *Supra* section II.C.1-2.

interpreted the behavior to mean.[167] When determining context, it is appropriate to evaluate whether the actual complainant *reasonably* believed the defendant's conduct to be a true threat. Many cases involving New York's Aggravated Harassment statute and other proscribable speech or conduct statutes perceptibly demonstrate a rather unpleasant relationship between the defendant and the complainant. Therefore, in the analysis of these cases, the intended recipient's interpretation along with that of the objective reasonable person standard would provide a more exhaustive examination of the incident, and determine why these two opposing parties behaved in such a way.

The law is not blind to the propensities of human nature. Courts realize our imperfections may cause us to be unreasonable on occasion, and that realization may save a person from being convicted of a criminal offense and stripped of his or her First Amendment rights. However, as stated in many cases, not all conduct deserves First Amendment protection. In order to create a more uniform approach to defining the line between protected and criminal conduct, there needs to be a continuing effort by the courts to perform a meticulous contextual analysis of the circumstances to prove whether the incident was a simple flare up of one's temper or a serious and personal threat.

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[167] *Supra* section II.C.2.

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