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Terror on Your Timeline: Criminalizing Terrorist Incitement on Social Media Through Doctrinal Shift

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**TERROR ON YOUR TIMELINE:
CRIMINALIZING TERRORIST INCITEMENT ON
SOCIAL MEDIA
THROUGH DOCTRINAL SHIFT**

*Zachary Leibowitz**

The United States faces a barrage of threats from terrorist organizations on a daily basis. The government takes some steps to prevent these threats from coming to fruition, but not much is being done proactively. Any person can log into a social media account to preach hate and incite violence against the United States and its citizenry, and sometimes these words result in action. When speakers are not held accountable, they can continue to incite the masses to violent action across the United States. This Note proposes a new incitement doctrine to prevent these speakers from being able to spread their violent message on the internet, which might very well decrease the threats the United States faces and the number of tragedies it often experiences.

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INTRODUCTION

A Brooklyn man spends months gathering the necessary materials and information to carry out an attack.¹ Inspired by a similar attack in Nice, France, he acquires a garbage truck and plans to drive through a large crowd in Times Square.² Luckily, he is discovered and apprehended before the planned attack, thus saving the lives of innocent civilians.³ Unfortunately, the group that inspired him to attempt this attack remains at large. The group with whom the man had been in contact will continue to incite others to lawless action, using social media as its platform.⁴ The speech used by this group posted on social media was instrumental in driving the man to plan this attack.⁵

The United States persistently faces extremist threats—threats that by some measure amount to a constant state of war. This war is not

1. This anecdote is loosely adapted from the facts of an investigation and pending case. See NY1 News, *Brooklyn Man Accused of Supporting Times Square Terror Plot*, SPECTRUM NEWS NY1 (Nov. 22, 2016, 4:47 AM), <http://www.ny1.com/nyc/all-boroughs/news/2016/11/21/brooklyn-man-accused-of-supporting-times-square-terror-plot.html> [<https://perma.cc/9P87-PBH4>].

2. See *id.* In 2015, a group of terrorists supporting the Islamic State of Iraq and Syria (ISIS) drove a cargo truck through a beach promenade in Nice, France, on Bastille Day, killing more than eighty people. *Id.*

3. *Id.*

4. *Id.* The Nice attacker made multiple trips to Yemen. *Id.* The government claims he was attempting to be recruited and trained by ISIS, while the attacker claims he was simply visiting his family that lives there. *Id.*

5. “Incite” means “to provoke or stir up (someone to commit a criminal act, or the criminal act itself).” *Incite*, BLACK’S LAW DICTIONARY (10th ed. 2014). The meaning of “incite” in this Note varies depending on the legal interpretation applied. For purposes of this Note, incitement is used to connote the prompting of someone to commit (1) illegal action or (2) action that would likely cause harm to the general public.

characterized by a single, named enemy and has persisted for the past two decades. But with the increasing adoption and use of technology and social media, the United States now faces unprecedented challenges in combating enemies and protecting citizens. Terrorists routinely employ social media to recruit new members, indoctrinate the easily influenced, and incite individuals and terrorist cells to violence.⁶

Over the past century, the U.S. Supreme Court has grown increasingly more protective of the individual's freedom of speech, safeguarded by the First Amendment.⁷ Indeed, the early twentieth century witnessed the development of modern First Amendment doctrine, particularly in the realm of inciting or inflammatory speech.⁸ But prior to the modern formulation of speech doctrine, courts in the United States took a more proactive approach to stopping lawless action.⁹ Moreover, the United Kingdom and Israel have interpreted their freedom of speech doctrines narrowly, mimicking the early Supreme Court's tendency to muzzle dangerous and inciting speech to fight terrorism more effectively.¹⁰

Accordingly, this Note explores the prevalence of terrorist speech on social media—specifically, recruitment activities, indoctrination, and calls for violence—and attempts to cabin such speech in the context of current speech doctrine. This Note also examines the national security threat and highlights how other constitutional rights have been curtailed to further national security interests. Ultimately, this Note contends that current First Amendment speech doctrine is overprotective of such speech and presents too burdensome a barrier to restrict terrorist incitement on social media. This Note concludes that regulation of inciting terrorist speech should be allowed as a matter of public safety, public policy, and pragmatism.

Part I examines the history of First Amendment doctrine, with a particular focus on incitement and abstract teaching or advocacy. This Part also explores the history of social media and how it differs from other forms of expression and communication. Finally, Part I discusses the challenges surrounding the criminal prosecution of social media users.

Part II examines the deficiencies of current First Amendment doctrine; specifically, it suggests that current doctrine needlessly protects dangerous speech that should, in certain circumstances, be subject to criminal penalties.

6. This Note assumes all social media posters are within the jurisdiction of the United States, but this certainly is not always the case. When individuals post outside of the United States, it is uncertain whether the First Amendment would apply or whether the U.S. federal judicial system could assert personal jurisdiction.

7. See U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); see also *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam) (articulating that the current standard for protection of incitement under the First Amendment is very robust); *infra* Part I.A (discussing the development of modern First Amendment doctrine). This Note focuses on the Free Speech Clause of the First Amendment.

8. See *infra* Part I.A.1.

9. See generally *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

10. See *infra* Part I.A.4.

It next inquires into national security policy and highlights how other areas of law in the United States have evolved due to increased threats of terrorism. Part II goes on to explore how other countries have adapted their own approaches to regulating social media speech, while the United States has remained stagnant in First Amendment doctrine development.

Part III suggests that speech doctrine should be modified to better handle twenty-first-century terrorist threats, which are administered in greater proportion by ever-increasing social media use. To facilitate this goal, this Note proposes that the federal judiciary borrow facets of older First Amendment doctrine, as well as speech doctrines of foreign governments, to implement a new standard. This standard will be constitutional, will allow for the prosecution of those who use social media as a vehicle to incite terroristic behavior, and will be modular, so that the doctrine and standards adapt based on geopolitical climate.

I. FREE SPEECH AND THE RISE OF SOCIAL MEDIA

When the Constitution was framed, avenues for speech existed in a radically different landscape. Speech entailed a limited number of actions: the act of speaking and printed text. Although technology has developed rapidly in the past two centuries, most First Amendment doctrine has not similarly evolved. In fact, existing doctrine has instead been applied to new forms of communication.¹¹ The doctrine for most forms of communication evolved more slowly and did not correctly adapt to newer forms of technology, and the change was too slow to effectively protect individual rights and the government's interest.¹² The modern era is thus left with an antiquated style of thinking applied to a method of speech and expression that had not been contemplated at the time of the framing of the Constitution or the subsequent judicial application of the law.¹³ The question becomes: How well has the doctrine been adapted to the new form, and is it effective enough to be justified?

Part I.A takes an in-depth look at incitement doctrine throughout U.S. history and at how the current U.S. incitement doctrine is applied. Additionally, Part I.A examines scholarly commentary on past and current incitement doctrine, highlighting the relevant strengths and critiquing the weaknesses. Part I.A concludes by discussing the incitement doctrine of other nations compared to that of the United States.

Part I.B discusses the rise of the internet and social media and how those rises have changed the way speakers can be prosecuted. In addition, Part I.B explores how terrorists have used social media to further their agendas.

11. David R. Dow & R. Scott Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1219 (1998).

12. *Id.* In fact, in some instances, the originalist theory may have been a more effective way to govern speech today; while the medium may have changed, the purpose of speech has not. *See id.*

13. *See* John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 427–28 (2002).

A. Tracing the History of Inciting Speech

In the early years of the twentieth century, the government and the judiciary were far more concerned with the government's interests in protecting the citizenry and increasing the country's global presence.¹⁴ Speech doctrine reflected that end through limiting individuals' rights to question the government and call for its overthrow or dismantlement.¹⁵ As time progressed and the population became more exposed to liberal thought, speech doctrine also liberalized to reflect this change, thus becoming more protective of individuals' rights of expression.¹⁶ Public commentary illustrates how and why these changes occurred, and it also examines how the United States' speech doctrine compares to those of various other governments.

1. Inflammatory Speech Through Time

The right of free speech is one of the most prominent aspects of the United States' national identity and the Supreme Court has gone to great lengths to protect this right.¹⁷ While speech is highly protected in this country, it is not an absolute right; some speech is not protected because it has "low value."¹⁸ Low-value speech has traditionally included threats, obscene material, and violence-inciting speech.¹⁹ To be clear, such examples of speech are not per se illegal: they merely fall beyond the protection of the First Amendment, and the government may enact statutes that prohibit or restrict their use.²⁰ Indeed, some speech is regulable even though the regulation is based on the content of the speech.²¹ The Court develops tests to determine when such speech may or may not be regulated.²² These tests constitute a kind of categorical balancing.²³

14. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 174 (2004).

15. *Id.*

16. *Id.*

17. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 454 (2011). *Phelps* concerned the Westboro Baptist Church protests during funerals of fallen service members to promote the Church's antihomosexual agenda. *Id.* at 443. The Court concluded that while the actions taken by the Westboro Baptist Church were deplorable and extremely offensive, the Church's speech was protected under the First Amendment because speech that entails matters of public concern brings social and political issues to light in the community. See *id.* at 454 (giving examples of extremely offensive and repugnant messages that are nonetheless protected by the First Amendment's guarantees).

18. See Eugene Volokh, *Crime-Facilitating Speech*, 57 *STAN. L. REV.* 1095, 1150–73 (2005).

19. See, e.g., *Virginia v. Black*, 538 U.S. 343, 363–64 (2003); *Miller v. California*, 413 U.S. 15, 19–20 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (per curiam); *Schenck v. United States*, 249 U.S. 47, 51–52 (1919).

20. See 18 U.S.C. § 871 (2012) (prohibiting threats against the president and successors); 18 U.S.C. § 2101 (2012) (prohibiting the incitement of riots).

21. See, e.g., *Black*, 538 U.S. at 359–60 (explaining limitations on speech that is threatening); *Miller*, 413 U.S. at 36–37 (placing restrictions on speech that is obscene).

22. See Robert A. Sedler, *The "Law of the First Amendment" Revisited*, 58 *WAYNE L. REV.* 1003, 1009–10 (2013).

23. See *Brandenburg*, 395 U.S. at 448–49; see also Volokh, *supra* note 18, at 1136–38.

The development of the Court's incitement doctrine began in the early 1900s and continued through the 1960s, and the Court has not changed its interpretation or application since.²⁴ While other areas of constitutional law have developed along with technology, especially post-September 11, 2001,²⁵ First Amendment jurisprudence in the context of incitement has remained extremely protective of the individual's speech right.²⁶

Most of the Court's doctrine on inciting speech developed in a series of early twentieth-century cases. In *Schenck v. United States*,²⁷ the first modern case addressing incitement, the defendant was charged under the Espionage Act of 1917²⁸ for urging men who had been selected for the draft to reject their obligation.²⁹ The defendant communicated the message through mailed leaflets, which contained "impassioned language" urging men to "[a]ssert your [r]ights" and to "not submit to intimidation" from the federal government.³⁰ The Court, focusing on the effect of the speech, upheld the conviction and created the "clear and present danger" test.³¹

As Justice Oliver Wendell Holmes, writing for the Court, noted, "of course the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have . . . except to influence [people] to obstruct [the draft]." ³² This case, in effect, stood for the proposition that incendiary³³ speech was meant to bring about a specific *effect* for those consuming it.³⁴ Speech became properly regulable if the "words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."³⁵ Although the ruling in *Schenck* did not turn on the clear and present danger test, it was a

24. See Dow & Shieldes, *supra* note 11, at 1217–20. Indeed, this Article was written pre-9/11; since then, nothing has changed in First Amendment incitement doctrine. Zachary M. Mattison, *America's War on Terror Goes into Cyberspace. Will the First Amendment Prevent the Government from Giving Chase?*, SYRACUSE SCI. & TECH. L. REP., Fall 2005, at 105.

25. See *infra* Part II.A (discussing how the USA PATRIOT Act allowed for greater access to private information and punished any form of support to a designated terrorist organization).

26. See Dow & Shieldes, *supra* note 11, at 1218–19.

27. 249 U.S. 47 (1919).

28. 18 U.S.C. §§ 792–799 (2012). The Espionage Act of 1917 was enacted shortly after the United States entered World War I. Espionage Act of 1917, Pub. L. No. 65-24, § 1, 40 Stat. 217, 217–19. The Act prohibited any interference with the operations of the U.S. government or U.S. military and promotion of the success of its enemies. Fern L. Kletter, Annotation, *Validity, Construction, and Application of Federal Espionage Act, 18 U.S.C.A. §§ 793 to 794*, 59 A.L.R. Fed. 2d 303 Art. 1 (2011). The amendments of the Sedition Acts of 1918 went further to prohibit any disloyal or abusive language about the U.S. government. *Id.* When defendants were charged under the Sedition Act, it was recorded as the Espionage Act because the Sedition Act was an amendment to the original Espionage Act. *Id.* The Sedition Act amendments were repealed in 1921. KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 25 (6th ed. 2013).

29. See *Schenck*, 249 U.S. at 51.

30. *Id.*

31. *Id.* at 52.

32. *Id.* at 51.

33. Incendiary speech is the same as incitement speech for purposes of this Note.

34. See *Schenck*, 249 U.S. at 51–52.

35. *Id.* at 52.

supplement to upholding the conviction of a man who had circulated a leaflet encouraging draft dodging, a “substantive evil” that Congress had authority to prevent.³⁶

This was a turning point in First Amendment law. Prior to this case, speech could be criminalized only if it had a “bad tendency,” a test rooted in English common law.³⁷ Speech was considered to have a bad tendency when it caused harm to public welfare or incited illegal activity.³⁸ This test was less speech protective than the clear and present danger test and was part of the general progression to a more speech-protective doctrine.

Still, the standard that Holmes created did not get the reverence he desired. In *Abrams v. United States*,³⁹ a similar set of facts led to another conviction under the Espionage Act, but the clear and present danger test was supplementary to the bad tendency test in upholding the conviction and affirming the constitutionality of the Act.⁴⁰ The Court stated that the speech in this instance was incitement and not purely political speech because it was “not an attempt to bring about a change of administration by candid discussion” but rather an attempt to paralyze the country in a time of war through a general strike.⁴¹

Justice Holmes dissented from the opinion of the Court and claimed that the ruling was not in line with the clear and present danger test he had set forth earlier that year.⁴² In this dissent, however, Justice Holmes further refined the test and argued that, for the government to constitutionally regulate speech, it must show not only a present danger, but a “present danger of *immediate evil* or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion.”⁴³ Immediacy is a theme that the Court later included in the doctrine,⁴⁴ but in a later case, Holmes expressed his true feelings regarding the Court’s application of the incitement standard.⁴⁵ Justice Holmes wrote that speech may be further proscribed in a time of war, but during peacetime the laws should be more forgiving as the U.S. government is not under attack.⁴⁶ This type of reasoning also indicates that speech regulation that is constitutional during wartime very well could be unconstitutional during times of peace.⁴⁷

In *Gitlow v. New York*,⁴⁸ the Court upheld the conviction of a man who “advocate[d] and urge[d] in fervent language mass action [to] . . . overthrow and destroy organized parliamentary government.”⁴⁹ The “Left Wing

36. *Id.*

37. *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

38. *See id.*

39. 250 U.S. 616 (1919).

40. *See id.* at 622.

41. *Id.*

42. *Id.* at 625 (Holmes, J., dissenting).

43. *Id.* at 628 (emphasis added).

44. *See generally* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

45. *See* *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

46. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

47. *See id.*

48. 268 U.S. 652 (1925).

49. *Id.* at 665.

Manifesto” in question advocated, advised, and taught that organized government (in this case, the U.S. government) should be overthrown by force, including violence.⁵⁰ The Court held that, because there was a “revolutionary spark [that] may kindle a fire that . . . may burst into a sweeping and destructive conflagration” in the defendant’s distributed manifesto, the speech was punishable under the clear and present danger test.⁵¹

In what appears to be sarcasm, Justice Holmes remarked that “[e]very idea is an incitement” because every idea is intended to bring about some sort of change.⁵² He went on to criticize the majority for abusing the clear and present danger test and misunderstanding the imminence factor.⁵³ In retrospect, it appears that what Holmes intended was for the Court to investigate causation in these cases—to determine if the speech would likely cause imminent lawless action, which is incitement by today’s standards.⁵⁴

2. Incitement Doctrine Today

Twenty-four years after the Court articulated the clear and present danger test, the Court transitioned to the modern approach regarding inciting speech. In *Brandenburg v. Ohio*,⁵⁵ Brandenburg was convicted under the Ohio Criminal-Syndicalism Statute as a leader of the Ku Klux Klan (KKK) for incendiary statements that he made on television.⁵⁶ The speech at issue was his claim that, if the government continues to suppress the white race, then “it’s possible there might have to be some revengeance [sic] taken.”⁵⁷ The Supreme Court overturned his conviction and held that the speech at issue was protected under the First Amendment.⁵⁸

While the Court noted that Brandenburg’s comments were deplorable, it determined that the government could not proscribe such speech.⁵⁹ The Court found that Brandenburg’s language could not be viewed as incitement because it did not specify a time for attack, nor was it an immediate call to action.⁶⁰ Instead, Brandenburg’s comments could at most be characterized as a call for action in the indefinite future.⁶¹ As such, the Court ruled that his speech constituted advocacy for change, and thus could be considered speech spurring political debate.⁶² Such speech, the Court held, could not be

50. *See id.*

51. *Id.* at 669.

52. *Id.* at 673 (Holmes, J., dissenting).

53. *See id.*

54. *See Dow & Shieldes, supra* note 11, at 1217.

55. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

56. *Id.* at 446. Brandenburg’s speech included statements such as “[s]end the Jews back to Israel” and “[b]ury the niggers.” *Id.* at 446 n.1.

57. *Id.* at 446.

58. *Id.* at 449.

59. *Id.* at 447.

60. *Id.* at 447–48.

61. *Id.* at 448.

62. *Id.* at 447–48.

silenced by government regulation.⁶³ As a result, the Court found the underlying statute unconstitutional.⁶⁴

In stark contrast to the earlier Supreme Court cases, *Brandenburg* did not turn on the clear and present danger test: the Court found it too mechanical and formulaic.⁶⁵ Instead, the Court employed a test that mimicked what Justice Holmes had stressed in his dissents decades earlier.⁶⁶ Drawing from what Holmes proffered as incitement, the Court developed the imminent lawless action test, also known as the *Brandenburg* test.⁶⁷ Under this test, speech that is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action” may be proscribed.⁶⁸ For a person to be punished for inflammatory speech: (1) there must be an intent to cause imminent lawless action, (2) the action must be imminent, and (3) there must be a likelihood that imminent lawless action will occur.⁶⁹

Brandenburg shifted away from the earlier doctrine under which speech advocating for lawlessness or for the overthrow or impediment of U.S. government operations could be criminalized.⁷⁰ In *Brandenburg*’s aftermath, speech considered advocacy for reform—whether by violent overthrow, political discussion, or abstract teaching—could no longer be proscribed or categorized as incitement.⁷¹ In brief, First Amendment doctrine became more liberal and protective of individual rights.⁷²

The Supreme Court has not employed the test in a case of national security since the test’s articulation in 1969.⁷³ *Brandenburg* itself hardly considered aspects of national security as it involved a small sect of the KKK advocating to overthrow the government using hypotheticals.⁷⁴ Yet, although the Court

63. *Id.* at 448–49.

64. *Id.* (explaining that the statute criminalized advocating or teaching the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform).

65. *See* *Dennis v. United States*, 341 U.S. 494, 515–17 (1951) (plurality opinion) (explaining that the clear and present danger test was not a pure mathematical formula, it was able to be reduced to something close to that).

66. *See* *Brandenburg*, 395 U.S. at 447.

67. *Id.*

68. *Id.*

69. *See id.* This test is currently employed by the Court. The likelihood factor is what Justice Holmes referred to as “proximity and degree.” *Schenck v. United States*, 249 U.S. 47, 52 (1919).

70. *See* *Dow & Shieldes*, *supra* note 11, at 1234–35.

71. *See id.*

72. *See generally* *Brandenburg*, 395 U.S. 444; Hans A. Linde, “*Clear and Present Danger*” *Reexamined: Dissonance in the Brandenburg Concerto*, 22 *STAN. L. REV.* 1163 (1970).

73. *See* David L. Hudson Jr., *Landmark Case Sets Precedent on Advocating Force*, *FIRST AMEND. CTR.* (June 8, 2009), <http://www.firstamendmentcenter.org/landmark-case-set-precedent-on-advocating-force> [<https://perma.cc/XA9K-K9AM>]. The cases from the earlier part of the century all centered on national security in some respect. *Id.* The nation was at war and the incitement that the cases considered was not focused on rioting or incitement to murder, but rather incitement to overthrow the government or attack many people. *Id.*

74. *See* *Brandenburg*, 395 U.S. at 447–48.

has made few comments about the test, some lower courts have applied its standard.⁷⁵

For instance, the Court applied the standard in *Hess v. Indiana*,⁷⁶ where a protestor claimed that he would “take the fucking streets” at a later, undefined time.⁷⁷ The lower court determined that his language was incitement and could be punished, but the Supreme Court stressed the importance of immediacy and ruled that Hess’s speech could not amount to more than a mere suggestion aimed at the indefinite future.⁷⁸

In *Bible Believers v. Wayne County*,⁷⁹ the Eastern District of Michigan ruled that speech intended to anger a target audience could not be considered incitement to lawless action.⁸⁰ The court used the *Brandenburg* standard to determine that the speech was constitutionally protected even though it was offensive and meant to infuriate.⁸¹ The opinion cites Eugene Volokh, noting that it is hard to find speech that rises “to such a dangerous level that it can be deemed incitement” and that there will hardly ever be enough evidence for a jury to find a party guilty.⁸²

In *In re White*,⁸³ the Eastern District of Virginia considered whether blog posts by the defendant constituted incitement under *Brandenburg*.⁸⁴ The defendant’s posts included threats to an individual and advocated the use of violence against others.⁸⁵ The court held that the blog posts did not amount to incitement under *Brandenburg* because there was no advocacy for *imminent* lawless action.⁸⁶ It stated that posting words on the internet alone was not sufficient evidence that the defendant’s suggested actions were likely to be immediately carried out by his readers.⁸⁷ Finally, the court held that advocating for violence or harm is not removed from First Amendment protections when the imminence factor of *Brandenburg* is not satisfied.⁸⁸

3. Scholarly and Public Commentary on Incitement Doctrine

The application of the *Brandenburg* test has been minimal but straightforward over the last fifty years, with no doctrinal developments. There has, however, been a large amount of published scholarship and journalistic think pieces that discuss the efficacy of *Brandenburg* and urge reconsideration of the test.⁸⁹ Responses to the doctrine have been both

75. See *infra* notes 79–87 and accompanying text.

76. 414 U.S. 105 (1973) (per curiam).

77. *Id.* at 107.

78. See *id.* at 108–09.

79. 805 F.3d 228 (6th Cir. 2015).

80. See *id.* at 228.

81. See *id.*

82. See *id.* at 244.

83. No. 2:07CV342, 2013 WL 5295652 (E.D. Va. Sept. 13, 2013).

84. *Id.* at *38–41.

85. See *id.* at *21–22.

86. *Id.* at *62.

87. *Id.*

88. See *id.*

89. See generally Dow & Shields, *supra* note 11; Lyriisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147 (2011); Linde, *supra* note 72.

defensive and critical with each side setting forth various arguments that would either promote the continued use of *Brandenburg* or call for a reevaluation of it.⁹⁰

Some scholars have suggested that there are two distinct sides to the issue, and various judges have aligned themselves with one or the other.⁹¹ On the one hand, judges that prioritize security are more inclined to proscribe speech; on the other hand, those who prioritize freedom of expression tolerate a greater risk of harm to achieve that end.⁹²

The purpose of keeping language unrestricted is to promote political discussion.⁹³ Speech that *could* be classified as incitement is often not meant to spur imminent lawless action but rather action in the political sphere meant to influence positive change.⁹⁴ Indeed, language that uses hyperbole and triggers emotion can influence people to make a change.⁹⁵

Some suggest that the American Revolution was a result of incendiary speech and that, without the founders publishing their thoughts, the United States would not have come to be an independent nation.⁹⁶ The calls to break free from the ties with England and to form a new nation would likely not be protected under *Brandenburg* today.⁹⁷ The intent was to bring about imminent lawless action against the current government through the formation of militia and declaration of independence.⁹⁸

By contrast, the current standard mostly lies in the reality of what happens *after* particular speech is disseminated. In most cases—when nothing comes of the speech—then there is no case for prosecution due to the imminence and likelihood requirements.⁹⁹ Under the current doctrine, the government essentially must wait for something terrible to happen to prevent a speaker

90. See Linde, *supra* note 72, at 1183–86.

91. See *id.*

92. See Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 665–67 (2017); see also Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 605, 620–28 (2017).

93. See Volokh, *supra* note 18, at 1150–51.

94. See Sedler, *supra* note 22, at 1020–22.

95. See *id.* The issue is that speech meant to inspire change through lawful means can also inspire people to attempt to invoke change through unlawful means. *Id.* If the Court upholds the proscribing of political speech, it is certainly too restrictive of First Amendment rights. *Id.* But if the Court does not allow for regulation of speech that is likely to incite violence, there is a great risk of harm to the public. See *id.*

96. See Laura Stampler, *Here's Some Incredible Pro-Independence Propaganda from the American Revolution*, BUS. INSIDER (July 4, 2015, 4:35 PM), <http://www.businessinsider.com/pro-independence-propaganda-from-the-american-revolution-2015-7> [https://perma.cc/9PPS-3YSD] (discussing propaganda, such as Benjamin Franklin's "Join, or Die" poster and books such as Thomas Paine's *Common Sense*, as acts intended to prompt people to join a revolution and subvert British colonial control).

97. See *supra* Part I.A.2. Revolutionaries would speak and publish their thoughts regarding independence from England. James E. Leahy, "Flamboyant Protest," *The First Amendment and the Boston Tea Party*, 36 BROOK. L. REV. 185, 210 (1970). They called for the Boston Tea Party through speech that (1) was directed to incite imminent lawless action and (2) was likely to cause that action (and indeed, did). See *id.* at 187; see also *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

98. See *id.*

99. See Linde, *supra* note 72, at 1181–82.

from acting because likelihood and imminence are difficult to prove without threatened or inspired action actually occurring.¹⁰⁰

4. Foreign Incitement Standards

The United States has borrowed much of its common law from the United Kingdom for the sake of continuity, and much of it remains today.¹⁰¹ As a former British colony, the population had a familiarity with British law.¹⁰² The United Kingdom maintains a zero-tolerance policy toward speech that may incite terrorism; the current operative statute is unforgiving to promoters of terror attacks.¹⁰³ Specifically, the statute punishes the encouragement of terrorism and the dissemination of terrorist publications.¹⁰⁴ The types of speech that constitute encouragement of terrorism include glorification, direct and indirect inducement to prepare or instigate acts, and even reckless dissemination of this type of speech.¹⁰⁵ Although the British statute uses the word “encouragement” as opposed to the word “incitement,” the two words effectively have the same meaning. Encouragement is equivalent to incitement under U.S. law, but without the likelihood and imminence requirements.¹⁰⁶

The recent case of *R v. Choudary*¹⁰⁷ demonstrates how the United Kingdom’s doctrine is practically applied.¹⁰⁸ Anjem Choudary was convicted under the Terrorism Act 2000¹⁰⁹ for encouraging individuals to travel to Syria and fight for the Islamic State of Iraq and Syria (ISIS).¹¹⁰ Choudary had stayed within the bounds of the law for some time but was a prominent supporter of radical Islam and a lecturer that frequently promoted Sharia law.¹¹¹ Nothing he initially said or promoted amounted to

100. See *Brandenburg*, 395 U.S. at 447.

101. See Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 4–5 (1936).

102. See *id.*

103. See generally Terrorism Act 2006, c. 11, pt. 1 (Eng.). The Act was written and enacted in response to the 2005 London subway bombings committed by the terrorist organization Al Qaeda. See Ian Cobain, *London Bombings: The Day the Anti-Terrorism Rules Changed*, GUARDIAN (July 7, 2010), <https://www.theguardian.com/uk/2010/jul/07/london-bombings-anti-terrorism> [https://perma.cc/5APB-25T8].

104. See Terrorism Act 2006, c. 11, pt. 1, §§ 1–4 (Eng.).

105. See *id.* § 2.

106. Compare Terrorism Act 2006, c. 11, pt. 1, § 1 (Eng.) (stating that encouragement to lawless action amounts to a violation of the law), with *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (noting that encouraging lawless action is the same as inciting imminent lawless action but that encouraging does not require that the intent and effect be imminent and that there be a likelihood that the speech causes the effect).

107. *R v. Anjem Choudary* [2016] EWCA (Crim) 61 (Eng.).

108. *Id.*

109. See generally Terrorism Act 2000, ch. 11 (Eng.) (creating various offenses including terrorist fundraising and weapons training). This act is similar to the 2006 act but covers a broader range of crimes. For the purposes of this Note, it is safe to assume that the Terrorism Act 2006 would also apply.

110. See Jamie Grierson et al., *Anjem Choudary Convicted of Supporting Islamic State*, GUARDIAN (Aug. 16, 2016, 10:32 AM), <https://www.theguardian.com/uk-news/2016/aug/16/anjem-choudary-convicted-of-supporting-islamic-state> [https://perma.cc/227X-SYSU].

111. *Id.*

encouraging terrorism or inviting support for a terrorist organization.¹¹² Later, however, Choudary was arrested, and the court ruled to uphold his conviction, concluding that inviting the support for a terrorist organization through speech amounted to giving the organization the “oxygen of publicity.”¹¹³ While Choudary’s prior speech was considered appalling and dangerous, it did not rise to a level of criminality under the United Kingdom’s laws until he encouraged others to become part of an organization at war with “the West.”¹¹⁴

Israel is another country with laws that often closely resemble those of the United States.¹¹⁵ This is possibly because Israel shares the same fundamental values of democracy and individual liberties as the United States and because Israel is one of the United States’ closest allies.¹¹⁶ In comparison to U.S. law, it is easier for the government to prove incitement under Israeli law.¹¹⁷ The standard the Israeli judicial system uses is the “near certainty test.”¹¹⁸ Under this test, free speech will be limited only in the event of a national security concern.¹¹⁹ There has to be a “near certainty that national security and public safety will be harmed and that the harm is grave, serious and severe.”¹²⁰

Israeli law is more protective of national security than the current U.S. doctrine because Israel is under a constant terror threat.¹²¹ Terror organizations, and even other countries in close proximity to Israel, have called for Israel’s destruction.¹²² In that type of hostile climate, the Israeli

112. *Id.*

113. *R v. Anjem Choudary* [2016] EWCA (Crim) 61, [46] (Eng.) (quoting the lower court’s decision).

114. *See id.*; *see also* Grierson et al., *supra* note 110.

115. *See* Michal Buchandler-Raphael, *Incitement to Violence Under Israeli Law and the Scope of Protection of Political Speech Under Israeli Freedom of Speech Jurisprudence: A Comparative Analysis and an Alternative Perspective* 3 (Aug. 2007) (unpublished manuscript), https://works.bepress.com/michal_buchandler_raphael/1/ [<https://perma.cc/R24M-PLS2>] (arguing that, even though Israel does not have a written constitution like the United States, that does not mean that human and individual rights fall by the wayside, as they are protected by the Israeli judiciary).

116. *See id.* at 3–6 (noting that Israel has a great reverence for democracy and free speech rights, that it is the only country in the Middle East with a functional democracy, and that it has a political system in which the government can be criticized without fear of persecution, much like the United States).

117. *See id.* at 6.

118. *Id.* at 6–7.

119. *See id.*

120. *Id.* at 6.

121. *Victims of Palestinian Violence and Terrorism Since September 2000*, ISR. MINISTRY FOREIGN AFF., <http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/victims%20of%20palestinian%20violence%20and%20terrorism%20sinc.aspx> [<https://perma.cc/RND2-SLQK>] (last visited Oct. 16, 2017).

122. *See, e.g.,* Elliott C. McLaughlin, *Iran’s Supreme Leader: There Will Be No Such Thing As Israel in 25 Years*, CNN (Sept. 11, 2015, 7:48 AM), <http://www.cnn.com/2015/09/10/middleeast/iran-khamenei-israel-will-not-exist-25-years> [<https://perma.cc/6KEJ-JRND>] (explaining that the Iranian government has called for the destruction of Israel and hopes that there will be no country of Israel within twenty-five years and that there will be no serenity for Israel until it is destroyed).

government must be willing to step in at an earlier point to stop an attack, as the risk of an attack being carried out is much higher.¹²³

B. A More Connected World, A More Complex World

Before the 9/11 attacks, the internet was in its developmental years.¹²⁴ It was unclear how revolutionary the internet was going to be.¹²⁵ The attack occurred well before Facebook was even a thought on the Harvard campus.¹²⁶ After Facebook's founding, social media quickly became a way to supplement online communications such as email.¹²⁷ The fundamental difference between email and social media, however, was that the latter was created to connect many people from many regions and to bring ideas together on a platform open for discussion.

In 2000, there were approximately 738 million internet users; in 2015, there were over 3.2 billion.¹²⁸ Social media is where most of the connection occurs—over 33 percent of internet users, approximately 1.32 billion people, are daily active users of Facebook.¹²⁹ Facebook is used for sharing ideas between like-minded groups and “friends”; however, people can see posts of items that their friends promote or follow.¹³⁰ Twitter, a site and application on which users may post messages to their followers, and where their followers may “retweet” those posts,¹³¹ has a monthly active user base of 313 million.¹³²

With nearly half the world population using the internet and a significant portion of internet users on social media, the world has become a much smaller place. Information is accessible to anyone with an internet

123. See *Victims of Palestinian Violence and Terrorism Since September 2000*, *supra* note 122.

124. See generally Barry M. Leiner et al., *Brief History of the Internet*, INTERNET SOC'Y (Oct. 15, 2012), <https://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet> [https://perma.cc/8JEU-ZRUM].

125. See Leiner et al., *supra* note 124. For a detailed discussion of terrorism and internet intermediaries, see generally Raphael Cohen-Almagor, *The Role of Internet Intermediaries in Tackling Terrorism Online*, 86 FORDHAM L. REV. 425 (2017).

126. See Sarah Phillips, *A Brief History of Facebook*, GUARDIAN (July 25, 2007, 5:29 AM), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia> [https://perma.cc/2LVV-RWFL]. Founder Mark Zuckerberg was developing Facebook at Harvard University in 2004. See *id.*

127. See *Newsroom*, FACEBOOK, <http://newsroom.fb.com/company-info/> [https://perma.cc/R8KY-7QQM] (last visited Oct. 16, 2017).

128. Press Release, Int'l Telecomm. Union, ITU Releases 2015 ITC Figures (May 26, 2015), http://www.itu.int/net/pressoffice/press_releases/2015/17.aspx [https://perma.cc/7JPG-QXD6].

129. See *Newsroom*, *supra* note 127.

130. See *id.*

131. Each message sent out is a tweet and to retweet is to take a message sent by someone and then send it to another user's set of account followers. *Getting Started with Twitter*, TWITTER, <https://support.twitter.com/articles/215585> [https://perma.cc/825C-BUEN] (last visited Oct. 16, 2017). This can often lead to a message that was only sent to an audience of a certain size being sent to a much larger group of people, some of whom may have not been considered when sending the original message. *Id.*

132. See *Company*, TWITTER, <https://about.twitter.com/company> [https://perma.cc/HG9K-WEAH] (last visited Oct. 16, 2017).

connection, and people can quickly react to that information. Indeed, with this type of access and open and dynamic infrastructure, there are new challenges that governments face, particularly in the realm of criminal activity on social media.

1. Prosecution Based on Social Media Presence

While the internet has provided access to useful information and revolutionized communication, it has also opened the door for new ways to commit crimes, to disseminate illegal information and content, and to promote the advocacy of imminent lawless action.¹³³ Not everything that is deemed illegal by statute can be prosecuted, but there are methods by which law enforcement agencies may track down and prosecute people committing crimes on the internet.¹³⁴

The traditional way that law enforcement identifies offenders is through an individual report of an online post. The Supreme Court first encountered social media postings when a woman reported her estranged husband's Facebook comments to the police.¹³⁵ The defendant posted rap lyrics indicating that he was going to harm his wife and her coworkers.¹³⁶ His conviction for violating a federal statute prohibiting any communication containing a threat of personal injury was upheld at the district and appellate levels but overturned by the Supreme Court because his words did not amount to a true threat.¹³⁷ The Court noted that when words are posted online, it becomes harder to prove whether the speaker had the requisite intent.¹³⁸ Prosecutors trying to prove incitement face this same hurdle.¹³⁹

Another way the government finds and prosecutes speakers on the internet is through the FBI and other law enforcement agencies combing the web. The FBI tracks publicly available information on social media, such as tweets and Facebook posts through social media monitoring software.¹⁴⁰ This information is already available to many companies that utilize similar software to develop marketing and advertising plans.¹⁴¹ So long as the FBI and other law enforcement agencies do not use their monitoring software to

133. Crimes based on social media presence include: possessing and distributing child pornography, 18 U.S.C. § 2252A (2012), posting threats to or stalking individuals online, 18 U.S.C. § 2261A (2012), identity theft, 18 U.S.C. § 1028 (2012), and using the internet to commit bank or wire fraud, 18 U.S.C. § 1343 (2012).

134. See Kate Green, *Catching Cyber Criminals*, MIT TECH. REV. (Mar. 9, 2009), <https://www.technologyreview.com/s/405467/catching-cyber-criminals/> [https://perma.cc/5QR8-C97C].

135. See generally *Elonis v. United States*, 135 S. Ct. 2001 (2015).

136. *Id.* at 2005–07.

137. *Id.* at 2002.

138. *Id.* at 2012–13.

139. See *id.*

140. See Jared Keller, *The FBI Wants to Read Your Tweets*, ATLANTIC (Jan. 26, 2012), <http://www.theatlantic.com/technology/archive/2012/01/the-fbi-wants-to-read-your-tweets/252059/> [https://perma.cc/Z97J-XY8].

141. See *id.*

view private correspondences and instead limit tracking to public information only, they are acting within their legal bounds.¹⁴²

When the government uses this type of surveillance to monitor social media speech, it is mostly looking for terrorist activity or general threats to national security.¹⁴³ The recent conviction of Tarek Mehanna under the USA PATRIOT Act (the “Patriot Act”) for providing material support to a terrorist organization¹⁴⁴ was the result of the government’s surveillance of his social media activity.¹⁴⁵ While some viewed this conviction as an assault on First Amendment rights, the court did not cite the content of his speech or his beliefs as the bases for his conviction but rather his role in providing support to a designated terrorist organization.¹⁴⁶

While there are difficulties in proving intent of social media speech due to the wide audiences it reaches, it is nevertheless possible under certain circumstances for the government to combat crime effectively on this medium. Technology exists to track keywords and trends on social media.¹⁴⁷ Moreover, the FBI has planned to purchase technology that tracks the geolocation of social media users to further analyze speakers’ contexts and to track them if warranted.¹⁴⁸ This will help prosecutors to determine what the intended effect of speech is in incitement cases, which is required under *Brandenburg*.¹⁴⁹

2. How Terrorists Use Social Media

Terrorists both at home and abroad have taken full advantage of the “fruits of globalization” by using the internet to orchestrate assaults and attacks from many locations.¹⁵⁰ Because terrorists are no longer geographically restrained, their network has expanded and they are able to reach far more people than before.¹⁵¹ It is no longer necessary for a terror organization to have an active website; instead, the organization can use social media to reach out and provide information to its audience.¹⁵² Previously, an interested

142. See *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); cf. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

143. See Keller, *supra* note 140.

144. See *infra* Part II.A (discussing the material-support provision of the Patriot Act).

145. See Andrew F. March, *A Dangerous Mind*, N.Y. TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/opinion/sunday/a-dangerous-mind.html> [<https://perma.cc/H4LL-XEKT>]; see also *United States v. Mehanna*, 735 F.3d 32, 44 (1st Cir. 2013).

146. See *Mehanna*, 735 F.3d at 46.

147. See Keller, *supra* note 140.

148. See *Social Media Monitoring Platform*, FED. BUS. OPPORTUNITIES (Sept. 15, 2015, 10:43 AM), <https://www.fbo.gov/index?s=opportunity&mode=form&id=ec695b317a2a3d1751354c42e3d9eb02> [<https://perma.cc/F7XV-CHSD>].

149. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

150. Gabriel Weimann, *Terror on Facebook, Twitter, and YouTube*, BROWN J. WORLD AFF., Spring/Summer 2010, at 45, 45 (2010).

151. See *id.* at 45–46.

152. See *id.* at 48–51.

individual would have to search actively for an organization's website.¹⁵³ Now, the same person who may not have been interested enough to search on his or her own is more likely to stumble across a message or post from a terrorist organization on social media.¹⁵⁴

When a terrorist organization posts on social media, it often includes videos of its fighters training and killing as well as messages from its leaders.¹⁵⁵ The videos are intended either to inspire viewers to commit similar acts or to instill fear in viewers by demonstrating what the organization is capable of doing.¹⁵⁶ Additionally, many posts occur in the form of pictures accompanied by text, or text alone.¹⁵⁷ These posts are intended to inform, recruit, and incite people whom the organization believes it can convince of its cause.¹⁵⁸

Since terrorists' adoption of social media, there have been more frequent attacks and more threats of attacks than at any other period in time.¹⁵⁹ While the vast majority of terror attacks have occurred in the Middle East,¹⁶⁰ the number of attacks in the United States has increased, and "lone wolf" terrorists have increased in number.¹⁶¹ A lone wolf is a person who acts without the explicit backing of an organization but is indoctrinated and inspired, or incited to act, by a terrorist organization or ideology.¹⁶² For reference, the 9/11 attacks were planned and carried out by Al Qaeda, but lone wolf terrorists carried out the San Bernardino massacre in 2015.¹⁶³

The lone wolf is often a homegrown terrorist—someone who was born in the country he or she is attacking and became radicalized by some form of online content or through acquaintances. Not all homegrown terrorists are

153. *See id.* at 48.

154. *See id.*

155. *See* Jason Burke, *How the Changing Media Is Changing Terrorism*, *GUARDIAN* (Feb. 25, 2016, 1:00 PM), <https://www.theguardian.com/world/2016/feb/25/how-changing-media-changing-terrorism> [<https://perma.cc/GN3S-SWSZ>].

156. *See id.*

157. *See* Weimann, *supra* note 150, at 52–53.

158. *See id.*

159. *See* Lazaro Gamio & Tim Meko, *How Terrorism in the West Compares to Terrorism Everywhere Else*, *WASH. POST* (July 16, 2016), <https://www.washingtonpost.com/graphics/world/the-scale-of-terrorist-attacks-around-the-world/> [<https://perma.cc/AF5T-FXLM>].

160. The terrorism that occurs in the Middle East is often related to civil wars, and because of this, it is hard to separate terror attacks from armed conflicts. *See* Margot Sanger-Katz, *Is Terrorism Getting Worse? In the West, Yes. In the World, No.*, *N.Y. TIMES* (Aug. 16, 2016), <http://www.nytimes.com/2016/08/16/upshot/is-terrorism-getting-worse-in-the-west-yes-in-the-world-no.html> [<https://perma.cc/CEL7-6RF8>].

161. *See* Katie Worth, *Lone Wolf Attacks Are Becoming More Common—and More Deadly*, *PBS* (July 14, 2016), <http://www.pbs.org/wgbh/frontline/article/lone-wolf-attacks-are-becoming-more-common-and-more-deadly/> [<https://perma.cc/6QRQ-RPAS>].

162. *See id.*

163. On their Facebook pages, the San Bernardino shooters pledged their allegiance to ISIS prior to carrying out the attack that killed fourteen people. *See* Michael S. Schmidt & Richard Pérez-Peña, *F.B.I. Treating San Bernardino Attack as Terrorism Case*, *N.Y. TIMES* (Dec. 4, 2015), <http://www.nytimes.com/2015/12/05/us/tashfeen-malik-islamic-state.html> [<https://perma.cc/KD2C-R2RR>].

the product of extreme Islamic terror organizations; some are the product of white hate groups such as the KKK¹⁶⁴ and antigovernment militia groups.¹⁶⁵

Terrorism is a tactic that requires constant communication and recruitment efforts.¹⁶⁶ It is not about the sheer numbers a terrorist organization can amass at once; rather, the effectiveness of a terrorist campaign is its ability to recruit without being stopped.¹⁶⁷ ISIS's rapid ascent to prominence shows that social media has added fuel to the fire.¹⁶⁸ As mentioned above, however, "recruitment" no longer means calling upon would-be recruits to come to an area and be trained.¹⁶⁹ Recruitment now means being indoctrinated with materials available online—posts on Twitter and Facebook, documents, or videos on YouTube.¹⁷⁰

There are many cases in which social media has been a significant factor in the planning or carrying out of terrorist activity. The anecdote mentioned in the Introduction is just one example of a terrorist being called to action.¹⁷¹ The San Bernardino shooters pledged their allegiance to ISIS in an online post before carrying out their attack.¹⁷² Choudary also illustrates how supporters of terrorism use social media to spread their message and incite people to join a cause.¹⁷³ A nightclub shooter in Orlando, Florida, frequently viewed propaganda and violent videos distributed by ISIS, which investigators believe was critical in his indoctrination and incitement to action.¹⁷⁴ Clearly, terrorist organizations present a global problem by furthering their goals via social media. In the United States, there are limited ways to combat the problem.

164. The *Brandenburg* case was just one example of the KKK trying to incite lawless action; it is an extreme organization that has committed terrorist acts.

165. The Oklahoma City Federal Building bombers were homegrown terrorists. See *United States v. McVeigh*, 153 F.3d 1166, 1177–78 (10th Cir. 1998).

166. GABRIEL WEIMANN, *TERROR ON THE INTERNET: THE NEW ARENA, THE NEW CHALLENGES* 111 (2006).

167. See *id.*

168. See Weimann, *supra* note 150, at 52–53.

169. See *supra* Part I.B.2.

170. See Weimann, *supra* note 150, at 48–51.

171. See *supra* notes 1–5 and accompanying text. The anecdote was adapted from an actual occurrence in which a Brooklyn man planned an attack on New York after partial inspiration and incitement from social media posters. See NY1 News, *supra* note 1.

172. See Schmidt & Pérez-Peña, *supra* note 163. While the actual intent and inspiration of the shooters is unclear (because they were killed and never questioned) the fact that they posted their allegiance to ISIS on social media suggests that their inspiration came from social media, and perhaps they too were attempting to inspire and incite future attacks in the name of ISIS.

173. See *supra* Part I.A.4.

174. See Del Quentin Wilber, *The FBI Investigated the Orlando Mass Shooter For 10 Months—And Found Nothing. Here's Why*, L.A. TIMES (July 14, 2016, 3:00 AM), <http://www.latimes.com/nation/la-na-fbi-investigation-mateen-20160712-snap-story.html> [<https://perma.cc/S3YZ-VVPA>]. The FBI notes that watching a video is not illegal, but under a more stringent interpretation of the First Amendment, posting the video would be illegal and thus the video would not have been available for the shooter to watch. See *id.*

II. STRIKING THE BALANCE BETWEEN LIBERTY INTERESTS AND CURTAILING TERROR

In light of the recent surge in terrorist social media presence, the United States has in some respects compromised its national security by not taking measures to curtail incitement. In 2016 alone, more than fifty people were killed in terrorist attacks.¹⁷⁵ This Part describes how certain liberties have been curtailed in favor of the United States' interests and efforts in security and public safety—in particular, the Fourth Amendment and the Patriot Act. In so doing, this Part also lays out alternative approaches to handling incitement and incitement-like speech, mirroring the same liberty-restricting approaches the government has employed in the name of national security in other contexts. Such approaches to speech regulation range from the most speech protective to those most protective of national security. Finally, this Part provides hypothetical scenarios that closely mimic relevant and related fact patterns to determine the point at which the government may step in and prosecute a person for his or her speech under the differing approaches.

A. *The National Security Threat*

Since 9/11, the United States has placed great emphasis on national security.¹⁷⁶ But the question remains: Is the United States any safer than it was on 9/11?¹⁷⁷ The area in which most American citizens see a change in their day-to-day lives post-9/11 is privacy.¹⁷⁸ The government justifies invasions into personal privacy in the interest of stopping terrorist attacks before they occur.¹⁷⁹ Accordingly, the FBI's budget has tripled since 2001 in an effort to monitor and stop terrorist activity.¹⁸⁰

Perhaps most remarkably, less than one week after 9/11, legislative steps were taken to combat future terrorist attacks, and less than two months later, the Patriot Act¹⁸¹ was signed into law.¹⁸² The Act was touted by the Justice Department as a tool to preserve life and liberty by “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.”¹⁸³ The Justice Department attempted to

175. See 2016 Terrorist Attacks, ESRI, <https://storymaps.esri.com/stories/terrorist-attacks/?year=2016> [<https://perma.cc/3Y8T-RQGA>] (last visited Oct. 16, 2017).

176. See Steven Brill, *Is America Any Safer?*, ATLANTIC (Sept. 2016), <http://www.theatlantic.com/magazine/archive/2016/09/are-we-any-safer/492761/> [<https://perma.cc/XM96-SU48>].

177. See *id.*

178. See *id.*

179. See *id.*

180. See *id.*

181. United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S. Code).

182. See WEIMANN, *supra* note 166, at 174 (explaining that governments are not as good at being preventative as they are reactionary and that it often takes a large event to spur change on the federal government level).

183. See *The USA PATRIOT Act: Preserving Life and Liberty*, DEP'T JUST., https://www.justice.gov/archive/ll/what_is_the_patriot_act.pdf [<https://perma.cc/BL3K-2BT4>] (last visited Oct. 16, 2017).

explain in simple terms what the Patriot Act allows—the interception of private communications made by citizens who the government *suspects* might be terrorists.¹⁸⁴ Critics of the Patriot Act claim that it allows for warrantless, extrajudicial searches and seizures of private information in violation of the Fourth Amendment.¹⁸⁵

An additional part of the Patriot Act that has garnered attention is the material-support provision.¹⁸⁶ In the landmark decision *Holder v. Humanitarian Law Project*,¹⁸⁷ the Supreme Court concluded that some types of speech, such as training and expert assistance, do not rise to the level of incitement but could be criminalized in certain instances.¹⁸⁸ The Court explained that certain groups, even with lawful intentions, “are so tainted by their criminal conduct that any contribution to such an organization facilitates [prohibited] conduct.”¹⁸⁹ The respondents did not challenge the secretary of state’s authority to determine which groups are designated terrorist organizations, and, therefore, which groups were covered by the statute.¹⁹⁰ In effect, so long as the executive branch deems an organization tainted, any form of advocacy or encouragement with respect to that group becomes punishable.¹⁹¹

In his dissent, Justice Breyer claimed that this is the type of speech that the *Brandenburg* standard protects—advocacy that does not amount to incitement cannot be proscribed or punished.¹⁹² This notion, however, seems to confuse the point of the statute. The statute is directed at those providing support; in this instance, support that could only come through speech. Incitement is unlikely to be categorized as support under the statute based on the definitions of support that Congress provided, and thus an inciting speaker could not fall under the statute’s coverage.¹⁹³

184. *See id.*

185. *See Surveillance Under the Patriot Act*, ACLU, <https://www.aclu.org/infographic/surveillance-under-patriot-act> [<https://perma.cc/ZK9G-3X49>] (last visited Oct. 16, 2017). The Patriot Act gives rise to many concerns. *See* Russell Berman, *A Long-Awaited Reform to the Patriot Act*, ATLANTIC (May 2015), <https://www.theatlantic.com/politics/archive/2015/05/a-long-awaited-reform-to-the-usa-patriot-act/393197/> [<https://perma.cc/WQ4P-AGSX>]. In 2001, Congress was much more willing to work together to pass legislation targeted to protect national security because of the 9/11 attacks. *Id.* Today, Congress is beginning to end the practice of bulk data collection. *See id.*

186. *See* 18 U.S.C. § 2339A (2012) (prohibiting the knowing provision of support to a terror organization listed by the secretary of state). Under the statute, material support includes tangible or intangible property; services such as financial services, lodging, training, and expert advice or assistance; weapons; money; and transportation. *See id.* The Act does criminalize the provision of medical or religious services. *See id.*

187. 561 U.S. 1 (2010).

188. *Id.* at 33.

189. *Id.* at 38.

190. *Id.* at 9–10.

191. *See id.*

192. *Id.* at 44 (Breyer, J., dissenting).

193. *See id.* at 21–23 (majority opinion). While incitement to terrorist action would seem to be more criminal than teaching a group to engage with the United Nations, such activity is not what Congress intended to criminalize. *See id.*

Many scholars have claimed that, over the years, various presidential administrations have exploited national security fears to pass legislation.¹⁹⁴ Some have argued that the Espionage Act of 1917¹⁹⁵ was enacted by the government to suppress political dissent.¹⁹⁶ Others claim that the Court adopted the clear and present danger test¹⁹⁷ to further this end and to align the law with the national consensus.¹⁹⁸ To this point, the Court often takes up the national consensus and considers external social conditions when expounding the law.¹⁹⁹

Scholars also assert that the Court should be particularly protective of individual liberties—especially free speech—during times of national security threats.²⁰⁰ During these “pathological times,” where the acceptance of unorthodox ideas becomes prevalent, the Court ought to uphold First Amendment freedoms.²⁰¹ This argument is compelling, but it leaves plenty of room for disagreement. Pathological times arise due to real concerns or fears felt by the public.²⁰² Is the general public not entitled to believe that its safety at home is more important than being able to express its dissatisfaction with the government to the extent that it borders on incitement?

B. Doctrinal Approaches to Inciteful Terrorist Speech on Social Media

Courts have rarely applied the *Brandenburg* test to social media cases. Accordingly, this Part applies alternative speech approaches to several hypotheticals and anecdotes. This Part also explores standards from the earlier part of the twentieth century²⁰³ and other countries.²⁰⁴ In doing so, it attempts to determine at which point the government could step in and prosecute a terrorist speaker on social media for inciting speech in order to safeguard national security.²⁰⁵

This Part applies various doctrinal approaches to the following hypothetical: A person posts on his or her Facebook and Twitter profile, “I am calling on all supporters of our cause to wreak havoc in New York City.

194. See, e.g., STONE, *supra* note 14, at 74,; see also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

195. See *supra* Part I.A.1.

196. See STONE, *supra* note 14, at 146–47 (arguing that the Wilson administration passed the Act to quell the fears of World War I but later abused it to stop any form of questioning or criticizing of the government).

197. See *supra* Part I.A.1.

198. See STONE, *supra* note 14, at 146, 172, 184 (claiming that the government effectively convinced the population of the narrative that there was a reason for fear and concern regarding national security, and that to match the national consensus, the Court implemented the clear and present danger test to uphold convictions under the Act).

199. See Blasi, *supra* note 194, at 482–84.

200. See, e.g., *id.* at 449–50.

201. See *id.* at 450–51.

202. See *id.*

203. See *supra* Part I.A.1.

204. See *supra* Part I.A.4.

205. Of course, most prosecution for unlawful speech that falls beyond the scope of the First Amendment’s protections are rooted in statute. In the hypotheticals that follow, this Note assumes the existence of such a statute.

We should consider attacking the enemy where they live and where they work.” This internet speaker is based in New York and his post will reach roughly 50,000 people before any type of attack occurs.²⁰⁶ The “cause” the poster mentions is a hatred of the United States and its foreign policy. In the past, this same poster has expressed his distaste with the U.S. government.

1. The *Brandenburg* Test

For speech to be proscribed under *Brandenburg* it must be “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”²⁰⁷ If the *Brandenburg* test were applied to the above fact pattern the government would likely fail to convict, as it is similar to the actual fact pattern in *Brandenburg*.²⁰⁸ The fact pattern does not give a specific time when there would be an attack, it does not direct what to attack, and it does not give the nature of what the attack will be.²⁰⁹ Under *Brandenburg*, one may argue that the speaker meant to wreak havoc by starting a protest; attacking people at home or work could mean attacking their values and might not have anything to do with lawless action.²¹⁰

The hypothetical poster will not be convicted under *Brandenburg* for additional reasons. First, there is no imminence factor; the speaker does not say “go attack right now,” and there is no way of determining when he meant for the attack to occur. The imminence requirement under *Brandenburg* is strict; it is required in the speaker’s intent and the effect of the speech.²¹¹ Second, there is no direction to cause *lawless* action. The speech could be interpreted as a call to cause inconvenience and to verbally attack morals. This poster would be able to continue his speech, and even if there were an attack that stemmed from this noninciting speech, the speaker would be safe from prosecution.

This is currently the best case for those desiring a speech-protective approach. The value of having a speech-protective approach is that it allows social dissent and encourages political discussion.²¹² While the hypothetical fact pattern may not be the ideal example of speech that inspires political discussion, the cause mentioned could be something worth investigating and considering in the political arena.²¹³ Even odious political speech can have

206. Often, once an attack that is linked to a social media post occurs, news networks cover it and cause the message to be received by a wider audience than originally intended.

207. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

208. Compare *supra* Part II.B (explaining the hypothetical fact pattern), with *Brandenburg*, 395 U.S. at 444–46 (reversing the conviction of a KKK supporter whose speech did not incite imminent lawless action).

209. See *supra* Part II.B.

210. See *Brandenburg*, 395 U.S. at 446–48. The speech at issue was necessarily hypothetical because it lacked a description of a specific time and place of attack. Additionally, the *Brandenburg* standard suggests a stronger presumption rather than incitement. See *id.*

211. See *Dow & Shieldes*, *supra* note 11, at 1235.

212. See *Cronan*, *supra* note 13, at 436.

213. The ideas that western ideals are incorrect, that certain values of politicians are corrupt, or that government policies are counterproductive and detrimental to groups of people are all ideas worth considering and should not be suppressed in a society that values free speech and the marketplace of ideas. See *Sedler*, *supra* note 22, at 1017–20.

value; it contributes to the democratic process and increases the breadth of ideas from which a population may draw to make decisions.²¹⁴

2. Foreign Speech Doctrine

There are several ways in which foreign countries handle inciteful speech. This Part examines and applies the standards of some nations that are similar to the United States. There are many countries that do not allow social media access²¹⁵ and others that limit free speech and would determine that almost any speech that could be considered incitement or criticism should be punished.²¹⁶ Accordingly, this Note applies the laws of the United Kingdom and Israel to the hypothetical. Unlike the United States, each of these countries would likely criminalize the speech presented in the hypothetical.

a. United Kingdom

If U.K. law were applied to the hypothetical, it likely would result in a conviction for encouraging terrorist activity.²¹⁷ The current laws in the United Kingdom allow the government to punish speakers who intentionally or recklessly encourage or glorify terrorist activity.²¹⁸ The only problem with convicting the poster in the fact pattern is that prosecutors would need to prove that the call constituted *terrorist* activity.²¹⁹

Much like the speaker *Choudary*,²²⁰ this poster has previously expressed his disdain for the government and values of the West.²²¹ The attack he speaks of can easily be viewed as promoting a terrorist activity if his previous posts are admitted as evidence. The call for an attack is likely to be viewed as encouraging terrorist action because attacking people at their homes and offices reasonably could be understood as terrorist activity. Additionally, under the Act it does not matter if the terrorist act actually occurs; what matters is whether the speech *could* cause terrorist action.²²²

While this approach is very protective of national security, it heavily encroaches on free speech rights. It proscribes incitement as well as encouragement.²²³ Prosecutorial discretion, however, is problematic in cases

214. See Volokh, *supra* note 18, at 1151 (noting that political speech is on “the highest rung” of importance).

215. See Jeremy Bender, *6 Countries That Block Social Media*, BUS. INSIDER (Apr. 6, 2015, 3:10 PM), <http://www.businessinsider.com/the-six-countries-that-block-social-media-2015-4> [<https://perma.cc/4TJ5-UZ69>] (explaining that certain countries that block social media access in different ways).

216. See *Freedom of Speech: Unholy Silence*, ECONOMIST (Jan. 27, 2015), <http://www.economist.com/news/international/21640747-middle-east-free-expression-rarity-blasphemy-laws-are-favoured-tools> [<https://perma.cc/9ZSK-EMXN>] (discussing the lack of free speech in many Middle Eastern countries).

217. See Terrorism Act 2006, c. 11, pt. 1 (Eng.).

218. *Id.*

219. See *id.*

220. See *supra* Part I.A.4.

221. See Grierson et al., *supra* note 110.

222. Terrorism Act 2006, c. 11, pt. 1(5)(i)(b) (Eng.).

223. See March, *supra* note 145.

like this. Such discretion can become relaxed and lead to the targeting of specific groups or people. The First and the Fifth Amendments safeguard against this precise situation.²²⁴

b. Israeli Approach to Proterror Speech

When applying Israeli law to determine how the hypothetical poster's speech would be treated, one must consider the primary focus on national security.²²⁵ Understanding Israel's global position and the attitude of its neighbors, national security is of great importance to not only the Israeli government but also to the Israeli people.²²⁶

Applying the near-certainty test would likely result in the speaker's conviction.²²⁷ The hypothetical is a call to attack a city, not an idea or the government, which could be viewed as intangible.²²⁸ The attack is not a theoretical possibility, but a real possibility, and could thus be considered a near-certain threat.²²⁹ Additionally, any of the speaker's previous posts may be considered to determine the context of the speech and if the speaker actually intended to incite an attack.²³⁰

Indeed, the Israeli test is even less forgiving than the clear and present danger test and is more likely to result in speech being proscribed when national security is at risk. The test balances the threat of national security against free speech rights, which are not absolute, much like U.S. law. The speech would be punishable under the Israeli law; even if the speech were toned down, the importance of national security likely would lead to the same result.

3. The Clear and Present Danger Test

An analysis of the fact pattern using the clear and present danger test reveals the most variation of any approach, and it is dependent upon which of the Court's views is applied.²³¹ While there are similar outcomes in the Court's *Schenck*, *Abrams*, and *Gitlow* decisions, the reasoning that is and should be applied from each version of the clear and present danger test may vary with the present fact pattern.²³² Holmes's opinion for the Court in

224. See Jonathan Keim, *Prosecutorial Discretion, Part II: Its Limits*, NAT'L REV. (Sept. 29, 2014, 2:54 PM), <http://www.nationalreview.com/bench-memos/389067/prosecutorial-discretion-part-two-its-limits-jonathan-keim> [https://perma.cc/D4EZ-DC94]. See generally Part I.A.

225. See *supra* notes 115–23 and accompanying text.

226. See *supra* notes 118–20 and accompanying text.

227. See *supra* Part II.B.

228. See *supra* Part II.B.

229. See Buchandler-Raphael, *supra* note 115, at 6–7 (explaining that a theoretical possibility does not suffice for the government to proscribe the speech, which means that if the poster said “attacking the city would be wonderful!” then it would not be punishable).

230. See *id.*

231. See *supra* Part I.A.1. This is the early twentieth-century test for incitement used in the United States and it is less protective of individual rights.

232. Compare *Schenck v. United States*, 249 U.S. 47, 51–52 (1919), with *Gitlow v. New York*, 268 U.S. 652, 665–66 (1925), and *Abrams v. United States*, 250 U.S. 616, 624 (1919).

Schenck created a test that closely resembles the *Brandenburg* standard.²³³ However, as applied in the subsequent cases, the test more closely resembles Israel's and the United Kingdom's laws.²³⁴

While the clear and present danger test is similar to the *Brandenburg* test, the outcome from the test's application would not be the same. For speech to be punishable under the clear and present danger test, it must be shown that a danger exists that Congress has the authority to prevent through legislative enactment.²³⁵ Here, the danger is an attack on New York City, which Congress surely has the right to defend against.²³⁶ The remaining hurdle is showing that the speech indicates a *clear and present* danger. Indeed, a court would likely hold that it does. The speaker gives a directive to attack, and if heard by the target audience, it could incite some to commit these acts.²³⁷ However, Holmes intended the test to incorporate an imminence factor.²³⁸ It would again be more difficult to prove that this speech would cause an attack immediately. Often, the only way to prove imminence is for something to actually occur, and then retroactively punish the speaker for incitement.

When a speaker posts that he wants the followers of his cause to attack a city and its citizens, the speech must be regulable under the clear and present danger test.²³⁹ This is the type of speech the Court wished to proscribe when it fashioned the clear and present danger test.²⁴⁰ The directive to those who see the message to attack is no different than attempting to cripple the United States government during a time of war; in fact, it is arguably a more present danger.²⁴¹

Even if the fact pattern were changed to be less direct by removing the second sentence to read only "I am calling on all supporters of our cause to

Justice Holmes dissented from the Court's opinion in both *Abrams* and *Gitlow*, writing that the clear and present danger test was being improperly applied. *See supra* Part I.A.1. Even so, the test leaned in favor of the government because, at the time, the United States was facing the Red Scare, which in actuality posed no threat to the public on U.S. soil. *See* ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 220 (1987). The United States today faces terrorism, which is arguably a more dangerous threat than the Red Scare.

233. *Compare* *Schenck*, 249 U.S. at 51–52 (establishing the clear and present danger test), with *Brandenburg v. Ohio*, 395 U.S. 444, 455–57 (1969) (per curiam) (applying the imminent lawless action test). This comparison indicates that the imminence factor was important to both Justice Holmes and to the modified test suggested in *Brandenburg*. Even so, *Schenck* is far more government-friendly than *Brandenburg*.

234. *Compare* *Gitlow*, 268 U.S. at 665–66, and *Abrams*, 250 U.S. at 624, with *supra* Part II.B.2 (showing that the Court did not give the imminence factor due weight in applying the tests). Foreign law is more concerned with the possibility of incitement occurring at any time, not immediately.

235. *See* *Schenck*, 249 U.S. at 52.

236. The U.S. Constitution was established "in Order to form a more perfect Union, establish Justice, [and] *insure domestic tranquility*. U.S. CONST. pmb1. (emphasis added); *see also* *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010).

237. The target audience is the group of people that the speaker intended to incite to lawless action.

238. *See supra* notes 42–54 and accompanying text.

239. *See* *Abrams*, 250 U.S. at 627.

240. *See* Blasi, *supra* note 194, at 184.

241. *See* *Abrams*, 250 U.S. at 622.

wreak havoc in New York City,”²⁴² it would still be a clear and present danger under the test that Justice Holmes developed for the Court.²⁴³ This test, while less protective of national security than the Israeli or U.K. laws, still provides the government with a great deal of power when prosecuting internet speakers.²⁴⁴

National security is clearly an important government interest. This does not mean, however, that individual liberties must disappear to keep the population safe. Such an event would bring about a totalitarian dictatorship,²⁴⁵ which is why the Constitution protects rights to certain extents.²⁴⁶ The Court was very protective of national security in the *Schenck* era.²⁴⁷ When assessing the facts from the view of the Court in that era, it is much easier to rationalize the criminalization of speech under the clear and present danger test.²⁴⁸

C. Onus on Providers

Are social media platforms doing good work at keeping terror-inciting speech off their websites, or should it not be their responsibility to monitor terror activity on their sites?²⁴⁹ Social media platforms have done a fairly good job at keeping hate speech censored, especially against prominent figures, and have gone so far as to ban users for breaking this code of conduct.²⁵⁰ But offending users continue to create accounts after their old accounts are deactivated, which gives companies no real control to permanently stop the offenders.

A division of Google is working on keeping terrorist publications suppressed in online searches and is also developing technology to divert searches for terrorist content to content that argues against terrorist causes.²⁵¹

242. See *supra* Part II.B.

243. See *supra* Part I.A.

244. The *Schenck* era cases are very protective of national security because they were decided during a time where there was a strong public fear that the country was threatened from the outside and the inside. See STONE, *supra* note 14, at 174.

245. The fear of all rights disappearing is one that has been conjured up by many; in this context, the Orwellian dystopia comes to mind, in which mere thought, without any verbal communication, can be criminal. This, of course, is not the world the founders intended when they wrote the Constitution, which is why the Constitution protects individual rights from government infringement. See THE FEDERALIST NO. 10 (James Madison).

246. See *id.*

247. See STONE, *supra* note 14, at 153.

248. See *generally supra* Part I.A (highlighting the transition of the Court’s incitement standard and what it took to punish someone who may have been trying to incite others to lawless action).

249. See Andy Greenberg, *Google’s Clever Plan to Stop Aspiring ISIS Recruits*, WIRED (Sept. 7, 2016, 7:00 AM), <https://www.wired.com/2016/09/googles-clever-plan-stop-aspiring-isis-recruits/> [<https://perma.cc/3H3H-KF85>].

250. See Alina Selyukh, *What Does It Take to Get Permanently Banned from Twitter?*, NPR (July 20, 2016, 2:31 PM), <http://www.npr.org/sections/alltechconsidered/2016/07/20/486738705/what-does-it-take-to-get-permanently-banned-from-twitter> [<https://perma.cc/A8D8-ZSMJ>].

251. See Greenberg, *supra* note 249. A division of Google is attempting to stop terrorist indoctrination where it can. See *id.* It is redirecting users searching for content such as radicalization videos and posts to content that provides an alternative for these desires. *Id.*

Should this onus be placed on social media platforms? If responsibility is placed on social media platforms, it could also be argued that it is the responsibility of the internet provider to deny access to those who further terrorist goals.²⁵² This logic fails, and the onus should not be placed on social media platforms. While it is helpful for companies to help protect the community when they can, companies are not be considered “speakers” when individuals post.²⁵³ Thus, companies should not be punished by the government. Such punishment would likely drive companies to end their business instead of providing the service, which is valuable to many.²⁵⁴

III. FINDING THE RIGHT BALANCE: INCREASED PROTECTION WITHOUT TRUE SACRIFICE

The current *Brandenburg* doctrine has failed to adequately protect against incitement.²⁵⁵ The United States has endured substantial terrorist attacks that could have been prevented by criminalizing terrorist speech, otherwise protected under *Brandenburg*.²⁵⁶ Accordingly, this Note proposes a change to the doctrine, which the Supreme Court ought to adopt to ensure national security and simultaneously avoid significant encroachment on individual First Amendment rights. The proposed doctrine is flexible—in a time of war or heightened threat of attack, the ability to proscribe speech would be easier; in peacetime, it would be more difficult.

The proposed test would no longer require imminence. Rather, it must be shown that, because of speech directing, advocating, or encouraging lawless action, there is a substantial likelihood of a high level of harm. The speech must have a fairly clear directive toward illegal action that could actually occur. Other facts include the current political climate and the speaker’s target audience.

A. *An Imminence Requirement Creates Room for Danger*

The imminence factor of the *Brandenburg* test is where the Court has most failed the public. Imminence is an incredibly high hurdle for the government to overcome, because it primarily relies on a retroactive approach.²⁵⁷ With this approach, law enforcement agencies must wait for a tragic event to occur

252. See Xavier Amadei, Note, *Standards of Liability for Internet Service Providers: A Comparative Study of France and the United States with a Specific Focus on Copyright, Defamation, and Illicit Content*, 35 CORNELL INT’L L.J. 189, 213 (2002) (explaining that internet providers are not responsible for all the content that is put on the internet similar to how the state is not responsible for all car crashes on public highways but noting that U.S. law holds internet providers held responsible for illicit content and copyright infringement).

253. See 47 U.S.C. § 230 (2012).

254. In fact, the Communications Decency Act provides a safe harbor for internet intermediaries that attempt to remove offensive material posted by users on their websites. See *id.* See generally Catherine Tremble, Note, *Wild Westworld: Section 230 of the CDA and Social Networks’ Use of Machine-Learning Algorithms*, 86 FORDHAM L. REV. 825 (2017).

255. See *supra* Part II.B.1.

256. See *supra* Part II.B.1.

257. See *supra* Part I.A.3.

before they can prosecute a provocative speaker for inciting terrorism.²⁵⁸ In other words, the terrorist event must occur before one looks for the speaker who allegedly incited the event.

The imminence requirement aligns with much of First Amendment law, which is underpinned by the premise that continued speech may encourage cooler heads to prevail and reliance on that is preferable to government regulation.²⁵⁹ The corollary to that premise is that government intervention is only permissible when speech has the intent and effect of causing imminent harm.²⁶⁰ In addition, the First Amendment generally prefers more speech because it is better for political discussion.²⁶¹ But when it is fairly clear that the intent of the speech is not for political discussion, but to inspire harmful actions, more time and speech cannot be the answer.²⁶²

When a dynamic internet speaker or leader has committed followers, there is too great a chance of serious harm to society, so allowing more speech is not a sufficient remedy. The internet provides instantaneous results; it has brought the world closer together than ever before.²⁶³ With instantaneous results, instantaneous reactions are to be expected. However, these posts remain on the internet for extended periods of time and thus can be seen by future readers.²⁶⁴ This means that speech posted in the past can incite action that would not necessarily have been considered imminent. That logic does not work when the government's interest is in protecting the public.

B. Substantial Likelihood and Level of Harm Creates Flexibility

The likelihood factor²⁶⁵ from the *Brandenburg* test is a step in the right direction, but it does not consider the totality of circumstances that must be considered when proscribing speech.²⁶⁶ Substantial likelihood means that, not only must the threat of harm be possible, but the speaker must be likely to achieve his or her goal of causing that harm without government intervention. If speech is purely political, it will not be deemed substantially likely to cause harm, but the more it borders on triggering lawless action, the more it can be regulated. For instance, if someone calls on terror supporters to attack the moon, it is not only unlikely, but also currently impossible to cause this harm. Instead, it could be considered political speech meant to spur discussion on how space colonization will one day take place. While this example seems farfetched and ludicrous, it effectively illustrates how a

258. See Cronan, *supra* note 13, at 450–51.

259. See Blasi, *supra* note 194, at 482.

260. See *id.*

261. See Sedler, *supra* note 22, at 1017.

262. See Cronan, *supra* note 13, at 450–51 (explaining that, because of the ambiguity of the imminence requirement, any action not immediately following speech could be deemed not imminent).

263. See *supra* Part I.B.

264. See *supra* Part II.C. While the onus theoretically could be placed on social media platforms, this is not the most effective or realistic manner to combat the issue.

265. The likelihood factor considers the likelihood of the speech causing imminent lawless action. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*).

266. See *supra* Part I.A.3.

call to do something that is completely unlikely cannot, by default, be incitement.

Substantial likelihood also makes the doctrine more flexible regarding the level of harm. When there is a greater global threat or a more terror-prone time, there is a greater chance the incitement to terrorism will result in actual and greater harm. By contrast, when there is a greater sense of calm in the nation, there is less of a likelihood of the action being carried out.²⁶⁷ Courts will apply a multifactor test to determine the action's likelihood. Factors that could be considered are: (1) if the United States is in a state of war; (2) how many terror organizations exist and pose a present threat; (3) the number of attacks worldwide (and, more particularly in the West); and (4) the number of followers or supporters an organization has (as more people reading the message means it is more likely there is someone who will act on it). At a certain point, courts will find a substantial likelihood of a high level of harm and the government could successfully prosecute a speaker.²⁶⁸

This type of flexible doctrine addresses the critics who claim that the Supreme Court becomes too inconsiderate of individual rights during wartime.²⁶⁹ It will mean that the standards that the Court puts into place during wartime will be able to adapt and change with the transition to peacetime—without later being subject to abuse by courts and prosecutors.²⁷⁰

This prong will also take into account the number of people who see the message or post. If a person posts a message and only fifteen people see it, they are unlikely to stir up a result with their speech, no matter how inflammatory. It means that the government will not be wasting its time or resources going after speakers who will only be heard by a small number of people and pose no substantial threat.

C. The Test in Sum

The test would not require intent to cause lawless action. Instead, it must be shown that because of speech directing, advocating, or encouraging lawless action, there is a substantial likelihood of a high level of harm. This makes it most like the Israeli test and the clear and present danger test.²⁷¹ It is most similar to these tests in that it looks to what the actual effect of the speech would be instead of to the intent of the speaker.²⁷² These tests have been proven to protect people from terrorism through incitement by stopping problems at the source.²⁷³ Because the clear and present danger test is

267. *See supra* notes 46–47 and accompanying text.

268. This analysis requires courts to use their discretion to determine when the level of harm creates a substantial likelihood that the speech will cause lawless action.

269. *See supra* notes 196–202 and accompanying text (explaining that some scholars think that modifying doctrine during wartime is dangerous because rights would be improperly restricted later but also noting that a flexible doctrine can adjust the extent to which rights are limited during peacetime).

270. *See supra* notes 196–202 and accompanying text.

271. *See supra* Part I.A.2; *supra* notes 115–23 and accompanying text.

272. Intent need not be a part of the test because any speech that is inflammatory and targeted is likely to be spoken with requisite intent or purpose.

273. *See* Grierson et al., *supra* note 110.

constitutional and was never overturned,²⁷⁴ it is likely that this test is similarly constitutional and would thus be a viable solution to the current issue.

D. The Proposed Test's Application

Returning to the hypothetical, the directive-to-harm portion of the test is clearly met because the speech is calling for an attack.²⁷⁵ Since imminence is not a requirement, the speech is already on the fast track to being punishable under this doctrine.²⁷⁶ However, the hiccup will be in the substantial-likelihood prong.²⁷⁷ During wartime and when the speaker has many followers, his speech likely will be punishable. However, during a relatively calm time or when few people see a message, the government should not prosecute because it likely will not lead to a conviction under this test. Instead, the government should simply monitor the speaker's social media account if conditions change.

Using the technology the FBI plans to implement,²⁷⁸ the government will be able to determine whether it can assert jurisdiction by determining the location from which a speaker is posting.²⁷⁹ Additionally, using existing technology, the government can monitor speakers and understand their context to help determine if their speech constitutes actual threats and should be prosecuted.

CONCLUSION

The Supreme Court ought to fashion a new test to determine when inflammatory speech may be proscribed. This test should do away with the imminence factor present in the current doctrine and more closely mirror older United States law and the laws of our peer nations. The outcome should hinge instead on the substantial-likelihood factor, taking into account the current political climate. The substantial-likelihood factor will allow the test to be dynamic for different types of speech and different periods in time. This will prevent social media users from posting messages that lead to terrorist recruitment and incitement and will result in a safer world where individual rights are balanced against the importance of national security.

274. *Brandenburg* did not overturn the clear and present danger test but rather built on it, leaving room for the Court to return to its prior reasoning.

275. *See supra* Part III.

276. *See supra* Part III.A.

277. *See supra* Part III.B.

278. *See supra* Part II.B.

279. It is quite possible that a poster makes minimum contacts with a U.S. jurisdiction by attempting to incite this type of action regardless of where he speaks.