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Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites

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INCITING TERRORISM ON THE INTERNET: AN APPLICATION OF *BRANDENBURG* TO TERRORIST WEBSITES

I. INTRODUCTION

The unexpected attacks of September 11, 2001 abruptly shattered the illusory bubble of isolation that had heretofore kept America psychologically "safe" from the insanity of international terrorism. The acts committed on that terrible day expanded the shadow of global terrorism directly to our borders. Unlike the focused military attack on Pearl Harbor and the targeted destruction of life and property in Oklahoma City perpetrated by our own citizens, September 11th made us the victims of a dogma war that is marked by random and incomprehensibly horrific acts, wrought by a loose network of fanatics who are joined not by the ideals and conventional nationalism of past conflicts, but instead by an aberrant religious belief that includes a command to kill Americans.[1] Such fanatics are identifiable not by a particular geography or country, but instead by their untenable hatred of the United States and single-minded devotion to the annihilation of our way of life. Who are our antagonists, and when will they strike again? Despite our technology, our military might, and our global position as the last standing superpower, we really do not know precisely who, where, or when, but we are absolutely certain that terrorism is no longer the remote problem of other nations: we are its direct victims and have little assurance that it can be effectively stopped. We intuitively know this as Americans because it is the freedom inherent to our open way of life that ironically provides easy access to us as targets and provides our enemies with the same legal protection of individual rights: rights that can be openly abused to facilitate the execution of acts intended to destroy our way of life. A lot has changed in the United States since

1. Usamah Bin-Muhammad Bin-Laden et al., *Jihad Against Jews and Crusaders: World Islamic Front Statement at http://www.fas.org/irp/world/para/docs/980223-fatwa.htm* (Feb. 23, 1998). From a religions ruling (fatwa) issued by Usama bin Laden and his associates:

> The ruling to kill the Americans and their allies – civilians and military – is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty Allah, "and fight the pagans all together as they fight you all together," and "fight them until there is no more tumult or oppression, and there prevail justice and faith in Allah."

Id.

September 11th, and one of the most significant changes of all is the feeling of powerlessness that will be with us until the evil that spawns terrorism has been identified and subjected to the justice of civilized nations. Until then, we will be constantly looking over our shoulders, no longer safe from the unspeakable evils that torment the world. Because we cannot know for certain when the next attack will come or from where it will strike, we have been forced to an unprecedented threshold of danger that is already having a significant impact on our freedom and our daily lives.[2]

At various times during our history the judiciary has had to balance the scope of individual constitutional rights against Congress's legitimate role to protect our democratic system.[3] It is a recurrent truism that a majority of Americans will choose national security and personal safety in exchange for certain restrictions of individual rights when faced with the potential for catastrophic consequences, particularly during periods of war and times when our society was perceived to be in danger from radical influence.[4] A fundamental right that has consistently come under attack at such times is the right to free speech, especially when the speech at issue is unpopular or inconsistent with the majority view of traditional American societal norms, thus perceived as a danger of such magnitude that a response more immediate than public debate is deemed warranted.[5] Freedom of speech is one of our

2. *See, e.g.*, U.S.A. Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). Air travel in general and airport security specifically have been highly visible manifestations of the nation's shift toward increased vigilance through restrictions in the name of safety. The added restrictions have resulted in substantial impositions on the freedom of the traveling public to move about in airports without being subjected to x-rays, physical searches and potential felony charges for something as innocuous as making jokes. Other signs of changes in our society are not as visible, but potentially more damaging to individual freedoms. The most obvious example is the Patriot Act, which expands the powers of the Federal Government to gather information and invade privacy. *Id.*

3. *See* Schenck v. United States, 249 U.S. 47, 52 (1919). This theme was succinctly summarized by Justice Holmes when he articulated his "clear and present danger" test. *Id.*

4. In modern times, the airport experience is the most visible example of this proposition. People often express their agreement with heightened, often-invasive security searches if safety is at stake. *See* Jere Longman, *A Nation Challenged: Airport Delays; Waits Increasing for Air Travelers*, N.Y. TIMES, Sept. 29, 2001, at A1; ARTHUR J. SABIN, IN CALMER TIMES: THE SUPREME COURT AND RED MONDAY 46 (1999). From a historical perspective, Professor Sabin concludes that the *Dennis* trial and its fallout was a "mirror of American society," broad elements of which were fearful of the potential for "losing" America to the communists resulting in a resolute effort to eliminate the threat of communism at home. *Id.* (referring to Dennis v. United States, 341 U.S. 494 (1951)).

5. The Smith Act, 18 U.S.C. § 2385 (2000) (enacted in 1940). The Smith Act is an example of a statute that restricts First Amendment rights. Passed in 1940 in reaction to the events taking place in Europe, it reads in part:

> Whoever knowingly or willfully advocates, . . . or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the Unites States . . . ; or Whoever, with intent to cause the overthrow or destruction of [the government of the

most protected rights.[6] With few exceptions, one of which will be examined here, speech that contributes to the free exchange of diverse ideas is constitutionally welcome, no matter how unpopular, misguided, or repugnant it is perceived to be. The constitutional answer to repugnant ideas has evolved, during our relatively short American history, from one of outright suppression of unpopular speech and prosecution of those who promulgated it[7] to the modern concept of a "free trade in ideas," where the response to unpopular speech is simply more speech.[8] Under this ideal, a multiplicity of ideas is encouraged to congregate in the public arena of debate, thereby exposing the false by illuminating it with the truth.[9] The virtually unrestrained freedom of expression we enjoy in America is central to the idea of a democracy where the minority voice is sustained by the force of law, necessary to counter the oppressive tendency of unadulterated majority rule.

Notwithstanding the expansive range of the First Amendment right to free speech, not all speech is protected, and the right to free speech is not absolute.[10] Throughout our history, the Court has recognized certain types of speech as being of such low value or being so harmful to an ordered society as

> United States], prints, publishes, . . . or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force of violence, or attempts to do so . . . Shall be fined not more than $20,000 or imprisoned for not more than twenty years or both.

Id.

6. KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 964 (14th ed., 2001). "The Court has shown special judicial solicitude for free speech, meaning that governmental action directed at expression must satisfy a greater burden of justification than government action directed at most other forms of behavior." *Id.*

7. Reference here is to the Alien and Sedition Acts passed while John Adams was President in an attempt to cancel the perceived threat to the nation from the radical ideas emanating from the French Revolution. At the time, war with France was imminent, and Congress reacted with the Alien Act to rid the nation of aliens who were believed at the time to be plotting against the U.S. and generally creating an atmosphere of hostility. The Sedition Act criminalized public criticism of the government, the President or Congress. *See* An Act Concerning Aliens, 1 Stat. 570 (1798); An Act in Addition to the Act Entitled An Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 596 (1798). *See also* SABIN, *supra* note 4, at 14.

8. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Justice Holmes's dissent in *Abrams* laid the foundation for the modern view of freedom of expression.

9. *Id*.

10. Frohwerk v. United States, 249 U.S. 204, 206 (1919) (Justice Holmes recognized that First Amendment protection does not extend to "every possible use of language." He explained that neither Hamilton nor Madison ever thought that criminalizing the counsel of murder would be an interference with free speech rights under the Constitution); *accord* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("It is a fundamental principle, long established that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.").

failing to rise to the level of protected speech even within the construct of a free exchange of ideas.[11] The type of unprotected speech that will be examined here is incitement type speech, i.e., speech that "incites imminent lawless action," with a focus on the incitement of terrorist acts via the Internet. Speech that incites lawless activity, or has the tendency to do so, has historically failed to find sanctuary in the Constitution. In a famous and arguably the first substantive free speech opinion produced by the Supreme Court, Justice Holmes used the analogy of a man falsely shouting fire in a crowded theater and creating a panic as representative of harmful and therefore unprotected speech.[12]

This general argument that the Constitution does not protect speech tending to incite harm or criminal activity has prevailed throughout the Court's First Amendment jurisprudence.[13] Additionally, the Court has wrestled with the paradox between an open democracy and a constitution that arguably protected the right to advocate the destruction of the American democratic government through anarchy, sedition, and the promulgation of some extremely unpopular and, under the circumstances, truly reprehensible ideas.[14]

11. *See* SULLIVAN & GUNTHER, *supra* note 6, at 965-68. Throughout our First Amendment jurisprudence there has been a debate with regard to whether the constitutional right is absolute or whether there are competing interests that require a balancing of the free speech right against compelling state interests. Certain types of speech, however, have been universally recognized as warranting either no or less protection, i.e., obscenity, fighting words, libel, and incitement. *Id.*

12. Schenck v. United States, 249 U.S. 47, 52 (1919).

13. *See* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 119-20 (Jamie Kalven, ed., 1988). An often quoted hypothetical supporting the argument that even expressions of opinion when stated under certain circumstances do not deserve protection, is from John Stuart Mill: "An opinion that corn-dealers are starvers of the poor . . . ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer." JOHN STUART MILL, ON LIBERTY 76 (Atlantic Monthly Press ed., 1921).

14. For a concise history and a discussion on the Supreme Court's role in defining the scope of the rights of individuals who advocated communism, see generally, SABIN, *supra* note 4. Representative of "reprehensible ideas" were communists who sought violent overthrow of the U.S. government and the capitalist system. So great was the fear and loathing for a form of government in America that beginning with the early 1900's and the Russian revolution where communism became a reality through the Cold War years when communism reached its zenith in the world, those even remotely connected to communism came under vociferous attack and were subjected to criminal charges, loss of livelihood, and stained reputations. All segments of the government, including the judiciary, participated to further an objective of total ruin of the communist party in the United States. Looking back on those years, we can observe and judge retrospectively, McCarthyism, the actions of the Hoover FBI, and the raw oppressive power of a federal government bent on eliminating this threat to our way of life. But, what would have been the outcome for America if the communist movement were not treated as a threat? At the turn of the century, the United States was still a fragile nation, having barely won its independence from England, scarred by its narrow escape from civil war, and a participant in a world war with Germany, including an incursion into Russia during the popular revolution. Victorious from the

Despite the Court's continual expansion of the protection of the First Amendment, incitement to imminent lawless activity is still an exception to constitutional speech protection.[15]

The path taken by the Court to establish our modern free speech rights will be explored in sufficient detail to provide a historical overture to the modern incitement exception, established by the Court in its 1969 decision, *Brandenburg v. Ohio*.[16] The *Brandenburg* decision was the culmination of a number of significant Supreme Court decisions that struggled with the scope of First Amendment protection for the universal evil of inciting others to commit illegal acts.[17] Although *Brandenburg* is read as significantly expanding First Amendment protection by extending protection to mere advocacy, it nonetheless preserved an exception for incitement type speech where such speech is "directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."[18] Because of the necessity to show that the speech in question is advocating *imminent* lawless action, the exception provided by the Court in *Brandenburg* is narrow and difficult to satisfy, triggering the strictest scrutiny by the courts in order that the broadest spectrum of ideas can be freely exchanged in the public discourse.[19] As narrow as it is, however, the exception exists because the Court steadfastly acknowledges the necessity in allowing for circumstances where speech that

"war to end all wars," the United States became a world leader as the industrial age blossomed, fueled by capitalism, and brought with it enormous wealth and power to a feisty young nation. In its zeal to grow, capitalism's excesses treated labor as fodder and left to its own devices; lead the country to unprecedented economic depression and the financial ruin of most Americans. Under circumstances such as these, when much of the country was suffering largely at the hands of unrestrained capitalism and failed government policy, it is not difficult to envision a substantial vulnerability to the message of communism as an alternative to the system that was responsible for the ruin of so many. Given that context, it is equally not difficult to understand the government's response as increased vulnerability also increased the reality of danger from the advocacy of a radically different form of government. Today we can see how communism utterly failed. Was the oppression of communism in the United States during the twentieth century justified if it saved us from the eventual outcome suffered by the people of the Soviet block countries? Certainly we could not predict the ultimate outcome in those early days, but it was clear that American ideals of freedom and individual opportunity were held in high value and were at substantial risk. Because of this fear that American ideals might be lost, some of the ideals that America represented were discounted in the name of self-preservation, saving their restoration for the day the threat was inconsequential. *Id.*

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

16. *Id*.

17. *Schenck*, 249 U.S. at 47; Frohwerk v. United States, 249 U.S. 204 (1919); Debs v.United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); Dennis v. United States, 341 U.S. 494 (1951).

18. *Brandenburg*, 395 U.S. at 447 (emphasis added).

19. *Id.* at 448.

advocates harm cannot be effectively countered with the constitutionally favored solution of more speech.[20]

The focus of this paper will analyze the *Brandenburg* exception for application to censure terrorist Internet sites advocating the murder of Americans and the destruction of American property. The proposed solution will examine in particular the imminence element of the exception, showing how *Brandenburg* can be used as appropriate authority for challenging terrorist incitement-type speech transmitted via the Internet. Modern First Amendment incitement jurisprudence is grounded in the scenario of a contemporaneous setting between "speaker" and "hearer" concluding that speech is protected, unless the lawless action advocated is imminent and likely to incite or produce such action.

In order to be of service to society, the law must possess a certain elasticity that allows its application to a variety of scenarios. But, as cyberspace has replaced the soapbox as the "poor man's" forum for the propagation of messages and ideas, the Court has not yet fully explored the unique characteristics of a ubiquitous electronic forum, where speakers are unseen and listeners unknown in a non-contemporaneous setting. There is no question that the terrorists infesting the world today are single-minded in their determination to accomplish their evil objectives and are quite willing to die in the process. Surely speech that advocates murder and wanton destruction is not worthy of sheltered access in the "marketplace of ideas." Should terrorist websites advocating the murder of our people and destruction of our nation be shielded by the Constitution on the basis that speech is an effective response to a terrorist's message? A common-sense response might be no, but if the forum is the Internet and the *Brandenburg* exception is applied, the answer is yes. Applying traditional *Brandenburg* analysis to challenge the validity of First Amendment protection to a website inciting others to conduct terrorism against the United States has some problems, chief among them the need to satisfy the imminence prong of the test. But, under the circumstances that exist today, this paper proposes a novel approach to the application of the *Brandenburg* exception to place websites advocating terrorism outside the pale of constitutional protection.

The Internet, more than any other medium to date, is perceived to possess the potential to grant everyone a similar power to freely trade in ideas, a concept eloquently articulated by Justice Holmes as the ideal for free

20. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

> [I] think we should be eternally vigilant against attempts to check the expression of opinions we loathe and believe to be fraught with death, *unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country*.

Id. (emphasis added).

expression in an open democratic society.[21] Proponents of the Internet tend to be free expression absolutists and, not unlike other purists, fiercely guard the right to free speech under any circumstances.[22] But, the Court has not adopted an absolutist view, opting instead to provide expansive yet not all encompassing protection to free expression.[23] If the freedom of speech is therefore not absolute, how do we determine, for a given set of circumstances, when expression can be restricted? *Brandenburg* provides the basis for making that determination for speech that incites others to unlawful activity, but its modern application has been to situations more akin to the real-time characteristics of a soapbox than to the virtual, extra-contemporaneous character of the Internet. Since the advent of the Internet, no website to date has been challenged under the *Brandenburg* exception, even though there are some sites that have generated a First Amendment challenge under a "true threat" theory.[24] Is incitement type speech on the Internet protected because of the nature of the Internet itself and the perceived difficulty attached to satisfying the imminence element of *Brandenburg*? Does the nature of the Internet foreclose the application of the exception to any alleged incitement speech found there? Put another way, is it possible that the Internet opens a loophole in the *Brandenburg* exception?

This paper examines an approach to the application of the *Brandenburg* incitement exception to websites that advocate terrorist acts against the United States under specific circumstances and suggests a constitutional basis to censure such sites without disturbing the significant progress the Court has made toward protecting the right of free speech. The suggested approach adopts the position that the circumstances that now exist within the United States arising from the terrorist attacks on September 11th, 2001 and the subsequent heightened state of national alert to terrorist activity has placed the

21. *Id.* (Holmes, J., dissenting).

22. Internet proponents use the First Amendment to defend the right to free speech as zealously as the National Rifle Association uses the Second Amendment to defend the right to possess firearms. For an example, see generally MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE (1998).

23. Koningsberg v. State Bar of California, 366 U.S. 36, 49 (1961) ("[W]e reject the view that freedom of speech and association . . . are absolutes.").

24. Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1062-64 (9th Cir. 2002) (Planned Parenthood challenged a site known as "The Nuremberg Files," a site devoted to ending abortion and infamous for listing the names and personal information of abortion doctors along with a graphic representation of their status, e.g., injured or killed. The site and two anti-abortion posters were challenged on a "true threat" theory, alleging that the site and the posters represented a threat to the safety and lives of the abortion doctors listed on the site). For an in depth discussion of threats and incitement, see generally Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV 541 (2000); John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425 (2002).

likelihood of further terrorist acts at a "threshold of imminence" such that the serious advocacy of terrorist acts via the Internet can be placed beyond the pale of constitutional protection in accord with the *Brandenburg* incitement exception. In the next section, Part II, a historical review of the Supreme Court's development of First Amendment incitement doctrine is examined to establish the backdrop for the current incitement standard, beginning with Justice Holmes's "clear and present danger" test in *Schenck v. United States*[25] to the reformulation of the test in *Dennis v. United States*.[26] Part III examines the landmark *Brandenburg* decision and the founding of the modern incitement exception, showing how the Court has applied it in modern times. Representative Internet sites are considered in Part IV, including a brief look at a terrorist website, setting the stage in Part V for an examination of a proposed application of the *Brandenburg* incitement exception to challenge websites advocating terrorism.

II. EVOLUTION OF FIRST AMENDMENT INCITEMENT JURISPRUDENCE

The backdrop to the Court's first substantive foray into First Amendment speech protection was the First World War (the fight with Germany) and the United States' incursion into Russia at the time of the Russian revolution. The early cases dealt with speech made during wartime where the "speakers" were prosecuted and convicted under provisions of the Espionage Act of 1917 for advocating resistance to the military.[27] The mood of the nation was such that the war was considered unavoidable, and conscription was believed by the majority of the population to be a "necessary and just" way to raise a national army.[28] It was in this context and under such circumstances that the Court considered the power of government to regulate speech.[29]

25. Shenck v. United States, 249 U.S. 47, 52 (1919).

26. Dennis v. United States, 341 U.S. 494, 509 (1951).

27. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917). As enacted on June 15, 1917, the Espionage Act established the following offenses:

> Whoever, when the United States is at war, shall willfully make of convey false reports or false statements with intent to interfere with the operation of success of the military or naval forces of the United States or to promote the success of its enemies and whoever, when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall willfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

Id.

28. ZECHARAIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES, 36 (1954).

29. *See, e.g.*, Masses Pub. Co. v. Patten, 244 F. 535 (D.C.N.Y. 1917). The genesis of judicial circumscription of the free expression of subversive advocacy had its beginnings two years before the Supreme Court decided its first significant free speech case. In July of 1917, District Court Judge Learned Hand granted an injunction against the postmaster of New York

A. The Wartime Trilogy

In 1919, the Supreme Court decided three cases within a week of each other, all involving violations of various provisions of the 1917 Espionage Act[30] during the United States' involvement in the First World War.[31] The opinions were all written by Justice Holmes and represented the Supreme Court's first significant analysis of the scope of First Amendment protection for speech that advocated unlawful activity.[32]

1. *Schenck v. United States*

Justice Holmes wrote the unanimous opinion in *Schenck*, the first case in the trilogy, establishing the "clear and present danger" test that became a foundation for deciding whether certain speech advocating lawless action was shielded by the Constitution.[33] Schenck was the general secretary of the Socialist Party and was convicted for conspiring to violate the Espionage Act of 1917 by printing circulars denouncing the conscription statute and urging resistance to the draft.[34] Schenck asserted that the First Amendment protected the circulars, and it was on this ground that the case made it to the Supreme

who had refused to accept the publications of the Masses Publishing Company, a radical organization opposed to the military draft. *Id.* At issue was whether certain cartoons contained within the offending publications violated certain provisions of the Espionage Act, the same act that the Supreme Court would deal with two years later. *Id.* In arriving at his decision, Judge Hand used statutory construction of the act itself rather than the First Amendment as a judicial tactic for determining whether the cartoons fell within the provisions of the statute. *Id.* Acknowledging that during times of war, Congress has the power to suppress activity possessed with the capacity to jeopardize the existence of the state, Judge Hand proceeded to define the scope of the postmaster's authority to ban the mailings as that based on the language of the act and Congress's intention of the act. *Id.* Construing the language of the statute proscribing the willful making of false statements as it applies to the cartoons, Judge Hand determines that the cartoons in question were within the "range of opinion and of criticism," concluding that the authority granted by the right of free expression privileges such statements. *Id.* Judge Hand's decision was reversed on appeal, but what is remarkable about the *Masses* opinion is that Judge Hand draws a line between a legitimate state power to limit to expression that functions as a "trigger of [illegal] action" and mere political agitation, positioning the line at a point where agitation becomes a "direct incitement to violent resistance." Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917). The distinction made by Judge Hand in *Masses* is an ironic backdrop to the path taken by the Supreme Court as it took up violations of the Espionage Act and the constitutional protection afforded such violations by the First Amendment. *Id.*

30. Espionage Act of 1917, 40 Stat. at 219. The key provisions of the 1917 Espionage Act violated by Schenck prohibited obstruction of military recruiting, causing insubordination within the military forces, use of the mails to send materials declared non-mailable by the Act, and for unlawfully using the mails to send such materials. *Schenck*, 249 U.S. at 52.

31. *Schenck*, 249 U.S. at 52; Frohwerk v. United States, 249 U.S. 204, 205 (1919); Debs v. United States, 249 U.S. 211, 212 (1919).

32. SULLIVAN & GUNTHER, *supra* note 6, at 964.

33. *Schenck*, 249 U.S. at 48.

34. *Id.* (all facts articulated in this section are taken from the Court's opinion in *Schenck*).

Court. In his opinion, Justice Holmes observed that the leaflets would not have been sent unless Schenck intended for them to obstruct the military draft.[35] But, even if this assumption is true, Justice Holmes conceded that the messages printed on the circulars would be constitutionally protected in "many places and in ordinary times," making it apparent that the first step in determining whether speech is protected by the First Amendment, is to consider the circumstances within which it is delivered.[36] Justice Holmes made it clear, therefore, that the circumstances and the context within which speech is used can shift the boundaries of First Amendment protection.[37] His famous example was of a man falsely shouting fire in a crowded theater and causing a panic: circumstances that according to Holmes would remove a First Amendment shield even under the "most stringent protection of speech."[38] That same shout in an empty theater, or even in crowded theater when there really was a fire, would be fully protected. In other words, speech by itself is a constant, but the circumstances in which it is used can vary the scope of constitutional protection. Holmes's proffered test to determine if otherwise protected speech belongs outside the protection of the First Amendment is whether it is used under such circumstances as to create a "clear and present danger" that the challenged speech would bring about the "substantive evils that Congress has a right to prevent."[39] Holmes was quite unequivocal when he said there is less tolerance for speech critical of the nation's war policy while the nation is in a state of war than during peacetime and speech possessing even the *tendency*[40] to obstruct a national war effort, cannot be

35. *Id.* at 51. Here, Justice Holmes unlocks the door to modern First Amendment jurisprudence by noting that the First Amendment is not "confined to previous restraints." *Id.* Prior restraint involved a requirement to obtain a license from the government to publish printed matter, having its roots in English law. In order to own and operate a printing press, for example, a license was required from the government; presumably the government could revoke the license at will, thereby effectively controlling what was printed. From the time the Bill of Rights was enacted and throughout much of the 19th century, it was generally thought that the First Amendment was a response to prior restraint. Under this construction, the protection afforded to speech by the Constitution was limited and until the Supreme Court began its First Amendment journey in the 20th Century, the government could, and did, restrict speech with few challenges. The almost casual acknowledgement by Justice Holmes that the First Amendment stands for more than a response to prior restraint was an important pronouncement under the circumstances.

36. *Id.* at 52.

37. *Id.*

38. *Schenck*, 249 U.S. at 52.

39. *Id.*

40. *See* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLES DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 384-89 (2000) (explaining that the "bad tendency" test employed to suppress speech was used extensively by abolitionists to justify suppression of anti-slavery speech and can be found as far back in legal history as Blackstone. The test required no actual consequences, nor was there any need to show a temporal connection between the so-called dangerous speech and the evil presumed to result from it. As

sanctioned under the Constitution.[41] The result of Holmes's analysis is important because he has no trouble denying protection to speech that does not actually produce the intended effect or harm as long as it can be found to have been expressed with the requisite intent and possessed with the tendency for future mischief.[42] Thus, the test for proscribing speech advocating unlawful action after *Schenck* was whether the challenged speech was used in circumstances that create a "clear and present danger" that a substantive evil may result.[43] One such circumstance identified as justifying a contraction of the scope of First Amendment protection is when the nation is at war.[44]

2. *Frohwerk v. United States*

Decided a week after *Schenck*, the Court reviewed the conviction of Jacob Frohwerk who, like Schenck, was convicted for conspiring to violate Espionage Act.[45] The offense arose from the publication of a number of articles in the *Missouri Staats Zeitung*, a newspaper of limited circulation, strongly decrying the hypocritical involvement of the United States in the war against Germany and condemning the draft as a wrong greater than the wrong committed by one who resists it. The Court rendered a unanimous opinion, sustained the convictions, and referred to its decision in *Schenck*.[46] One of the things worth noting about *Frohwerk*, in the context of the First Amendment, is Justice Holmes's concession that criticism of the government even during war would not be a crime under some circumstances.[47] This was somewhat inconsistent with his opinion in *Schenck*, where the fact that the nation was at war seemed to hold some significance to where the protection boundary is drawn.[48] Applying the "clear and present danger" test to the record at hand, Holmes found sufficient danger in the possibility that the newspaper could have stirred up some real mischief, likening the articles to "a little breath" but "enough to kindle a flame" if that possibility was relied on by the authors.[49] While the actual "clear and present danger" found in both *Frohwerk* and *Schenck* seems incongruent with a common understanding of the literal terms,

can be seen from the *Schenck* decision, the bad tendency test continued to be a justification for speech suppression into the twentieth century).

41. *Schenck*, 249 U.S. at 52 (emphasis added).

42. *Id.*

43. *Id*.

44. *Id*.

45. Frohwerk v. United States, 249 U.S. 204, 205 (1919) (all facts articulated in this section are taken from the Court's opinion in *Frohwerk*).

46. *Id*. at 206.

47. *Id*. at 208.

48. *Schenck*, 249 U.S. at 52.

49. *Frohwerk*, 249 U.S. at 209.

it is clear after *Frohwerk* that circumstances and the context within which words are used are determinative to the scope of speech protection.

3. *Debs v. United States*

The last case in the trilogy of wartime cases, *Debs v. United States*,[50] was decided on the same day as *Frohwerk* and unanimously affirmed the conviction of one Eugene V. Debs for violations of the Espionage Act.[51] Eugene V. Debs was a leader of the Socialist movement and had run for president under the Socialist Party ticket numerous times, and therefore he was not within the class of relatively obscure characters who had run afoul of the Espionage Act in *Schenck* and *Frohwerk*.[52] Mr. Debs was convicted under the provision of the Espionage Act criminalizing "causing or attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military," the violations resulted from a public speech given in Canton, Ohio in June of 1918.[53] Mr. Debs was making a political speech expounding the economic virtues of Socialism and used the war as an example of the "supreme curse of capitalism."[54] The speech contained a harsh indictment of government ("master class") declaring wars for which the working people ("subject class") [involuntarily] furnished the corpses.[55] The remarks were made at a convention of Socialists, were not directed specifically to persons subject to the draft or to soldiers, and did not advocate resistance to the draft,[56] one of the factors distinguishing Debs's speech from the speech activities of Messrs. Schenck and Frohwerk. At his trial, Debs took the stand and frankly admitted his abhorrence of war and his opposition to it, while asserting that his speech did not justify the charges against him.[57] Central to the justification that the Court used to affirm Debs's conviction were the remarks he made concerning Rose Pastor Stokes, a woman convicted under the Espionage Act for attempting to cause insubordination in the military, stating at his trial that if she was guilty so was he.[58] Another particular piece of evidence used by the Court to sustain the conviction was an "Anti-War Proclamation" that Debs referred to in his testimony to the jury, which was particularly damning because it contained a recommendation for "continuous, active and public opposition to the war."[59] The instructions given to the jury at his trial were

50. Debs v. United States, 249 U.S. 211 (1919).
51. *Id*. at 216.
52. *See* CHAFEE, *supra* note 28, at 84 n.89.
53. *Debs*, 249 U.S. at 212.
54. *See* CHAFEE, *supra* note 28, at 85.
55. *Debs*, 249 U.S. at 213.
56. *Id*. at 212-13.
57. *Id.* at 214.
58. *Id*.
59. *Id.* at 215.

such that if the "natural and intended effect" of his speech was to obstruct recruiting and, after considering all the circumstances, that was the probable effect, the speech would not be protected even if made in the context of a "general program and expressions of a general and conscientious belief."[60] In other words, even if Debs's speech was found to be ordinarily protected political speech on the general topic of Socialism, if he intended for his speech to have the effect of obstructing the draft, and if there was a reasonable probability that the words used possessed the tendency to do so, there would be no constitutional protection for the offending words on the basis that they were part of an otherwise protected political speech.[61] The jury found sufficient evidence under those instructions to return a verdict against Debs, which the Court unanimously affirmed.[62]

When one considers that Debs was an activist politician who had been a candidate for the office of President of the United States four times prior to his conviction,[63] coupled with the paucity of evidence that convicted him to a term of ten years for making what would certainly be considered today nothing more than a political speech, the justification for such a harsh outcome is one that is difficult to fathom, particularly under test labeled "clear and present danger." Is it that the perceived danger was partly found in Mr. Debs's socialist views, which if fully realized would effectively finish the American system of republican government and individual freedom? Considering the circumstances of the times, i.e., the war, revolution in Russia and the emergence of communism as a major system of government, the influx of immigrants with arguably radical views, and the vulnerability of the United States as it emerged on the world stage as a major power, it is possible to imagine such danger to the essence of Americanism, where extraordinary circumstances may exist whereby the first order of government is to survive, even at the risk of restricting individual rights. Perhaps these thoughts offer some validation for the paradoxical decisions of the Court in the wartime cases as Justice Holmes articulated principles of broader protection for speech while sustaining the government restrictions.[64]

60. *Debs*, 249 U.S. at 216.

61. *Id.*

62. *Id*. at 217.

63. *See* CHAFEE, *supra* note 28, at 84 n.89. In 1920 when he was in jail, Eugene Debs ran for President of the United States for the fifth time as the Socialist candidate, receiving 919,799 votes, more than he had received in 1912 when he ran last. *Id.*

64. *See* CHAFEE, *supra* note 28. Professor Chafee suggests that Justice Holmes wrote the opinions in the wartime cases to promote the cause for expansive freedom of speech and was waiting for the right opportunity to break from the mold. *Id.* That opportunity came with the *Abrams* case, *see infra* at Section II.B.

4. The Wartime Trilogy Summarized

Simply put, the wartime trilogy sustained statutes prohibiting *expression* by linking the challenged speech to the circumstances within which the speech was used to adjust the scope of constitutional protection. Speakers, therefore, weren't being punished for the *results* of their speech, but essentially for expressing ideas that coincidentally were immensely unpopular for the times.[65] The "clear and present danger" test established by the Court, while facially speech-friendly, was used instead to move the boundaries of the First Amendment to effectively bypass the protection normally afforded such speech under different, non-wartime, circumstances. It has been argued with force that the decisions in these cases were a reflection of the popular sentiments of the times[66] and that the trials were more political in nature than neutral examinations on the merits, thus failing to rise to the ideals of free expression set when the nation was born.[67] But there is another argument to be made, and that is the danger perceived by Congress was genuine, and some restrictions were in order for self-preservation purposes.[68] Did the Court properly affirm the statutory restrictions placed on mere expression? In retrospect, the affirmations by themselves fall far short of the model for a free and open society. But what can be drawn from these decisions, when considered in the context of the geo-political situation of the times is a certain support for the proposition that the First Amendment has boundaries that may be altered under circumstances where a perceived danger is so great that it outweighs the potential to expose the necessary detours along the path of achieving the highest standards of the American ideal.

65. SABIN, *supra* note 4, at 19-20.

66. *Id*. at 45 (reviewing the trial of Eugene Dennis, Solicitor-General of the Communist Party, Professor Sabin makes a similar observation when he refers to the trial as "mirroring American Society").

67. *Id*. at 14 (referencing the assertion that America held itself out as an "exemplar of the right of free expression").

68. COMMUNISM, THE COURTS AND THE CONSTITUTION: PROBLEMS IN AMERICAN CIVILIZATION 2 (Allen Guttmann & Benjamin Munn Ziegler eds., 1964). The 1917 Russian Revolution bore stark witness to the violent overthrow of an established government by a small, dedicated group of revolutionaries. While the Socialists in America were attempting to acquire power through the democratic processes, Communist Party of the United States adopted a position of agitation and preparation for violent overthrow of the U.S. government. Following is a quote from Lenin's Third International, a twenty-one manifesto adopted by the American Communist and American Communist Labor parties:

> It is [the duty of Communists] to create everywhere a parallel illegal organization machine which at the decisive moment will be helpful to the party in fulfilling its duty to the revolution. In all countries where the Communists, because of a state of siege and because of exceptional laws directed against them, are unable to carry on their work legally, it is absolutely necessary to combine legal with illegal activities.

Id.

B. Abrams v. United States[69] *and Justice Holmes's Dissent*

In 1918, the Espionage Act of 1917 was amended to include provisions that significantly expanded the reach of government speech suppression, adding broad proscriptions to seditious publications that encouraged resistance to war effort and advocated the curtailment of war material production.[70] It was in this more expansive web that Abrams was caught, an apt analogy because in the larger context Abrams and his associates were minnows in the ocean of world events. Abrams was the leader of a pathetic band of Russian Jewish émigrés, who were self-styled "rebels" actively opposing the United States' encroachment into Russia during the war with Germany.[71] Operating from a basement in New York, Abrams printed a number of leaflets, some in English and some in Yiddish, decreeing the hypocrisy of the United States for its incursion into Russia and alleging that the real reason for the invasion was to join with German militarism to put down the Bolshevist "worker" revolution.[72] They distributed their leaflets by throwing them out of the fourth floor of a hat factory in New York City, which graphically demonstrates how small and ineffectual Abrams and his group were.[73] When this case arrived at the Supreme Court, just eight months after deciding *Debs*, one would have confidently predicted that Holmes would merely add *Abrams* to the *Schenck* progeny. But it was not Holmes who wrote the opinion: It was Justice Clarke, who relied on the "clear and present danger" test in *Schenck* to flatly reject Abrams's First Amendment claim.[74] In his remarkable dissent, Holmes quite clearly laid out a path that diverges from the *Schenck* trilogy by pronouncing that before speech can be restricted, it must engender *imminent* danger.[75]

69. Abrams v. United States, 250 U.S. 616 (1919).

70. KALVEN, *supra* note 13, at 139. The provisions of the amended Espionage Act of 1917, 40 Stat. 553 (1918) applicable to the prosecution of Abrams were: (i) publishing "disloyal, scurrilous and abusive language about the form of Government of the United States;" (ii) publishing language "intended to bring the form of Government of the United States into contempt, scorn, contumely and disrepute;" (iii) publishing language "intended to incite, provoke and encourage resistance to the United States in said war;" (iv) "by utterance, writing, printing an publication, to urge, incite and advocate curtailment of the war." *Id.*

71. *See* CHAFEE, *supra* note 28, at 109-10.

72. *Id*.

73. *Id*. at 109.

74. *Abrams*, 250 U.S. at 617-24.

75. *Id*. at 619. Inferentially, one can conclude that the ineffectual nature of Abrams's efforts, which Holmes characterizes earlier in his opinion as "the surreptitious publishing of a silly leaflet by an unknown man," did not rise to the level of immediate danger necessary to pass muster under the clear and present danger test. Holmes then reveals his belief that the true reason Abrams was sent to prison for twenty years had more to do with his political beliefs that the Court has no right to consider in the context of the charges. It is likely that Holmes was outraged at the severity of the punishment meted out by the government and believed that hysteria, not reason

Holmes's dissent is of critical importance to free speech proponents because he stated that speech merely advocating illegal action without directly linking the speech to an *imminent* danger produced or intended should be accorded the protection of the Constitution.[76] Thus, the "clear and present danger" test as clarified by Holmes now has a definition more akin to its literal moniker, i.e., we now know that it requires some linkage to an immediate danger. This has the startling effect of transforming the application of the test to justify restricting expression to one that is speech protective.[77] Through his dissent, Holmes tried to reconcile the conflict between government restriction of loathsome opinions and the ideal of a free exchange of ideas of all types.[78] However, the idea that truth will emerge victorious through a market-like exchange among competing, even unpopular or "loathsome," opinions implies a desire for a dialogue and an opportunity for persuasion, rebuttal, and, ultimately, conversion. Without the basic elements of discourse, the value of the marketplace is limited if not altogether valueless. It is worth noting that even as Holmes expanded the scope of First Amendment protection, he did not abandon the belief that circumstances can still control the boundaries of protection.[79] Not only did Holmes affirm the constitutionality of punishing

was controlling the situation. *Id.* For additional information on Holmes's motivation to dissent in *Abrams*, see SABIN, *supra* note 4, at 19.

76. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); SABIN, *supra* note 4, at 19.

77. *See* SABIN, *supra* note 4, at 19.

78. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting). Holmes's dissent in *Abrams* is most famous for laying the foundations of modern free speech doctrine with the following bit of eloquence:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that that the ultimate good desired is better reached by *free trade in ideas*—that the best test of truth is the power of thought to get itself accepted in the *competition of the market*, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based on imperfect knowledge. While that experiment is part of our system, I think we should be eternally vigilant against attempts to check the expression of opinions we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Id. (emphasis added).

79. *Id.* at 630-31 (Holmes, J., dissenting). "Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech.'" *Id.*

speech that "produces *or* is intended to produce a clear and imminent danger," he similarly affirmed that the power to restrict speech is greater in wartime.[80] Although Holmes raised the constitutional shield substantially higher, one can still find from his dissent in *Abrams* the principle that speech itself is a constant and that the determination as to whether the speech is within or without constitutional protection should be made from the circumstances, thus leaving intact a foundational exception from unrestrained speech from the *Schenck* trilogy.[81]

C. The Syndicalism Era – Peacetime Speech Restrictions

The next two cases arose after the First World War and deal with subversive advocacy or the violation of state statutes prohibiting the advocacy of overthrow of the government by force, violence, assassination, or any unlawful means.[82] The oldest of these statutes was enacted in New York in 1902, following the assassination of President McKinley, and is representative of the criminal syndicalism statues enacted by many states.[83]

1. *Gitlow v. New York*[84]

Benjamin Gitlow was convicted under New York's criminal anarchy law, which made it a crime to advocate the forceful overthrow of organized

80. *Id*. at 627-28 (Holmes, J., dissenting) (emphasis added).

81. *Id*. at 630 (Holmes, J., dissenting).

82. *See* KALVEN, *supra* note 13, at 163.

83. N.Y. PENAL LAW, §§ 160-61 (1902) (current amended version at N.Y. PENAL LAW § 240.15 (1999)). Section 160 provides:

> *Criminal Anarchy Defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means, the advocacy of such doctrine either by word of mouth or writing is a felony.

Id., § 160. Section 161 provides:

> *Advocacy of Criminal Anarchy*. Any person who: (1) By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head of or of any of the executive officials of government, or by any unlawful means; or (2) prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means . . . is guilty of a felony and punishable by imprisonment, . . . fine . . . or both.

Id., § 161.

84. Gitlow v. New York, 268 U.S. 652 (1925) (it is important to note that one of the most important and enduring aspects of *Gitlow* is that it incorporated the First Amendment into the Fourteenth, thereby making federal free speech rights applicable to the states).

government.[85] His punishable offense was the act of publishing and distributing copies of a document called the "Left Wing Manifesto," which urged a departure from the evolution of socialism through the democratic process in favor of militant revolution.[86] On appeal to the Supreme Court, Justice Sanford took up the question of whether the absence of evidence of any illegal result arising from the publication of the Manifesto should be found to violate a statute that does not criminalize mere statements of doctrine, as that statute had been construed by the trial judge.[87] The Court also considered the constitutionality of a statute that punishes speech without considering the circumstances within which it is spoken.[88] It is easy to see the impact that Justice Holmes's dissent in *Abrams* had on the arguments raised by the defendants. But, in his majority opinion affirming the conviction, Justice Sanford found that while the statute did not prohibit academic discussion or the advocacy of changes in government within the framework of the democratic process, the language in the Manifesto advocating unlawful overthrow of government did violate the statute.[89] With regard to substantive danger that the statute was intended to guard against, the Court recognized the state's right of self-preservation and pronounced it superior to the right of free speech, where the challenged speech advocates overthrow of the government or falls within a similar category of utterances.[90] According to Justice Sanford, the right of self-preservation granted the state the power to pre-determine that certain speech, i.e., advocacy of acts intended to violently displace the government, were so antagonistic to the general welfare that it can be constitutionally proscribed.[91] With *Gitlow*, a peacetime decision, the "clear and present danger" test from the wartime cases was not applied, and the justification for restricting speech is the authority accorded to the legislature in the exercise of its right of self-preservation.[92] Holmes again dissented, steadfastly arguing

85. *Id.* at 654 (all facts articulated in this section are taken from the Court's opinion in *Gitlow*).

86. *Id*. at 656 n.2 (describing Gitlow as a member of the Left Wing Section of the Socialist party. This branch of the party, rather than accept the evolution of socialism through the democratic process, believed that it was necessary to "destroy the parliamentary state." The Left Wing Manifesto urged agitation and strikes as a strategy for achieving "mass industrial revolts" to be used as a prelude to revolution and militant replacement of capitalism with socialism).

87. *Id*. at 664.

88. *Id*.

89. *Gitlow*, 268 U.S. at 666.

90. *Id.*

91. *Id*. at 668.

92. *Id*. The Court granted great deference to the legislature's predetermination of the substantive evil of anarchy and refused to strike down the statute as unconstitutional unless it was found to be arbitrary or unreasonable. *Id.* The Court had no difficulty finding that the State had the right to enact statutes to protect the general welfare. *Id.* Therefore, it was completely unnecessary in the Court's view to consider the circumstances within which the Manifesto was

that the appropriate test is the "clear and present danger" test as stated in *Schenck* and modified with his *Abrams* dissent.[93] Under the Holmes modified "clear and present danger" test, speech may be proscribed if there exists an element of propinquity linking the speech to an immediate attempt to bring about the substantive evil.[94] His reference to *Schenck* was a clear reference that the circumstances must be considered when determining the danger that the objectionable speech could result in the identified transgression.[95]

Thus, even in peacetime, a rationale placing self-preservation ahead of speech advocating against violent overthrow of the government is found to be a reasonable and necessary by the Supreme Court. The struggle the Court is having with the conflict between individual free speech rights and the self-preservation rights of a democracy is clear when the majority opinion and Holmes's dissent are read together. Even though Holmes and Brandeis promoted expansive free speech rights rejected by the majority, Holmes's eloquence and reason cannot be ignored and started to have some effect, as evidenced by Gitlow's argument that his acquittal should be assured in the absence of some immediate evil resulting from his publishing and distributing the Manifesto. But even as he argued in his dissent that Gitlow's Manifesto was protected by the Constitution, Holmes continued to allow an exception where speech could be proscribed by law if there would be any danger that the speech was capable of immediately producing any evil.[96] The basic idea that speech can be proscribed if it produces evil continued to be common ground for the majority and the dissent in the strain to balance the individual free speech rights guaranteed by the Constitution against the power of a government to protect itself and its citizens.

used or whether there was any remote possibility that the Manifesto could bring about anarchy at all. *Id.* It was only necessary to find that that the speech was of the type proscribed by the statute, i.e., that it advocated anarchy rather than merely state a doctrine. *Id.*

93. *Id*. at 672-73 (Holmes, J., dissenting).

94. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

95. *Id*. (Holmes, J., dissenting). Holmes's eloquence is once again apparent in his dissent where he challenges the majority argument that the Manifesto was an incitement:

> Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at is birth. The only difference between the expression of an opinion and an incitement in the narrower sense, is the speaker's enthusiasm for the result. Eloquence may set fire to reason.

Id. (Holmes, J., dissenting).

96. *Id.* (Holmes, J., dissenting).

2. *Whitney v. California*[97]

Anita Whitney was prosecuted and convicted under the California Syndicalism statute,[98] which criminalized membership or assembly with any group organized to advocate, teach, or aid and abet criminal syndicalism.[99] Unfortunately, the Court was unable to consider the First Amendment questions of free speech and assembly because those issues had not been properly raised on appeal, and the Court affirmed her conviction on the due process and equal protection questions that were raised.[100] This case is noteworthy, however, for Justice Brandeis's concurrence, which was actually written as a dissent to the majority opinion in *Gitlow* and is a concurrence only because the Court's decision was in part a refusal to review First Amendment questions that had not been properly raised on appeal.[101] In his opinion, Brandeis strongly challenged the propriety of a legislature determining, in advance of any circumstances, that assembly with a group organized to advocate syndicalism constituted a clear and present danger sufficient to suppress free speech.[102] His fundamental argument was that the Founders recognized the necessity of public discourse of political questions to arrive at political truth and that this cannot happen where the government effects arbitrary suppression through statutes that facially address substantive evils, but which cannot possibly be relevant in situations where the circumstances actually fail to rise to the level of danger necessary to justify suppression of speech.[103]

97. Whitney v. California, 274 U.S. 357 (1927).

98. California Criminal Syndicalism Act of 1919, CAL. STAT. 1919, c. 188, §§ 1-3, p. 281 (1919).

99. California Criminal Syndicalism Act. § 1 defined "criminal syndicalism" as:

> any doctrine, or precept advocating, teaching or adding and abetting the commission of crime, sabotage (. . . meaning willful and malicious physical damage, or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control or effecting any political change.

Id.

100. *Whitney*, 274 U.S. at 360-61. The only constitutional questions considered by the Court were the Fourteenth Amendment due process and equal protection. The Court confined its review of those questions only, noting that: "[O]ur review is to be confined that that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise that any other Federal Question was presented in and either expressly or necessarily decided by that court." *Id.*

101. *Id*. at 372-80 (Brandeis J., concurring).

102. *Id.* at 374 (Brandeis J., concurring).

103. *Id.* at 375 (Brandeis J., concurring). For a fascinating analysis of Justice Brandeis's concurrence in *Whitney*, and a sobering perspective of the Founding Fathers' view of free speech, see generally Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 1 (1971).

This is a powerful argument that will ultimately influence the expansion of First Amendment protection, but consider the core rationalization that Justice Brandeis offered for freedom of speech. At the heart of his argument was that free speech is the protection the Constitution affords against injurious doctrine.[104] This hypothesis was that falsity and "noxious doctrine" will be exposed by an active public discourse, unfettered by the government, as the public carries out its duty to participate in political discussion.[105] His argument for expansive individual free speech rights closely resembled Justice Holmes's "marketplace of ideas," but Brandeis raised the political exchange of ideas to the level of a public duty, one that must not be breached if society is to be adequately protected from the harms inherent in a doctrine that threatens the existence of American democracy. But, Brandeis was not a First Amendment absolutist; that is, he believed there were proper justifications for suppressing speech, as long as the basis for serious harm is reasonable, and the harm is *imminent*.[106]

3. Summarizing the Imminence Issue Raised by Justices Holmes and Brandeis

One line of reasoning which emanated from the analysis of Justices Holmes and Brandeis was the proposition that the potential for harm inherent in speech advocating unlawful action against society[107] is adequately countered when there is *time* for debate and exploration of the truth. The element of *imminence* therefore is of critical importance when deciding whether speech may be suppressed because, given sufficient time, one can intelligently explore all aspects of a dangerous notion and offer persuasive counter arguments to offset the presupposed harm. The problem that the Court cannot come to grips with is how imminent must imminent be before the danger represented by certain speech becomes impervious to debate.[108] Nor has the Court been able to articulate a standard for the level of danger that must exist to proscribe speech when the question of imminence may be unknown, or unpredictable.[109]

104. *Whitney*, 274 U.S. at 375 (Brandeis J., concurring).

105. *Id.* (Brandeis J., concurring).

106. *Id.* at 376 (Brandeis J., concurring).

107. For the sake of simplicity, the term "society" is used here to encompass the entirety of the American infrastructure, including its economic, justice and political systems.

108. *Whitney*, 274 U.S. at 374 (Brandeis J., concurring). Justice Brandeis recognized the difficulty the Court has had with this question in his *Whitney* concurrence when he said:

> This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection.

Id. (Brandeis J., concurring).

109. *Id.* (Brandeis J., concurring).

The "clear and present danger" test and all of its variations therefore come down to a balancing test that can only be applied in the context of all of the circumstances. Where the evil is so substantial, even incomprehensible, as terrorism undisputedly is, it seems appropriate to challenge the importance of the imminence element in the face of catastrophic danger. If an insane person is holding a loaded gun to your head and is telling you why it is right and just that you should die, how long do you allow that person to speak before you are justified in pre-empting her argument? Put another way, how much speech would be necessary to disarm her?

D. The Cold War Period – Dennis v. United States[110]

The trial of Eugene Dennis, general secretary of the Communist Party-U.S.A., was undertaken at a time when the tension between communism and the world democracies was at its height and when one world crisis followed another.[111] Dennis was convicted for violations of the Smith Act[112] resulting from his membership in the Communist Party, which had adopted a policy of the overthrow of the United States government.[113] The *Dennis* Court applied the "clear and present danger" test and, in so doing, was obligated to decide what the phrase means.[114] The Court, while acknowledging that the trend in First Amendment jurisprudence was moving in the direction propounded by Holmes in his dissent in *Gitlow* and Brandeis in his concurrence in *Whitney*,[115]

110. Dennis v. United States, 341 U.S. 494 (1951).

111. The period of time following World War II, commonly referred to as the Cold War Period, was noted for the tension that existed between the United States and the Soviet Union. This tension produced significant fear, and irrational action on the part of American institutions such as the news media, the FBI, congress and the judiciary. The *Dennis* trial is an example of the "Let's give 'em a fair trial and then we'll hang 'em" attitude that was prevalent toward communists during the Cold War Period, especially when Hoover was running the FBI. It is beyond the scope of this paper to delve into the behind the scenes activity that was the backdrop for the *Dennis* case, and we will look at *Dennis* decision only for the contribution it made to shape the "clear and present danger" test. For an excellent examination of *Dennis v. United States* including the political and societal attitudes that contributed to its outcome, see generally SABIN, *supra* note 4, at 31-50.

112. *Dennis*, 341 U.S. at 497. Eugene Dennis et al. were charged with:

> Willingly and knowingly conspiring (1) to organize as the Communist Party of the United States of America as a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence, and (2) knowingly and willfully to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence.

Id. See also Alien Registration Act §§ 2-3, 54 Stat. 670 (codified as 18 U.S.C. § 2385 (2000)).

113. *Dennis*, 341 U.S. at 497.

114. *Id.* at 508-10.

115. *See supra* Sections II(C)(1-2). Recall from the discussion *supra* that the main thrust of Holmes's and Brandeis's argument is the necessity to demonstrate some emergency, or imminence of harm before speech can be suppressed.

nevertheless distinguished *Dennis* from these cases by pointing out that the circumstances in *Dennis*, i.e., "[T]he development of an apparatus designed and dedicated to the overthrow of the government in the context of world crises after crises," was not comparable to the situations in *Gitlow* and *Whitney*.[116] The test that the Court finally adopted was one that was articulated by Judge Learned Hand in a lower court decision.[117] Judge Hand's interpretation of the "clear and present danger" test adopted by the Court was as follows: "In each case, the [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[118] In other words there is a "sliding scale" whereby the courts can determine whether First Amendment protection is warranted on the basis of the magnitude of the evil reduced by the probability that it is likely to occur.[119] Applying this test, the Court found sufficient danger in the activities, even though there was no finding of an attempt to overthrow the government.[120] The Court found significant danger in the fact that the Communist Party was highly organized, very disciplined, and, in effect, just waiting for that call from the leadership stating the time was ripe for violent overthrow of the [U.S.] government.[121] Thus, the Court was able to apply the "clear and present danger" test, albeit in a modified form, to affirm the convictions of Dennis et al.[122] Considering the circumstances that existed during the Cold War period, it is not unreasonable to conclude that a "self-preservation" attitude was fostered by the tension of the times and that the perception of communism as a serious threat to the United States was not without foundation.

III. THE MODERN INCITEMENT EXCEPTION

The modern constitutional test for incitement speech is found in the Court's decision in *Brandenburg v. Ohio*.[123] In *Brandenburg*, the Court

116. *Dennis*, 341 U.S. at 510.

117. Dennis v. United States, 183 F.2d 201, 212 (2d Cir. 1950).

118. *Dennis*, 341 U.S. at 510.

119. For a graphic representation of Learned Hand's *Dennis* test, see WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS 140 (1991).

120. *Dennis*, 341 U.S. at 510.

121. *Id.* at 510-11.

122. *Id*. It is worth recalling that the *Schenck* trilogy used the "clear and present danger" test to suppress speech while Holmes's *Gitlow* dissent and Brandeis's *Whitney* concurrence turned the test speech protective, thus positively influencing subsequent decisions. Of note in *Dennis* is that the reformulation of the "clear and present danger" rule influenced by Judge Learned Hand reduces the necessity for immediacy, allowing the courts to suppress speech if the danger itself is significantly great, thus reverting the rule back to its original status as speech suppressive. There is a certain irony in this as there is the belief among scholars that Judge Hand played a significant role in influencing Justice Holmes's change of heart that is reflected in the *Abrams* dissent.

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

substantially narrowed the incitement exception by requiring that before speech can be suppressed, it must be "directed to inciting or producing *imminent* lawless action *and* is likely to incite or produce such action."[124] The element of imminence coupled with the requirement to show that the illegal action advocated is likely to occur is a difficult test to satisfy and has virtually ensured the protection of speech advocating violent action, when the action does not immediately occur. It is clear to see why *Brandenburg* represents a daunting hurdle when it is applied to Internet speech. Without the temporal connection between the advocacy and the unlawful act, (direct "speaker - hearer" linkage), meeting the imminence requirement is virtually impossible. In fact, the common application of *Brandenburg* is to situations where the speaker and hearer are in the same place at the same time so that there is no question that the temporal linkage is in place.[125]

A. Brandenburg v. Ohio[126]

Clarence Brandenburg, a member of the Ku Klux Klan, was convicted for violating the Ohio Criminal Syndicalism statute, part of which criminalized the advocacy of violence as a means of political reform.[127] At a cross-burning rally, which reporters attended, Brandenburg made a speech to a group of hooded figures, the substance of which was highly derogatory to Blacks and Jews. Brandenburg's speech was full of the predictable Klan garbage derogatory to blacks and Jews, but it was the following words that triggered his indictment and conviction: "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, *it's possible that there might have to be some revengeance taken*."[128]

Brandenburg appealed his conviction on First Amendment grounds, which was affirmed by the Appellate Court of Ohio and the Ohio Supreme Court as raising no First Amendment issues.[129] But, the United States Supreme Court, in a *per curiam* decision, reversed Brandenburg's conviction on the basis that First Amendment jurisprudence no longer supported the notion that mere

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

125. *See* NAACP v. Claiborne Hardware, 458 U.S. 886 (1982).

126. *Brandenburg*, 395 U.S. at 444 (all facts articulated in this section are taken from the Court's opinion in *Brandenburg*).

127. OHIO REV. CODE § 2923.13 (enacted 1919), which prohibited, "advocating the duty, necessity, or propriety of crime, sabotage, violence or unlawful methods of terrorism as a means of accomplishing industrial or political reform and for voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.*

128. *Id*. at 446 (emphasis added).

129. *Id.* at 445. Actually, the Ohio State Supreme Court dismissed the appeal *sua sponte* because it found no substantial constitutional question involved. *Id.*

advocacy of unlawful acts without more loses the protection of the Constitution.[130] Thus, the Court overruled its *Whitney* decision, holding in *Brandenburg* that advocacy of lawless action may not be proscribed unless it is "directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action."[131]

B. Applications of the Incitement Exception

The Court's decisions following *Brandenburg* demonstrate the narrow quality of the incitement exception. The two cases that follow illustrate the expansive protection afforded free speech, even where the speech arguably is intended to initiate or continue unlawful activity.

1. *Hess v. Indiana*[132]

Gregory Hess was one of two to three hundred demonstrators at Indiana State University who were blocking the street during a protest of the United States' involvement in the Vietnam War. To clear the street, sheriff's deputies walked up the street ordering the demonstrators to move to the sidewalks. Hess, with his back to the Sheriff, yelled out to the general crowd, "We'll take the f∗∗∗ing street again," whereupon he was arrested and convicted for disorderly conduct.[133] The Indiana Superior Court and Indiana Supreme Court upheld the conviction, and Hess subsequently appealed to the U.S. Supreme Court on First Amendment grounds.[134]

The trial court that convicted Hess found that his statement was "intended to incite further lawless action on the part of the crowd in [his] vicinity and was likely to produce such action."[135] On review the Supreme Court reversed, finding that Hess's words at worst could only be said to advocate illegal action at some indeterminate time in the future and holding that speech advocating unlawful action may only be proscribed when such advocacy is directed to inciting imminent lawless action and is likely to incite or produce such action.[136] Thus, the advocacy of lawless action at some *indefinite time in the future* fails to fall within the *Brandenburg* imminence exception.

130. *Id.* at 448. The *Brandenburg* Court referred to dicta in *Dennis* where it acknowledged the Court's distancing itself from the *Gitlow* and *Whitney* decisions, a clear indication that a linkage between advocacy and result must be apparent and that advocacy alone will not remove the protection of the First Amendment. *Id.*

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

132. Hess v. Indiana, 414 U.S. 105 (1973) (all facts articulated in this section are taken from the Court's opinion in *Hess*).

133. *Id.* at 110.

134. *Id.* at 105-06.

135. *Id.* at 108.

136. *Id.*

2. *NAACP v. Claiborne Hardware*[137]

Black members of the NAACP organized a boycott against white merchants in Claiborne County, Mississippi in response to the rejection of a petition of demands presented by black leaders that was aimed at securing a degree of justice for the black residents of the community. During the boycott, some members of the black community refused to honor the boycott, prompting promises of "discipline" from Charles Evers, the NAACP Field Secretary in Mississippi. In a speech made before a group of black community members calling for a total boycott of white businesses, Evers stated that if any of the boycott violators were caught, "we're gonna [sic] break your damn neck[s]."[138] The Court, citing the incitement exception in *Brandenburg*, found that although Evers's speech contained powerful rhetoric, it failed to satisfy the incitement exception because it was not *immediately* followed by violence and observed that the acts of violence connected with the speech occurred weeks or months later.[139]

The Court's decision in *Claiborne* established with more clarity that incitement type speech, regardless of the content, must be closely followed by lawless action.[140] A temporal gap (weeks) between the time speech is initiated and the lawless acts that are the subject of the speech can defeat the *Brandenburg* imminence exception.

C. Analyzing the Essential Elements of Brandenburg

The exception that remains from *Brandenburg* and its progeny is quite narrow and leaves significant doubt as to whether Holmes's "clear and present danger" test has any remaining validity, particularly since the test as applied in *Dennis* was abandoned in this decision.[141] The elements of the *Brandenburg* incitement exception thus established would uphold regulation of incitement speech only where speech is directed toward a person or group, advocates lawless action, *and* the speaker's audience responds in timely fashion by doing the unlawful acts urged by the speaker.[142]

1. Advocacy

There is no black-letter definition for advocacy, but it is clear from the decisions in *Schenck* to *Brandenburg* that the term at least encompasses promotion of illegal action as distinguished from merely teaching an abstract

137. NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (all facts articulated in this section are taken from the Court's opinion in *Claiborne*).

138. *Id*.

139. *Id.* at 928.

140. *Id.*

141. *Brandenburg*, 395 U.S. 449-50 (Black, J., concurring).

142. *Id*. (emphasis added).

doctrine or even expressing hope that something *might* happen. As posed by Professor Larry Alexander, it is less clear whether words of sarcasm with a superficially benign meaning or deliberate attempts to trigger prearranged action through otherwise nonsensical code words qualify as advocacy.[143] An argument that such code qualifies as illegal advocacy can be found in the *Brandenburg* Court's express rejection of *Whitney*, where the Court virtually refused to consider the circumstances the offending words were used in, granting virtual carte blanche to the legislature to make that determination in advance.[144] With *Whitney* soundly overruled, courts are free to consider all of the circumstances to determine whether speech violates the First Amendment. It is not unreasonable, therefore, to conclude that words unambiguously urging unlawful action are joined by *any* speech, which under the circumstances can be shown to have been used for the purpose of producing illegal action, as being within the definition of "advocacy."[145] Finding "advocacy" on the Internet poses no difficulty at all, as shown for example, by a message posted on an Al-Qa'idah terrorist site that represents the main ideological direction of the global Jihad.[146] The message posted at the site encourages Muslims to *temporarily* leave their jobs so they can travel to fight Americans and provides information on requesting unpaid leaves of absence to avoid raising suspicion for extended absences while carrying out the Jihad duty.[147]

2. Imminence

The element that is most difficult to overcome in an Internet setting is that of imminence. The obvious difficulty is that there is no temporal relationship existing between speaker, hearer, and subsequent illegal action. *Brandenburg*

143. Larry Alexander, *Incitement and Freedom of Speech, in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 106 (D. Kretzmer and F. Kershman Hasan eds., 2000). Professor Alexander poses this question in his essay and arrives at the conclusion that illegal advocacy encompasses a somewhat broad scope of language because the term is not restricted by the Court to the use of particular words. His position is contrary to those who would protect words that provide information, excluding only specific words of illegal incitement, arguing that all words of advocacy are informative at some level. *Id.*

144. *Whitney*, 274 U.S. at 647.

145. The specific notion that the Internet may be used by terrorists as a means of communicating orders and instructions in code to far-flung operative field cells is intriguing. Little information exists to demonstrate that it is in fact happening, but the concept is as old as World War II, where nonsensical coded instructions, such as "The plume is on the table," were passed by underground radio transmitters to resistance groups located in occupied zones. Because it would be relatively easy to do and would contribute to the efforts of terrorist organizations to effectively communicate in an innocuous manner, it would be prudent to assume that it is being done. The question is whether such speech would fail to satisfy the *Brandenburg* exception.

146. Jeremy Reynalds, *American ISP: We're Not Telling You Why We Host Terrorist Web Sites, at http://www.freerepublic.com/focus/news/718268/posts* (July 18, 2002).

147. *Id.*

and its progeny make it very clear that unless the unlawful action advocated in the speech is found to be imminent, the speech will be protected.[148] For the purposes of analyzing Internet speech, however, this strict requirement produces a disturbing anomaly whereby traditional applications of *Brandenburg* can result in protecting speakers who are clearly culpable in the realization of terrorism.

To illustrate the anomaly, consider the following hypothetical: The leader of a terrorist front informs all of his followers that they have a duty to kill the French and urges them to do so if it is possible. This directive is posted on a website. At some later time, Forsyth, a follower, is browsing the Internet, comes across the leader's message and reads it. After giving due consideration to his 'duty,' he buys a gun, goes to the Eiffel Tower and opens up on the crowd, killing a number of innocent people before being overpowered by Gendarmes.[149]

Forsyth, of course, is going to be prosecuted for the murders he committed, but what about the terrorist leader? He cannot be criminally implicated in Forsyth's acts, but doesn't he deserve some attention from the justice system for the contents of his website? According to the traditional applications of *Brandenburg*, the terrorist website is safely within the skirts of the First Amendment because the connection between publishing the message on the Internet and the subsequent illegal act is too remote to acquire the level of imminence required by *Brandenburg*, *Hess*, and *Claiborne*.

There is no question that the terrorist's speech could be prosecuted if he had given it directly to a group of his followers, and one of them had gone out and committed the act. Why then, should a terrorist be shielded because his choice for delivering his message was the Internet? In the next section we'll take a short look at some arguably dangerous websites, and in Section V, we'll consider an application of *Brandenburg* that would place a terrorist's message beyond the reach of constitutional protection.

IV. CYBERSPACE: A PLATFORM FOR GLOBAL ADVOCACY

According to Professor Jeremy Lipschultz, the Internet offers all users a measure of power.[150] It is inexpensive, ubiquitous, and easy. A lone user sitting at home possesses the same power to communicate and draw on the resources of Cyberspace as the largest corporate user. Because Cyberspace is

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

149. KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 263 (1989). This hypothetical is adapted from Greenawalt's discussion of criminal liability for those whom incite unlawful action. *See id.*

150. JEREMY HARRIS LIPSCHULTZ, FREE EXPRESSION IN THE AGE OF THE INTERNET 3 (2000).

an arena of power,[151] it is also subject to abuse and arguably the power to incite others to perform illegal acts. Three website examples illustrate the potential to incite are discussed below.

A. The Earth Liberation Front (E.L.F.)

The Earth Liberation Front, considered by the FBI to be the most dangerous terrorist group in the United States, has been in existence since the mid-90s when it turned to underground "actions" which are nothing more than the wanton destruction of targeted properties in its stated effort to "halt the destruction of the environment." To date, the group claims credit for the destruction of one-hundred million dollars of property.[152] They have been in the news recently as the group responsible for the arson fires that destroyed an Oregon tree farm, a university horticulture center in Seattle, a number of logging trucks, and a twelve million dollar ski resort at Vail, Colorado.[153] The general tone of the site is one of a complete and soulless disregard for the rights and property of those who are the targets of their destruction. Their movement consists of insulated cells of people, who, without any central authority, carry out "actions" in accordance with the group's guidelines, which includes "[e]conomic sabotage and property destruction and calls followers to do the following:

> 1. To inflict economic damage on those profiting from the destruction and exploitation of the natural environment.
>
> 2. To reveal and educate the public on the atrocities committed against the earth and all species that populate it.
>
> 3. To take all necessary precautions against harming any animal, human and non-human."[154]

According to their website, any "direct action" carried out in accordance with the guidelines can be considered an E.L.F. action.[155] The Internet is this group's platform for engaging like-minded terrorists and inciting them to destroy the property of others. Contrary to their guidelines, animals have died as a result of these actions, and it is only a matter of time before people are killed in their attempt at forcing radical environmental views on the nation. There is no question that the authors of this website are blatantly inciting others to destroy property, and it is working. This website is contributing to millions of dollars of wasteful, useless destruction.

151. *Id.*

152. Earth Liberation Front, *at* http://www.earthliberationfront.com (last visited Jan. 8, 2004).

153. Terrence Petty, *Earth Liberation Front, Stepping up Arson Campaign*, ASSOCIATED PRESS (June 2, 2001) *available at* http://www.mindfully.org/Heritage/ELF-Stepping-Up.htm.

154. *See* Earth Liberation Front, *supra* note 152.

155. *Id.*

B. The Nuremberg Files

An equally serious and somewhat infamous website known as "The Nuremberg Files" is an anti-abortion website.[156] This site lists the names of doctors who perform abortions, with the stated reason to keep current lists of those who will someday be prosecuted for their acts when abortion is no longer legal. The name of the site is a reference to the Nuremberg war crimes trials that put the Nazis on trial following World War II. The site used an image of dripping blood from aborted babies and referred to the abortion doctors as "baby butchers."

An attempt to stop the website was brought by abortion providers under the Freedom of Access to Clinic Entrances Act (FACE)[157] alleging the website constituted true threats under the act.[158] The operator of the site "grayed out" the names of the doctors who had been injured and struck a black line through the name if a doctor had been killed.[159] The Ninth Circuit found that certain "wanted" posters and "guilty" posters identifying specific abortion doctors, in conjunction with dead and injured doctors listed on the website "scorecard," constituted true threats under the act; nevertheless, the court held that the Nuremberg Files website was protected speech.[160] The website is still functioning and continues to list the names of dead, jailed, and active doctors, and in a recent major modification to the site, it has begun to show pictures of abortion doctors' homes and has indicated it will show pictures of where they buy gasoline – an obvious reference to the D.C. snipers who shot and killed a number of people while they purchased gasoline.[161]

C. World Islamic Front

The following statement was issued by Usama bin Laden as a fatwa[162] and has been posted on the Internet:

> The ruling to kill the Americans and their allies – civilians and military – is an individual duty for every Muslim who can do it in any country in which it is

156. The Nuremburg Files, at http://www.christiangallery.com/atrocity/aborts.html (last visited Jan. 8, 2004) (all information articulated in this Section is taken from this website).

157. 18 U.S.C. § 248(a)(1)(1999) (This statute was overruled in U.S. v. Bird, No. H-03-0163, 2003 WL 22016311, at *9 (S.D.Tex Aug. 18, 2003)).

158. Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002).

159. *See* The Nuremburg Files, *supra* note 156. For a detailed analysis of the Nuremberg website, see Gey, *supra* note 24 at 541.

160. *See Planned Parenthood*, 290 F.3d at 1088.

161. *See* The Nuremburg Files, *supra* note 156. For an argument that sites such as the Nuremberg Files possess the power to incite lawless action and should be challenged under an Internet incitement standard, see Cronan, *supra* note 24, at 425.

162. A "fatwa" is a religious ruling (command) that provides those who are compelled to obey it with the religious and moral justification for the acts it commands.

> possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty Allah, 'and fight the pagans all together as they fight you all together,' and 'fight them until there is no more tumult or oppression, and there prevail justice and faith in Allah.[163]

None of the preceding websites has been challenged under *Brandenburg* because of the problems associated with linking the speech to the acts. Next, we'll consider an approach that proposes an expansion of the definition of imminence for the purposes of *Brandenburg* that would allow application of the exception to certain Internet speech.

V. THRESHOLD OF IMMINENCE

Although it would be fair to say that Harry Kalven was a free-speech purist, he made an interesting observation that provides the basis for a proposition in support of banning the type of terrorist speech targeted in this discussion.[164] Professor Kalven noted the distinction between inciting the overthrow of a political system as opposed to speech directed toward advocacy of non-political crime.[165] Political speech advocating the violent overthrow of government has value in that criticism of government and society can be used to understand the perspective of the speaker and the premise upon which such criticism is made.[166] There is inherent value if one can gain an understanding of one's critics, especially the most radical ones. On the other hand, what value exists in the advocacy of baseless crime, particularly the wanton and senseless crimes encouraged and committed by contemporary terrorists? A line must therefore be drawn between politically oriented speech and speech that has no purpose other than to incite terrorist activity solely intended to destroy lives, property, and the economic and psychological well-being of an open and free society.[167] As the Court has stated before, the status of war can withdraw First Amendment protection from certain speech.[168] The unprecedented tragedy arising from the September 11th terrorist attacks has established a wartime discipline that has had the effect of modifying the behavior of our society and awakening a keen awareness that we are physically

163. Bin-Laden, et al., *supra* note 1.

164. See KALVEN, *supra* note 13, at 119.

165. *Id*. at 120.

166. *Id*.

167. The Internet today represents for practical purposes, unrestrained speech. Virtually all speech is protected, with very few exceptions. The Internet is a modern example of the right of a free people to publicly dissent and is raising anew the clash between that right and the legitimate right of a government to exercise its police power for self-preservation. *See* SABIN, *supra* note 4, at xiii.

168. Schenck v. United States, 249 U.S. 47, 52 (1919).

unprotected from the effects of terrorism. We are under attack and are being subjected to a type of tyranny that operates to contravene the rights and benefits of citizenship accorded by an open and free society. Until terrorism is removed from the world, there exists a "threshold of imminence" such that the potential for additional terrorist acts is so great that they must be considered imminent. Under these circumstances, terrorist websites advocating acts intended to destroy our society do not warrant the protection of the First Amendment.[169] Technology often advances more rapidly than the judicial system can effectively deal with the changes.[170] The Internet has presented new challenges to the courts, and because of its dynamic nature it will continue to be a center of attention for judicial scrutiny. But until new questions are raised and brought to the attention of the courts through the judicial machinery, all that can be done is apply the law that exists. For First Amendment questions of whether incitement type speech is protected, the law is *Brandenburg*. As discussed in a previous section, the modern incitement standard was designed for the soapbox speaker, directly addressing his audience, where the advocacy of illegal activity is directed toward inciting or producing *imminent* lawless acts.

The proposed approach to apply *Brandenburg* to terrorist advocacy over the Internet is to expand the imminence required by the exception to include the "threshold of imminence" that has arisen out of the direct terrorist attacks and the current state of vulnerability that exists while the threat remains unabated. This approach is limited to the necessarily narrow circumstances directly related to the extreme danger posed by international terrorism and our current inability to contain it or eliminate it.

169. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (discussing that not all speech is of equal value, and some speech has been identified as so valueless that it makes no contribution toward the truth and is therefore undeserving of First Amendment protection).

170. This proposition can be found in many areas of the law. For an example of technology outpacing the law relative to the Internet, see ROBERT D. RICHARDS, FREEDOM'S VOICE: THE PERILOUS PRESENT AND UNCERTAIN FUTURE OF THE FIRST AMENDMENT 80 (1998).

A. Criteria/Circumstances Necessary to Establish the "Threshold of Imminence"

A "threshold of imminence" sufficient to satisfy the *Brandenburg* exception exists when the following criteria are established: (1) Terrorist acts of the type advocated on terrorist websites have been, or are being, committed against the United States, or a state of war exists; and (2) a heightened state of national alert has been established by a responsible government agency, warning that the potential for such acts exists.[171] Finding that a "threshold of imminence" exists creates a rebuttable presumption that the imminence element of the *Brandenburg* test has been satisfied for the narrow purposes of proscribing the serious[172] advocacy of terrorism over the Internet. Serious Internet advocacy is analyzed with respect to the intent and likelihood prongs of the *Brandenburg* incitement test. Seriousness of the site is determined from an objective analysis of three questions: (1) Does the speech contain explicit words of action, urging "hearers" to perform specific acts of terrorism; (2) are these acts within the scope of those at the genesis of the heightened state of alert, or possess the characteristics of those that have in fact been committed; and (3) does the speech have any value as political discourse under the whole of the circumstances when balanced against the significant danger to society? Serious advocacy, in accord with *Brandenburg*, is not "mere abstract teaching" of unpopular ideas or even advocacy of violence that can be offset with more speech because more speech is not an answer to serious terrorist advocacy, and the marketplace of ideas does not benefit from any discourse.[173] With advocacy thus established, and the threshold of imminence in place to satisfy the "imminence" prong of the test, denial of First Amendment protection for the website can be accomplished with the concepts established by the Court in *Brandenburg*, leaving intact the broad protection accorded speech in this country.

VI. CONCLUSION

Establishing a "threshold of imminence" appropriate to the criteria presented provides the judiciary with a formulation of the *Brandenburg* incitement standard under sufficiently narrow circumstances that will serve to remove the Internet as a platform for the advocacy of terrorist acts bent on the catastrophic destruction of property and loss of human life, without compromising the expansive reach of modern First Amendment protection.

171. A responsible government agency may be the Homeland Security Agency, the FBI, or the military.

172. The advocacy proposed to be withdrawn from First Amendment protection must be classified as "serious," i.e., the speaker actually intends for the acts to be carried out. This intention may be inferred from prior terrorist acts.

173. *Brandenburg*, 395 U.S. at 448.

The right of free speech in an open society and the duty that Americans have to engage in a political dialogue to express new ideas and to always challenge the oppressive tendency of large government and the obligations of that government to preserve itself cannot, in the final analysis, be reconciled to perfection. History has shown that the dangers we face as a society often require temporary restrictions to expansive freedoms in order that society itself may be preserved. While it is easy to look back on those times and see with clarity the mistakes that were made and the excesses of the times, it is not as easy to speculate with any degree of accuracy what the future might have become under different circumstances. Nor is it easy to fully understand the full import of the circumstances without the benefit of knowing what the future wrought. We can, of course, strive to avoid the mistakes of the past, but we must not be handcuffed to the past when we are faced with a completely new set of circumstances and a danger that is irrational and unexplainable on its face. We face such a danger today. The threshold of imminence by its very nature has already begun to modify our behavior, thus opening the door to tyranny. We cannot let the Internet become a tool of the terrorists to widen the opening. The Internet is a powerful platform that should not be made available to the terrorists who are blatantly trying to destroy us.

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