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Preaching Terror: Free Speech or Wartime Incitement?

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INTRODUCTION

On September 16, 2001, a Muslim preacher named Ali al-Timimi gathered together at least eight of his followers in Virginia to discuss a plan of action following the 9/11 attacks.[1] To ensure the meeting's secrecy, al-Timimi and the attendees drew the window blinds and disconnected the phones.[2] Al-Timimi then told them that the gathering was an *amana*—"a trust that should be kept secret."[3] He stated that the 9/11 attacks "were justified" and that "the end of time battle had begun."[4] Al-Timimi discussed possibilities for his followers to travel abroad, stressing that the best option would be to answer the call of Mullah Omar, the leader of the Taliban, to fight against American troops who were expected to invade Afghanistan in pursuit of al-Qaeda.[5]

To justify fighting Americans, al-Timimi cited *fatwas*, or religious rulings.[6] When his followers asked to review the *fatwas*, al-Timimi told them to burn the documents after reading them.[7] Al-Timimi further advised his followers that Lashkar-e-Taiba ("L.E.T.")[8] in

1. Indictment of Defendant at 4, 5, United States v. Al-Timimi, No. 1:04cr385 (E.D. Va. 2004) [hereinafter Indictment *available at* http://www.usdoj.gov/usao/vae/ArchivePress/SeptemberPDFArchive/04/TimimiINDC092304.pdf. Although the Indictment serves only as the Government's allegation of facts, there is no formal court opinion from which to draw the facts otherwise, aside from the related opinion affirming the conviction of al-Timimi's associates in *United States v. Khan*. Further, as the jury ultimately convicted al-Timimi on all counts, the facts of the Indictment may be viewed as more credible than an undecided charge, having ostensibly gained the endorsement of the panel.

2. United States v. Khan, 309 F. Supp. 2d 789, 809-10 (E.D. Va. 2004).

3. *Id.* at 809. The secrecy of the meeting was underscored when one of al-Timimi's followers arrived with a friend who was not a member of the "paintball" group. *Id.* at 810. When the two arrived, discussion ceased until both men departed. *Id.*; *cf.* Paul Bradley, *Muslim Cleric Indicted in Paintball Case; Six Terror Charges Say He Urged His Followers to Train for Holy War*, RICH. TIMES DISPATCH, Sept. 24, 2004, at B4 (describing al-Timimi's followers as having trained in paintball skirmishes in northern Virginia, at the behest of, and with the knowledge of, al-Timimi). *But cf.* Karen Branch-Brioso, *U.S. Inquiry Puts Spotlight on Muslim War Gamers; Paintball Play Had No Terrorist Tie, Suspects Say*, ST. LOUIS POST-DISPATCH, June 13, 2003, at A1 (refuting allegations that al-Timimi knew of the paintball skirmishes and that the skirmishes served as preparation for jihad).

4. *Khan*, 309 F. Supp. 2d at 810.

5. *Id.*

6. *Id.*

7. *Id.*

8. L.E.T. is a State Department-designated "foreign terrorist organization." *See* Office of Counterterrorism Fact Sheet on Foreign Terrorist Organizations (FTOs), Oct. 11, 2005, http://www. state.gov/s/ct/rls/fs/37191.htm (identifying L.E.T. as

Pakistan was the correct organization from which to obtain military training prior to taking up arms in Afghanistan, because its belief system was good and it focused on combat.[9] After the meeting, four of al-Timimi's followers agreed to travel immediately to L.E.T.[10] The following day, al-Timimi told two of the four followers how to reach L.E.T. undetected.[11] By September 22, 2001, these four followers had obtained travel visas, driven to J.F.K. airport in New York, and flown to Karachi, Pakistan.[12] Within another two weeks, all four were training and firing weapons in L.E.T.[13]

This Comment discusses whether al-Timimi's words are protected under the U.S. Constitution. In April 2005, al-Timimi was convicted in federal district court, and in July, he was sentenced to life in prison.[14] As the first significant conviction targeting terrorist speech[15] in the post-9/11 era,[16] the resolution of this case on appeal will

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"Lashkar-e Tayyiba (LT) (Army of the Righteous)").

9. Indictment, *supra* note 1, at 6. Lashkar-e-Taiba is the military wing of Markaz Dawa Wa'al Irshad, "which was founded to organize Pakistani mujahideen . . . against the Russians in Afghanistan." *Id.* Since the Russians departed, a primary focus of L.E.T. has been to conduct jihad against India. *Id.* L.E.T. claims to have trained individuals who fight today in Afghanistan, Kashmir, Bosnia, Chechnya, Kosovo, and the Philippines. *Id.* at 2.

10. *Id.* at 6-7.

11. *Id.* at 6.

12. Indictment, *supra* note 1, at 6-7.

13. *Id.* at 7-8.

14. *See* Jerry Markon, *Jurors Convict Muslim Leader in Terrorism Case*, WASH. POST, Apr. 27, 2005, at A1 (convicting al-Timimi on all ten counts after seven days of jury deliberation); Matthew Barakat, *Islamic Scholar Gets Life in Prison in Va.*, A.P., July 13, 2005 (reporting Judge Leonie Brinkema's belief that the evidence supported the mandatory life sentence).

15. This particular case raises the issue of whether al-Timimi was in fact advocating terrorist activity, or merely unlawful activity. For an in-depth discussion on the nuances of defining terrorism, *see* WAYNE MCCORMACK, LEGAL RESPONSES TO TERRORISM 1-10 (2005). For the purposes of this Comment, "terrorist" activity is used interchangeably with "unlawful" activity because the question raised only revolves around whether al-Timimi exercised free speech. It is ultimately irrelevant whether al-Timimi in fact advocated terrorism, because his appeal does not hinge on this distinction. See "Defense in Terror Cases to Challenge NSA Spying," Dec. 28, 2005, http://www.msnbc.msn.com/id/10628591/ (reporting al-Timimi's appeal on free speech grounds). Thus, the headline of this Comment, "Preaching Terror," is designed to apply to preachers who may advocate acts beyond the scope of al-Timimi's indictment. *But cf.* Christine Chinlund, *Who should wear the 'terrorist' label?*, BOSTON GLOBE, Sept. 8, 2003, at A15 (describing one journalistic approach to the semantics of terrorism: "call the act terrorist, but not the organization").

16. *Cf.* Patrick Wintour, *Blair Vows to Root Out Extremism*, GUARDIAN UNLIMITED, Aug. 6, 2005, http://politics.guardian.co.uk/print/0,3858,5256534-116499,00.html (announcing a British initiative to ban the preaching of terrorism in an effort to rein in domestic extremism); *The Preachings of Abu Hamza*, GUARDIAN UNLIMITED, Feb. 7, 2006, http://www.guardian.co.uk/terrorism/story/0,,1704312,00.html (relaying the words of the London Finsbury Mosque's cleric Abu Hamza, who was convicted on charges of incitement). Abu Hamza counseled his listeners "to stab [the West] here and there until he bleeds to death. Then you can cut up the meat as you like to, or leave it to maggots. This is the first stage of jihad."

strongly impact the government's efforts to combat Islamist[17] terrorism.[18] Prior to the al-Timimi case, the government had only prosecuted the perpetrators of terrorist acts and those who provided *tangible* assistance to terrorist organizations.[19] However, al-Timimi's conviction targeted a speaker who merely incited and advocated a

17. *See* 9/11 COMMISSION, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 47-53 (2004) (terming the movement in the Muslim world that inspires terrorism "Islamism," whose actors are "Islamists"). *But see* Caleb Carr, *U.S. Needs a Clear Definition of Terrorism*, NEWSDAY, Aug. 18, 2004, at A49 (criticizing the 9/11 Commission's decision to redefine terrorism around "Islamism" because American strategy is not served by promulgating a "clash of civilizations" thesis). This Comment adopts the language of the 9/11 Commission, because the panel represents a relative measure of consensus and bipartisanship in the national body politic. Further, this Comment only refers to "Islamist terrorism" or "Islamist terrorist" and not "Islamist" alone in the attempt to narrow the subject to only those Islamists who advocate or participate in terrorist acts. *See* Aliya Haider, *The Rhetoric of Resistance: Islamism, Modernity, and Globalization*, 18 HARV. BLACKLETTER L.J. 91, 106, 109 (2002) ("Islamism is the sentiment that expresses the movement, politicized Islam. Islamists are those persons who use the tool of Islamism to propagate an ideology and justify a political goal through religion . . . . Islamism's goal is not Islam."). In addition to "Islamism," there are various other terms applied by reporters and experts. *See, e.g.*, BERNARD LEWIS, THE SHAPING OF THE MODERN MIDDLE EAST 124 (1994) (couching Islamism in terms of Islamic fundamentalism); Thomas L. Friedman, *Sinbad the Martian*, INT'L HERALD TRIB., Oct. 6, 2005, at Opinion3 ("Islamo-fascism"); Mortimer B. Zuckerman, *A Hang-Tough Nation*, U.S. NEWS & WORLD REP., Oct. 24, 2005, at 76 ("Islamofasicsts"); Saad Eddin Ibrahim, *Islam can vote, if we let it*, N.Y. TIMES, May 24, 2005, at A13 ("political Islam"); Abdul Cader Asmal, *Foe isn't Islam, it's Binladenism*, BOSTON GLOBE, Aug. 3, 2005, at A11 ("Binladenism"); Don Thompson, *Terrorists May Be Trying to Recruit U.S. Prisoners*, A.P., Aug. 21, 2005 ("radical Islam").

18. *See* Markon, *supra* note 14 (recognizing the Justice Department's praise that the prosecution of the al-Timimi "Virginia jihad network" was one of the most successful prosecutions of domestic terrorism since September 11, 2001); *see also* Indictment, United States v. Sami Omar al-Hussayen, No. 03-048 (D. Id. Feb. 13, 2003) (charging a Saudi grad student in Idaho for supporting Hamas by setting up and running web sites to recruit terrorists); *No Immigration Charges, Deportation for Sami Omar Al-Hussayen*, A.P., July 1, 2004 (discussing the acquittal of al-Hussayen on four charges and the dismissal of the remaining eight charges in exchange for al-Hussayen's deportation back to Saudi Arabia).

19. *See* United States v. Khan, 309 F. Supp. 2d 789, 818-27 (E.D. Va. 2004) (finding nine of al-Timimi's followers guilty of a variety of charges, including conspiracy to levy war against the United States and numerous firearms offenses); *see also* United States v. Ashfari, 412 F.3d 1071, 1074-81 (9th Cir. 2005) (labeling the donation of money to a designated terrorist organization beyond the scope of free speech protection); Faris v. United States, 388 F.3d 452 (4th Cir. 2004) (prosecuting defendant for providing material support to al-Qaeda); United States v. Al-Arian, 329 F. Supp. 2d 1294, 1305 (M.D. Fla. 2004) (requiring heightened standard of proof for the government in charging defendants with assisting foreign terrorist organizations); United States v. Yousef, 327 F.3d 56, 170-72 (2d Cir. 2003) (upholding conviction by jury trial for conspiracy to bomb United States commercial airlines in Southeast Asia and on charges relating to the 1993 bombing of the World Trade Center); United States v. Moussaoui, 282 F. Supp. 2d 480, 487 (E.D. Va. 2003), *aff'd in part, vacated in part, remanded*, 365 F.3d 292 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (2005) (imprisoning defendant for conspiracy to commit acts of terrorism); *Feds Probe Possible California Terror Cell*, FOX NEWS, June 9, 2005, http://www.foxnews.com/story/0,2933,158880,00.html (revealing investigation into a Pakistani plot to attack hospitals and supermarkets in the United States).

terrorist act.[20] If upheld, the conviction will represent a major shift in the courtroom battle in the "War on Terror"[21] by extending the arm of the law to criminalize a purported source of terrorism.[22]

The Constitution prohibits the government from criminalizing an individual's opinion merely because it is unpopular.[23] However, limits on the protection of free speech do exist,[24] as epitomized by Justice Robert Jackson's belief that the Bill of Rights is not a suicide pact.[25] The War on Terror challenges the United States to combat the terrorist threat while concomitantly preserving the country's free speech liberties.[26] Unlike the Communist Party-U.S.A. in the 1940s,[27]

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20. *See Prosecutors Say Islamic Scholar Urged Followers to Violence*, RICH. TIMES DISPATCH, Apr. 19, 2005, http://www.religionnewsblog.com/11009 (paraphrasing prosecutors' belief that al-Timimi urged his followers to take up arms against U.S. troops). *But see* Pierre Tristam, *Words Matter in War on Terror*, DAYTONA NEWS-J., July 19, 2005, http://www.commondreams.org/views05/0719-28.htm (dubbing al-Timimi a "moronic loud-mouth" who is being unfairly punished for his words, and not his actions).

21. This Comment utilizes the term "War on Terror" because it best encompasses the ongoing, although ambiguous and not necessarily military, counterterrorism efforts in Afghanistan and around the world. Although "War on Terror" may be viewed by some as a partisan term, this Comment does not employ the phrase with the intention to endorse the Bush Administration policies that commonly accompany its use. For a discussion on the role played by semantics in war, *see* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 8 (2004) ("Understanding the contestable character of the legal construction of war is crucial for enabling us to imagine the wide range of possible forms that that construction may take.").

22. *See* Holly Coates Keehn, *Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses*, 28 SETON HALL L. REV. 1230, 1231 (1998) (arguing that prosecuting "terroristic" speech, as opposed to terrorist activity raises immediate constitutional issues and would embody a shift in government tactics).

23. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974) ("[T]here is no such thing as a false idea."); *cf.* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (contending that the First Amendment requires us to tolerate speech even if we believe it is "fraught with death"); Thomas E. Crocco, *Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451, 453 (2004) ("[S]peech that contributes to the free exchange of diverse ideas is constitutionally welcome, no matter how unpopular, misguided, or repugnant it is perceived to be.").

24. *Compare* Miller v. California, 413 U.S. 15, 18 (1973) (withholding free speech protection for mass-mailing "obscene" and unsolicited material), *and* Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (excluding "fighting words" from the purview of free speech protection), *with* Cohen v. California, 403 U.S. 15, 17 (1971) (protecting defendant's lewd expression because his words failed to meet the obscenity standard), *and* Hustler v. Falwell, 485 U.S. 46, 47 (1988) (observing that free speech did not rise to the level of libel or the intentional infliction of emotional distress).

25. *See* Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is a danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.").

26. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L.

the goal of Islamist terrorists is not to gather popular support to overthrow the U.S. government.[28] Rather, Islamist terrorists succeed in achieving their goal by maintaining a subversive, amorphous network.[29] This Comment argues that the present-day standard for incitement-type speech should be recast in the context of the War on Terror. When analyzed in this context, the scope of "imminence" can be broadened beyond strict temporal limits, and as a result, may render al-Timimi's words unlawful.

First, this Comment will discuss the development of free speech parameters during times of national crises. Historically, the Supreme

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No. 107-56, 115 Stat. 272 (2001) (codified in scattered title numbers and sections of the U.S.C.) (representing the Federal government's most visible attempt to rein in the domestic terrorist threat); *see also* DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm (prohibiting any federal law enforcement agency from using racial characteristics in routine investigations). *But cf.* CHERYL LITTLE & KATHIE KLARREICH, FLA. IMMIGRANT ADVOCACY CENTER, SECURING OUR BORDERS: POST 9/11 SCAPEGOATING OF IMMIGRANTS 8 (2005), *available at* http://www.fiacfla.org/reports/securingborders.pdf (criticizing the Bush Administration's post-9/11 immigration policy for weakening American civil liberties). *See generally* Carol L. Chomsky, *Viewing September 11 Through the Lens of History*, 89 MINN. L. REV. 1437, 1447 (2005) (arguing that the very term "homeland security" implies a friction between facing a threat and maintaining yesterday's comforts, while suggesting "a commonality of ancestry and history, not just a common political allegiance, and therefore serv[ing] to reinforce an exclusionary reaction to immigrants"); Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges; Statistics Often Count Lesser Crimes*, WASH. POST, June 12, 2005, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/06/11/AR2005061100381.html (illustrating the Justice Department's poor record since 2001 in prosecuting terrorist suspects).

27. *See* Dennis v. United States, 341 U.S. 494, 497-98 (1951) (describing the Communist Party—U.S.A. platform as based on teaching and advocating the overthrow of the U.S. government by force and violence); *see also* Michael R. Belknap, *Cold War in the Courtroom: The Foley Square Communist Trial*, *in* AMERICAN POLITICAL TRIALS 208, 219 (Michael R. Belknap ed., Greenwood 1994) (reproducing deposition testimony from Communist Party-U.S.A. leaders who argued that the "[Communist Party-U.S.A.] sought to convert America to socialism not by force, but rather by educating the masses about the need to build a political organization committed to that economic system and by persuading a majority of the people to adopt it").

28. *See* 9/11 COMMISSION, *supra* note 17, at 51 (elaborating on Islamism's goals to force America to "abandon the Middle East, convert to Islam, and end the immorality and godlessness of its society and culture"). *But see* Robert Pape, *Blowing Up An Assumption*, N.Y. TIMES, May 18, 2005, at A23, *available at* http://www.iht.com/articles/2005/05/18/opinion/edpape.php (contending that different terrorist groups have different goals and that a suicide terrorist's goal is strategic, limited and secular).

29. *See* 9/11 COMMISSION, *supra* note 17, at 54-59 (expounding upon the complex organization that contributed to Bin Ladin's support network, traversing mosques, schools, boardinghouses, and financiers, with each cog playing a distributively minor role so as to go unnoticed to law enforcement authorities worldwide). *But see* Scott Atran, *A Leaner, Meaner Jihad*, N.Y. TIMES, Mar. 16, 2004, at A27 (responding that, ultimately, terrorism succeeds precisely because it garners popular support for the jihad movement).

Court has justified the curtailment of free speech during wartime because the context of war presented the arguable need to limit some speech in the interest of national preservation.[30] However, the governing case for incitement-type speech is *Brandenburg v. Ohio*,[31] in which the Court ascribed temporal limits to free speech with little consideration of context.[32] This section will address the Court's struggle between employing a contextual analysis versus a temporal analysis to evaluate whether the given speech causes imminent lawless action.

Next, this Comment will apply *Brandenburg* to *al-Timimi* and argue that the War on Terror presents a scenario that satisfies the "imminence" test. Secretive and detailed incitement that has no intent or opportunity to compete in the "marketplace of ideas" should not be protected under the Constitution.[33] Although al-Timimi's words incited action far abroad and possibly days or weeks down the road, his advice, steeped in a universalist Wahhabi-Islamist doctrine,[34] rendered unlawful action imminent and likely to occur in the context of a global War on Terror.

Third, this Comment will make two mutually exclusive recommendations. First, this Comment will recommend that the *Brandenburg* "imminence" test be applied with an understanding of

30. *See* Frohwerk v. United States, 249 U.S. 204, 208 (1919) (proffering wartime as a context sufficient to condemn certain speech even if that same speech could not be condemned during peacetime); *cf.* Korematsu v. United States, 323 U.S. 214, 224-25 (1944) (rationalizing that war produces hardships against liberties that the law sometimes cannot overrule). *See generally* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1002-03 (2004) (observing that certain wartime crises create a reaction towards national preservation, even above the law).

31. 395 U.S. 444 (1969).

32. *See id.* at 446-48 (basing its analysis solely on the words of the speaker and finding the conviction untenable because the statute punishes "mere advocacy." In *Brandenburg*, the defendant was initially convicted for urging his listeners to forcefully return the "nigger" to Africa, and the "Jew . . . to Israel." *Id.* at 447. The Court overruled the decision because the defendant's words did not cross the plane of imminence. *Id.* at 447-49. *But cf.* H. Brian Holland, *Inherently Dangerous: The Potential for an Internet-Specific Standard Restricting Speech that Performs a Teaching Function*, 39 U.S.F. L. REV. 353, 396 (2005) (comparing internet cases to *Brandenburg*, where, even though circumstances play a minor role, there is always a "contextual tipping point" in determining "imminence").

33. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (believing an opinion that competes with truth in the public forum must be entitled to protection, even "when a man says he has squared the circle"); *cf.* Keehn, *supra* note 22, at 1253 (averring that if the incitement-type speech does not set a date for breaking the law, it is much more difficult to constitutionally punish the speaker).

34. *See* Tashbih Sayyed, *Preachers of Prey*, PAKISTAN TODAY, Jan. 3, 2003, http://www.paktoday.com/prey.htm (describing the Wahhabi ideology as seeking to erase all other religions and democratic values in the pursuit of establishing an Islamic theocracy); *supra* notes 170-171 (describing further the ideology of Wahhabism).

context rather than solely within the framework of temporal limitations. Although *Brandenburg* and its progeny embodied the Court's shift towards stricter temporal limits,[35] the characteristics of the War on Terror present a context that renders a strict temporal analysis ineffective.[36] Alternatively, this Comment will recommend that if the Court holds that *Brandenburg* is not the governing standard for private speech, al-Timimi's conviction must be upheld under a non-*Brandenburg* standard that retains the "marketplace"[37] foundation. This alternative recommendation will take into account the threat posed by incitement-type speech that does not face competition in the "marketplace of ideas."

I. BACKGROUND ON FREE SPEECH DURING TIMES OF NATIONAL CRISES

From World War I through the Cold War, the Court sparred over the precise constitutional import of "make no law . . . abridging the freedom of speech."[38] In the early years of this judicial struggle, the context of an individual's speech proved most significant in the Court's assessment of free speech parameters.[39] Later, and largely up until the present day, temporal limits, as exemplified by *Brandenburg*, proved dispositive.[40] Yet, this Comment cannot begin with

35. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (finding that advocacy of violence "weeks or months" down the road is too indeterminable to render punishment lawful); Watts v. United States, 394 U.S. 705, 706 (1969) (invalidating the conviction of an individual who, at a public rally, said "'[i]f they *ever* make me carry a rifle the first man I want to get in my sights is L.B.J.'") (emphasis added).

36. *See* Crocco, *supra* note 23, at 482 ("We are under attack and are being subjected to a type of tyranny that operates to contravene the rights and benefits of citizenship accorded by an open and free society. Until terrorism is removed from the world, there exists a 'threshold of imminence' such that the potential for additional terrorist acts is so great that they must be considered imminent."); *see also* Jennifer Hannigan, *Playing Patriot Games: National Security Challenges Civil Liberties*, 41 HOUS. L. REV. 1371, 1390 (2004) (submitting that "the 'war on terrorism' is not a traditional war with a clearly identifiable enemy and an articulable timeline").

37. *See infra* Part I.B (discussing the development of a First Amendment jurisprudence framing the appropriate temporal limitations in regards to the availability of competing thoughts in the "marketplace of ideas," a term used by Justice Holmes in his dissenting opinion in *Abrams v. United States*, 250 U.S. 616 (1920)).

38. U.S. CONST. amend. I. *See generally* Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 5-10 (2003) (emphasizing the historical significance of the years 1919-1969 for modern free speech jurisprudence).

39. *See infra* Part I.A (documenting the emergence of free speech during World War I).

40. *See infra* Part I.C-D (describing the development of free speech after World War II).

Brandenburg, because *Brandenburg* was not born in a vacuum.[41] By understanding the doctrinal origins of modern free speech law,[42] one may apply and adapt the constitutional standard to new and unique scenarios.[43] This section lays the foundation of early free speech law, which is no longer fully utilized, and of a timeless "marketplace" approach that remains especially relevant for the *al-Timimi* case.

A. Emergence of a Free Speech Jurisprudence During World War I

Until the immediate post-World War I period, the Supreme Court did not address the limits of free speech in the context of a national emergency.[44] However, in a one-week span in 1919, the Supreme Court decided three free speech cases, known as the Wartime Trilogy.[45] In the first case, *Schenck v. United States*,[46] Justice Holmes authored a unanimous opinion upholding the defendant's conviction under the Espionage Act.[47] As General Secretary of the Socialist

41. *See generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 13-55 (2d ed. 2002) (summarizing the development of the incitement jurisprudence leading up to *Brandenburg*).

42. *See generally* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 161-67 (1994) (crediting Judge Hand's *Masses* approach, and Justice Holmes' "clear and present danger" test, as the primary contributors to modern jurisprudence).

43. *See, e.g.*, Rice v. Paladin Enterps., Inc., 128 F.3d 233 (4th Cir. 1997) (applying *Brandenburg* to a civil suit involving the publisher of a murder manual who was held liable for a wrongful death suit). *But cf.* United States v. Howell, 719 F.2d 1258, 1260-61 (5th Cir. 1983) (refusing to apply *Brandenburg* to a case involving threats to kill the President because *Brandenburg* is limited to advocacy cases).

44. *But cf.* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 11-25 (1998) (summarizing the Civil War case of *Ex Parte* Merryman, 17 F. Cas. 144 (D. Md. 1861), which, although it does not directly address free speech, remains relevant in signifying the government's attempt to restrain civil liberties at a time of exigent circumstances). In 1861, faced with a dissolving Union and a vulnerable Capital in urgent need of troops and supplies, President Lincoln suspended the writ of habeas corpus along the rail routes from the north. *Id.* Less than a month after Lincoln's suspension, John Merryman was arrested for participating in the destruction of railroad bridges north of Baltimore. *Id.* at 26. When the military authority refused to turn Merryman over to the civilian authority, Chief Justice Roger Taney, sitting as a Maryland circuit judge, held that the president "cannot suspend the privilege of the writ of habeas corpus." *Ex Parte* Merryman, 17 F. Cas. at 145 (D. Md. 1861). Although Merryman was released shortly thereafter, the challenge to the President's authority to suspend habeas corpus was never judicially resolved. REHNQUIST, *supra*, at 60. Lincoln noted in response the contextual vacuum from which Taney sat: "Are all the laws, but one, to go unexecuted, and the government itself to go to pieces, lest that one be violated?" President Lincoln, Message to a Special Session of Congress (July 4, 1861), *in* REHNQUIST, *supra*, at 38. An important lesson to be learned from *Ex parte Merryman* is that context matters. Jeffrey D. Jackson, *The Power to Suspend Habeas Corpus: An Answer From the Arguments Surrounding* Ex Parte *Merryman*, 34 U. BALT. L. REV. 11 (2004).

45. Debs v. United States, 249 U.S. 211, 212 (1919); Frohwerk v. United States, 249 U.S. 204, 205 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919).

46. 249 U.S. 47.

47. Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (1917); *see Schenck*, 249 U.S. at 52 (enumerating the defendant's violations to include obstruction of military

Party, the defendant had printed circulars denouncing the military draft.[48] While Justice Holmes admitted that "in many places and in ordinary times" the circulars would be protected by the Constitution, he denied them First Amendment protection because "the character of every act depends upon the circumstances in which it is done."[49] In the context of a war for which millions of soldiers needed to be recruited, words that created a "clear and present danger" that a "substantive evil" may result—in this case, threats to Congress's conscription efforts—may be constitutionally abridged.[50] Justice Holmes did not find it necessary for the "substantive evil" to actually result.[51] Instead, the Court could restrict free speech if it was expressed with the requisite intent, coupled with the "tendency" to dampen the willingness of Americans to serve in the military.[52]

A week later, in *Frohwerk v. United States*, the Supreme Court again addressed the Espionage Act.[53] In another unanimous opinion, Justice Holmes affirmed the conviction of a publisher whose newspaper decried the involvement of the United States in the war against Germany.[54] Referring to the opinion in *Schenck*,[55] yet failing to mention the nascent "clear and present danger" standard, Justice Holmes wrote that circumstances abridging speech are "quarters where a little breath would be enough to kindle a flame."[56]

Finally, *Debs v. United States*,[57] decided on the same day as *Frohwerk*, involved the former presidential candidate of the Socialist party, Eugene V. Debs.[58] In that case, the defendant delivered several

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recruiting and causing insubordination within the military forces).

48. *Schenck*, 249 U.S. at 49.

49. *Id.* at 52.

50. *Id.*

51. *See id.* ("If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime.").

52. *Id.*; *cf.* MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 384-89 (2000) (describing the "bad tendency" test as requiring no actual consequences, nor any need to show a temporal connection between the speech at issue and the evil presumed to result from it).

53. *See* 249 U.S. 204, 210 (1919) (addressing the defendant's conviction for conspiring to cause disloyalty, mutiny, and refusal of duty in the military).

54. *Id.*

55. *Id.* at 206.

56. *Id.* at 209.

57. 249 U.S. 211 (1919).

58. *Id.*; *see generally* David Ray Papke, *Eugene Debs as Legal Heretic: The Law-Related Conversion, Catechism and Evangelism of an American Socialist*, 63 U. CIN. L. REV. 339, 360-61 (1994) (describing Debs' speeches, delivered as part of a continuous Presidential campaign from 1900 to 1920 except for 1916 when Debs ran for Congress, as "an opportunity to educate workers in the evils of capitalism and the virtues of socialism").

incendiary speeches protesting military conscription, leading to charges of obstructing the recruiting efforts of the United States.[59] Like in *Frohwerk*, the Supreme Court failed to use the "clear and present danger" standard, but referred to *Schenck*,[60] in affirming Debs' conviction under the Espionage Act.[61] Justice Holmes again authored the opinion, finding that the trial court had carefully instructed the jury not to find Debs guilty unless the speech had a "natural tendency and reasonably probable effect to obstruct the recruiting service . . . and unless the defendant had the specific intent to do so in his mind."[62]

Of the three opinions, *Debs* is the most puzzling because Debs did not direct his speech to specific actors and did not appear to pose a "clear and present danger" of a "substantive evil."[63] Still, what is important to glean from all three cases is that the speakers were punished for public speech—speech made in public and intended to sway the public.[64] The Court upheld the convictions because it believed that the threat posed by the public speech was sufficiently linked to a future harm.[65] The Court established the link by analyzing

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59. *Debs*, 249 U.S. at 213-16.

60. *See id.*, at 215 (stating that any First Amendment defense relied upon by the defendant had already been "disposed of" in *Schenck v. United States*, 249 U.S. 47 (1919)).

61. *See id.* at 216-17 (upholding a ten-year sentence for obstructing the recruiting and enlistment service of the government by giving a speech to twelve hundred listeners); *see also* GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT TO THE WAR ON TERRORISM 196-97 (2004) (chronicling Debs' status as a national figure, not a social castaway, who as leader of the Socialist Party garnered one million votes in the 1912 presidential election). In fact, "one of every sixteen voters supported him." *Id.*

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

63. *See* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1262-63 (1983) (arguing that Holmes did not decide *Debs* and *Frohwerk* on the honest doctrinal framework of "clear and present danger," but remained lodged in a "bad tendency" analysis: "*Debs* demonstrated Holmes' continued reliance on the tendency of speech as the test for its legality and his willingness, bordering on eagerness, to sustain jury findings of fact.").

64. *See id.* at 1309 (discerning that Holmes came to realize just a year later in *Abrams* that "speech on matters of public affairs deserves added protection and cannot be viewed in the same manner as a simple solicitation to do a private wrong").

65. *See Debs*, 249 U.S. at 214-15 (stating the jury was warranted in finding that "[o]ne purpose of the speech . . . was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting"); Frohwerk v. United States, 249 U.S. 204, 209 (1919) (narrowing the inquiry to whether the overt acts were "done to effect the object of the conspiracy" and rejecting defendant's argument that the conspiracy count must allege "the means by which the conspiracy was to be carried out"); *Schenck*, 249 U.S. at 51-52 (stating that "[i]t well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . . [b]ut the character of every act depends upon the circumstances in which it is done"). The court went further to clarify that the main issue in such cases "[i]s whether the words used are used in such circumstances

the circumstances of war that magnified the probability and scope of the threatened harm.[66] However, the Court's notion of war remained wed to the tradition of a declared and finite war.[67]

Eventually the Court, and Justice Holmes in particular,[68] transitioned to a more protective free speech environment.[69] Ironically, it was Justice Holmes himself who laid the groundwork for the modern-day doctrine governing protected free speech by stating that the courts should: 1) consider the circumstances and context surrounding the speech; and 2) draw a link between the speech and the threatened harm.[70] How this foundation applies to an undeclared and seemingly endless war is a question that will be addressed shortly.

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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." *Id.* at 52. The fact that the country is at war is a circumstance to be considered. *Id.*

66. *See* United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (using a statistic-like analysis to determine whether speech is unprotected by the First Amendment: "[courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"), *aff'd*, 341 U.S. 494 (1951). Judge Hand used this analysis in *Masses Pub. Co. v. Patten*, 244 F. 535, 538 (S.D.N.Y. 1917). *See infra* text accompanying note 100.

67. *See* Scheppele, *supra* note 30, at 1015 (noting that World War I was fought in an era when wars were considered only of limited duration). *But cf.* STONE, *supra* note 61, at 153-58 (observing that the Wilson Administration employed a vast propaganda network simply to uphold public support for seventeen months of American involvement in the war).

68. *See* United States v. Schwimmer, 279 U.S. 644, 654 (1929) (Holmes, J., dissenting) (distinguishing the denial of citizenship to a woman claiming uncompromising pacifism from *Schenck* because the fear that she would "exert activities such as were dealt with in *Schenck*" were unfounded). The court further stated that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." *Id.* at 654-55.

69. *See, e.g.*, Herndon v. Lowry, 301 U.S. 242, 262-64 (1937) (rejecting for the first time the "bad tendency" test, which assesses the speech based on whether it has the tendency to incite lawless behavior, because the test has very "vague and indeterminate" boundaries that act like "a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others"); Near v. Minnesota *ex rel.* Olsen, 283 U.S. 697, 722-23 (1931) (overturning a statute allowing injunctions against "malicious, scandalous, and defamatory" material); Stromberg v. California, 283 U.S. 359, 369-70 (1931) (invalidating a statute prohibiting display of red flags).

70. *Accord* Whitney v. California, 274 U.S. 357, 379 (1927) (Brandeis, J., concurring) (clarifying the "clear and present danger" test to require that the threatened harm be imminent and substantial enough to justify a valid restriction on speech, whereas the Wartime Trilogy appeared to only require a weak, facial link).

B. Holmes & Brandeis: The "Marketplace of Ideas" Serving as a Doctrinal Basis for Temporal Limits

While the Wartime Trilogy illustrated the contextual constraints on free speech, Justices Holmes and Brandeis authored a series of minority opinions in the following years that encouraged greater liberties for free speech, limited only by temporal boundaries.[71] In time, Holmes' and Brandeis' reasoning framed the basis for the majority decisions broadening First Amendment rights.[72]

In *Abrams v. United States*, the Court affirmed the conviction of Russian émigrés who printed leaflets that were critical of the American intervention in the Russian Revolution.[73] In his dissent, Justice Holmes did not cite his Wartime Trilogy test, but rather eloquently articulated the "marketplace of ideas" doctrine, where "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[74]

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71. *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (arguing that "there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant's views . . . . If the publication of this document had been laid as an attempt to induce an uprising against government at once and not at some indefinite time in the future it would have presented a different question. . . . But the indictment alleges the publication and nothing more"); Gilbert v. Minnesota, 254 U.S. 325, 334 (1920) (Brandeis, J., dissenting) (positing that the statute at issue "abridges freedom of speech and of the press, not in a particular emergency, in order to avoid a clear and present danger, but under all circumstances . . . the teaching of the doctrine of pacifism"); Schaefer v. United States, 251 U.S. 466, 493-94 (1920) (Brandeis & Holmes, JJ., dissenting) (finding that the alleged omissions or additions in the contested news reports were harmless, and that applying a statute prohibiting false reports that interfere with the operation of the military in this way would unduly "discourage criticism of government policies" and "subject the press to new perils"); Abrams v. United States, 250 U.S. 616, 628 (1920) (Holmes, J., dissenting) (stating that "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned").

72. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 504-07 (1951) (conceding that although the Court never "expressly overruled the majority opinions" in *Schenck*, *Debs*, *Gitlow*, and *Whitney*, "there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale"); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (holding that the danger of injury was not "so serious nor so imminent as to justify the [statute's] sweeping proscription" of picketing); Hague v. C.I.O., 307 U.S. 496 (1939) (invalidating a municipal ordinance that prohibited all public meetings in streets and other public places without a permit); De Jonge v. Oregon, 299 U.S. 353 (1937) (reversing conviction for conducting a Communist meeting under an Oregon criminal syndicalism statute); Grosjean v. Am. Press Co., 297 U.S. 233 (1936) (rejecting a tax on newspapers as an unconstitutional limit on the expression of free speech).

73. 250 U.S. 616, 627 (1920).

74. *Id.* at 630. Justice Holmes discusses the underlying theory of free speech:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you

For Holmes, a society based on free thought will always have access to truth, and thus the threat of unpopular or dangerous speech is countered by its comparison to truth or another viewpoint.[75] Still, Holmes retained an exception for speech that did not compete in the "marketplace of ideas"[76]—speech that "so imminently threatens immediate interference with lawful and pressing purposes of the law" as to escape the protection of the Constitution.[77] A finding of imminence proved to be the essence of Holmes' "clear and present danger" test.[78] Yet, it would remain in dissent for decades more.[79]

Justice Brandeis also employed the notion of a proverbial marketplace in his concurrence in *Whitney v. California*.[80] Brandeis understood that a free society is sustainable because a government that rules with the consent of the governed puts its energies into bettering the lives of its' citizens, and not by instilling order through fear:[81]

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that

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> think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises . . . But when men have realized that time has upset many fighting faiths, they come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . . and that truth is the only ground upon which their wishes safely can be carried out.

Id.

75. *See generally* Woodrow Wilson, Address at the Institute of Paris, France (May 10, 1919) (stating that "if a man is a fool, the best thing to do is to encourage him to advertise the fact by speaking"), *quoted in* Terminiello v. Chicago, 337 U.S. 1, 36 (1949) (Jackson, J., dissenting). *But see* Jerome A. Barron, *Access to the Press: —A New First Amendment Right*, 80 HARV. L. REV. 1641, 1648 (1967) (voicing concern that "changes in the communications industry have destroyed the equilibrium of the marketplace").

76. *See Abrams*, 250 U.S. at 630-31 (arguing that "[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech'").

77. *Id.* at 630; *see* Holly S. Hawkins, *A Sliding Scale Approach For Evaluating the Terrorist Threat Over the Internet*, 73 GEO. WASH. L. REV. 633, 647 (2005) (claiming that there is a "market failure" in the Internet context, where the speed of web communications does not allow for time to "ferret out erroneous arguments" presented by Islamist terrorists).

78. *See* Brandenburg v. Ohio, 395 U.S. 444, 447-48 (1969) (highlighting the true import of "clear and present danger" to require a finding of "imminence," which was incorrectly manipulated in *Whitney* and many other decisions).

79. *See* Dennis v. United States, 341 U.S. 494, 579-92 (1951) (Black & Douglas, JJ., dissenting) (dismissing the majority's application of the "clear and present danger" test as mere rhetoric and a masquerade for prior censorship, far divorced from Holmes' substantive test).

80. 274 U.S. 357, 375 (1927).

81. *See id.* (Brandeis, J., concurring) (arguing that the more open and tolerant the society, the more stable a society will be).

> in its government the deliberative forces should prevail over the arbitrary . . . . But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government . . . that the fitting remedy for evil counsels is good ones.[82]

Although the Court did not adopt the "marketplace" approach in Holmes' or Brandeis' lifetime, its resonance echoed deep into the free speech establishment.[83] The purpose of the First Amendment was not just to bestow personal happiness through free expression,[84] but to ensure the health of an open society, as well.[85] Dissent, no matter how distasteful, contributed to peaceful change, or at least provided an opportunity for the opposition to voice and reaffirm its position.[86] However, within the "marketplace of ideas," there arose temporal limits on punishing speech for advocating imminent harm.[87] Speech that was closely connected in space and time to causing harm did not have an opportunity to compete with opposing opinions.[88] In short, the Holmes-Brandeis approach understood that

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82. *Id.*

83. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"); STONE, *supra* note 61, at 522 (celebrating the Court's unambiguous embrace of the Holmes-Brandeis version of clear and present danger in the 1960s).

84. *See Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (arguing that free speech provides personal happiness and also reinforces "the discovery and spread of political truth"); *cf.* Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court 1791-1930*, 35 EMORY L.J. 59, 132 (1986) (drawing a distinction between Holmes, whose progressive views were rooted in Social Darwinism, and Brandeis, a reformist pursuing "social and economic equality").

85. *See* Rabban, *supra* note 63, at 1321 (stressing Brandeis' belief in free speech as a prerequisite to democracy, and valuable to both individual and government). *But see* Alexander Tsesis, *The Boundaries of Free Speech*, 8 HARV. LATINO L. REV. 141, 153-54 (2005) (entertaining the idea that the "marketplace of ideas often favors dominant views" allowing for the ascendancy of destructive speech).

86. *See* Dennis v. United States, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring) (noting that speech extolling political violence is often "coupled" with sharp "criticism of defects in our society"); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) (reasoning that although the "tenets of one man may seem the rankest error to his neighbor," and although a committed advocate may resort to "exaggeration, to vilification . . . and even to false statement," freedom of all speech is "ordained" by the First Amendment). *But see* Mary Ellen Gale, *Reimagining the First Amendment: Racist Speech and Equal Liberty*, 65 ST. JOHN'S L. REV. 119, 148 (1991) (charging that Holmes' "marketplace of ideas" is a child of Social Darwinism, "rather than distributive justice").

87. *See infra* notes 200-201 and accompanying text.

88. *But see* Robert Firester & Kendall T. Jones, *Catchin' the Heat of the Beat: First Amendment Analysis of Music Claimed to Incite Violent Behavior*, 20 LOY. L.A. ENT. L. REV. 1, 11 (2000) (arguing that virtually every time the *Brandenburg* temporal limitation on

certain types of speech did not reach the "marketplace," and because of the speech's immediate threat of harm, should not find constitutional cover.[89]

C. The Cold War

When World War II ended, the United States almost immediately entered a war unlike any other it had ever waged.[90] The frontline of the Cold War was abroad, but seemed like it was in America, too.[91] Although no blood was spilled on American shores, the "Commie" paranoia that gripped the country ruined many lives.[92] These events also found their way into the courtroom in battles over free speech.[93]

The year leading up to *Dennis v. United States*[94] was a dramatic period in the early Cold War.[95] Leaders of the Communist Party-U.S.A. were convicted at trial.[96] The time seemed ripe for a new and decisive clarification of free speech jurisprudence.[97] Instead, the

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speech—"[o]nly when violent acts are so imminent [that] there is no time for response and discussion and thus no chance for the truth to prevail can speech be suppressed"—has been applied, "the speech has been protected").

89. *See, e.g.*, Bridges v. California, 314 U.S. 252, 263 (1941) (reiterating that "before utterances can be punished," the "substantive evil must be extremely serious and the degree of imminence extremely high").

90. *See* William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of* Dennis v. United States, 2001 SUP. CT. REV. 375, 406-28 (recounting the progression of international crises and mounting tensions that characterized the period from 1945-50). Many Americans felt a sense of "imminent apocalypse" following the Yalta Conference ("FDR's perfidious abandonment of gallant Poland to a Stalinist fate"), nuclear blackmail, Churchill's Iron Curtain speech, Soviet pressures in Iran, Turkey and Greece, the Marshall Plan, the formation of NATO, and the counter-response of the Warsaw Pact. *Id.* at 416-17.

91. *See generally* DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER 27 (1978) (describing "red-baiting" as the ultimate political weapon in the late 1940s and 1950s).

92. *See* STONE, *supra* note 61, at 312 (characterizing the post-war era as dominated by political opportunism, "bare-knuckled exploitation of anticommunism," with "Americans turned against one another in what would prove to be one of the most repressive periods in American history"). The targets in the Hollywood ranks included Dorothy Parker, Lillian Hellman, James Thurber, and Arthur Miller. *Id.* at 313.

93. *See, e.g.*, Feiner v. New York, 340 U.S. 315, 320-21 (1951) (employing "clear and present danger" to deny a free speech claim to the defendant's public outburst against President Truman despite the fact that the primary purpose of the speech was to promote a meeting); Am. Comm'n Ass'n v. Douds, 339 U.S. 382, 415 (1950) (upholding requirement that union officers sign "non-Communist" affidavit for union recognition); Bailey v. Richardson, 182 F.2d 46, 59-60 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) (upholding the defendant's dismissal from a federal job on charges of disloyalty and Communist-affiliation).

94. 341 U.S. 494 (1951).

95. *See* STONE, *supra* note 61, at 395 (noting that six free speech cases were heard during World War I while sixty were heard during the McCarthy era).

96. *Dennis*, 341 U.S. at 495.

97. *See* Wiecek, *supra* note 90, at 433-34 (admitting that "most of the Justices of the Vinson Court acknowledged anticommunism as a legitimate expression of

Court produced one hundred pages of opinions and a plurality applying the Holmes-Brandeis terms to a scenario that did not seem to pose a "clear and present danger" to cause harm.[98]

Eugene Dennis, general secretary of the Communist Party-U.S.A., was convicted of conspiracy because the Party endorsed a policy to overthrow the government.[99] The Supreme Court adopted Judge Learned Hand's analysis in the lower court opinion, reiterating his rule that "courts must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[100] Although this formulation stressed context by assessing the "evil" threat, it also left the door open on imminence by requiring a subjective judicial determination of the "probability" that the alleged "evil" threat would occur.[101] Using this standard, the Court affirmed the conviction of the defendants because it believed the Party was prepared and awaiting a call from leadership abroad to launch an effort to overthrow the government.[102] Clearly, the context of world events played a role in the Court's depiction of the Party's capability and threat.[103]

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democratic politics" and seemed prepared to act on this belief).

98. *See Dennis*, 341 U.S. at 494 (upholding convictions for conspiring to teach and advocating the overthrow of the government). It is important to note that the defendants were *not* charged with attempting to overthrow the government or with conspiring to overthrow the government. *Id.*

99. *Id.* at 511.

100. *Id.* at 510. The Court also refers to Judge Hand's analysis in *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), which protected anti-war speech in magazine articles because the words did not directly incite resistance to a congressional statute prohibiting the obstruction of the military draft. Although he found that the magazine articles did not incite action, Judge Hand acknowledged that words which have no purpose but to "counsel the violation of law" do not garner free speech protection. *Id.* Determining whether particular words are intended to incite or educate, however, must be decided on a case-by-case basis. *Dennis*, 341 U.S. at 572. It is noteworthy that even though the *Dennis* Court adopted Judge Hand's rule from the lower court opinion, Judge Hand later said he believed the *Dennis* defendants were unfairly punished. *See* GUNTHER, *supra* note 42, at 604; *infra* note 101.

101. *See* STONE, *supra* note 61, at 400-01 (concluding that the correct test for First Amendment cases was the "clear and present danger" standard). One of the conclusions stemming from this probability assessment is that "as the gravity of the feared harm increases . . . the degree of likelihood and imminence necessary to justify a restriction of speech decreases accordingly." *Id.* at 400-01; *see also* GUNTHER, *supra* note 42, at 604-05 (iterating Judge Hand's belief that *Dennis* would be more properly dealt with under his *Masses* reasoning).

102. *Dennis*, 341 U.S at 505-11 (distinguishing *Gitlow v. New York*, 268 U.S. 652 (1925), where the Court found that speech that advocates "the necessity or propriety of overthrowing organized government by force" was harmful and unlawful by its very utterance, no matter the circumstances).

103. *See* Wiecek, *supra* note 90, at 414-18 (suggesting that fears of a rising Communist threat were fed in part by the commencement of the Korean War and the House Un-American Activities Committee ("HUAC") hearings).

Six years later, however, *Yates v. United States*[104] "ended the Cold War in the Supreme Court,"[105] holding that the Constitution could not punish the mere "advocacy and teaching of forcible overthrow as an abstract principle," even if the intent of the speaker was to promote violence.[106] Instead, Justice Harlan opined that advocacy of unlawful conduct must include a call for specific action "now or in the future."[107] Circumstances again played a role in the *Yates* decision, as much had changed since the Court decided *Dennis* in 1951—Stalin and McCarthy had died, the Korean War was over, and four new justices sat on the Supreme Court.[108] Although still falling short of adopting the "imminence" vision of Holmes-Brandeis, the Court ended the Communist witch-hunt.[109]

The *Dennis* and *Yates* decisions illustrate the Court's approach to free speech in a time of another variable struggle[110] that, like the War on Terror, seemed to advance with no foreseeable end.[111] However,

104. 354 U.S. 298 (1957).

105. *See* STONE, *supra* note 61, at 413 (pointing to Stalin's death, the Senate's condemnation of Joseph McCarthy, a general relaxation in the public attitude towards communists, and major changes in the Supreme Court makeup as historical changes that influenced *Yates* and the other three cases argued to have "reversed the course of constitutional history"); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting) (stating "I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish").

106. *See Yates* 354 U.S. at 312, 318-19, 321-24 (stating that the mere "doctrinal justification of forcible overthrow" is "too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*").

107. *Id.* at 324-25.

108. *See* STONE, *supra* note 61, at 413 (remarking that Chief Justice Earl Warren replaced Fred Vinson, and Justices Brennan, Whittaker, and Harlan replaced Justices Reed, Minton, and Jackson).

109. *Id.* at 415 (providing that "[o]n remand, the government dropped the charges against the remaining defendants in *Yates* [and] dismissed its pending charges against Communist leaders in Boston, Cleveland, Connecticut, Detroit, Philadelphia, Pittsburgh, Puerto Rico, and St. Louis"); *see also* HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 212-26 (1988) (observing that the judicial attack on Communism ended with the elimination of *Yates*' Smith Act).

110. *See* Scheppelle, *supra* note 30, at 1015 (arguing that "[t]he Cold War was different: it promised an indefinite future of crises . . . and ushered in an era of 'permanent emergency' in which the constitutional sacrifices that were to be made were not clearly temporary or reversible"); *see also* Wiecek, *supra* note 90, at 417 (stating that "[s]eeing the period of the Cold War as actually a slow-paced, intermittent military engagement, a nightmare from which we could not disengage and that threatened our annihilation at any moment, helps us understand the fears and reactions of another time").

111. When observing the War on Terror exclusively from the ongoing war in Iraq, the War on Terror is generally seen as a low-intensity, undercover endeavor. *See generally* Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT'L L. 325 (attributing similar as well as different characteristics of the War on Terror when comparing it to a traditional war). *Cf.* France Fukuyama, *Invasion of*

hindsight reveals the flaws of *Dennis* and the significance of *Yates*. In both cases, to the extent that criminals sowed a conspiracy, those actors could have been punished.[112] But the *Dennis* defendants merely advocated their party's doctrine.[113] The Court based the "clear and present danger" test of *Masses* and *Dennis* almost entirely on context—communism's threat of harm—and little else.[114] Such a contextual analysis runs contrary to the "marketplace of ideas" because, by advocating their party's doctrine, the *Dennis* defendants competed with other political viewpoints.

In reality, the communist movement's wares were not selling so well in the American marketplace.[115] As admitted by John Gates, a defendant in *Dennis* and the editor-in-chief of the *Daily Worker*, communism failed to attract the support of most Americans.[116] Thus, *Yates* exposed *Dennis*' over-reliance on circumstances of national paranoia and triggered the move to a new standard.[117] The new standard would analyze context only so far as circumstances limited

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the Isolationists, N.Y. TIMES, Aug. 31, 2005, at A14, *available at* http://nytimes.com/2005/08/31/opinion/31fukuyama.html (asserting that Iraq was only "tangentially related to the threat from Al Qaeda"). *But cf.* Mortimer B. Zuckerman, *Good Things Take Time*, U.S. NEWS & WORLD REP., Apr. 11, 2005, at 84, *available at* http://www.usnews.com/usnews/opinion/articles/050411/11edit.htm (arguing that people must be patient for tangible stabilizing effects from the war in Iraq to take place).

112. *See* MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 63-64 (1966) (conceiving that the *Dennis* defendants were unfairly prosecuted for their speech because the government was forced to indict on advocacy provisions due to the fact that it had insufficient evidence to indict under criminal sedition laws).

113. *See* Dennis v. United States, 341 U.S. 494, 510 (1951) (conceding that the defendants did not attempt to overthrow the government). Despite this, the Court pointed out that there was a group ready to make such an attempt in order to justify the convictions. *Id.*

114. *See id.* at 510-11 (stating that "[t]he formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score"); Masses Pub. Co. v. Patten, 244 F. 535, 536-40 (S.D.N.Y. 1917) (considering the degree of danger posed to American security by the speaker's nationwide movement); *see also* Wiecek, *supra* note 90, at 434 (insisting that the "Supreme Court overcame the problem of facts not supporting the results it was determined to reach by accepting a generic 'proof' of Communism's seditious nature").

115. *See* Belknap, *supra* note 27, at 210 (observing that sixty-eight percent of Americans favored outlawing the Communist Party-U.S.A. in 1949).

116. *See* STONE, *supra* note 61, at 397 (noting the government's fear of the Communist Party-U.S.A. was unfounded, and observing that whether the party would use force to convert the United States to socialism was irrelevant due to the failure of the party to convince a majority of Americans of the merits of socialism).

117. *See* Wiecek, *supra* note 90, at 434 (concluding that the flaws of the pre-*Yates* Court were due to its use of a "formalist approach to classical legal thought" that "ignore[d] the realities of what was happening to individuals who posed no credible threat to the nation's safety").

or facilitated the presence of incitement-type speech in the "marketplace of ideas."

D. Brandenburg*: The Modern Incitement Exception*

In 1969, the Court overruled *Whitney*[118] with its landmark decision of *Brandenburg v. Ohio*.[119] In *Brandenburg*, the Court held that the Constitution does not permit the government to circumscribe advocacy of the use of force or of "law violation" unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[120] Thus, advocacy would only be punished if the defendant: (1) expressly advocates law violation; (2) calls for immediate law violation; and (3) immediate lawless action is likely to occur.[121] The *Brandenburg* exception arose because speech that is immediately linked to lawless action has no opportunity to face competition in the "marketplace of ideas," and thus, because of its likelihood to cause harm, is not protected by the Constitution.[122] *Brandenburg* represented the unencumbered adoption of a temporal analysis to determine whether speech posed a risk of imminent harm.[123]

Although *Brandenburg* set a new standard for punishing incitement-type speech, the Court's definition of "imminence" remained ambiguous.[124] Few cases have offered clarification in the last three

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118. *See* 274 U.S. 357, 359-60 (1927) (upholding a statute punishing those who participate in "criminal syndicalism," which is defined in the statute as "advocating . . . the commission of crime, sabotage . . . or unlawful methods of terrorism as a means of accomplishing industrial or political reform").

119. 395 U.S. 444 (1969).

120. *See id.* at 446 n.1, 447 (defending the First Amendment right of a Ku Klux Klan speaker to exhort his audience to "[s]end the Jews back to Israel" and to "[b]ury the niggers").

121. STONE, *supra* note 61, at 523.

122. *See supra* Part I.B (explaining the development of the "marketplace of ideas" concept in the Supreme Court and its importance in analyzing whether certain speech is protected). *But see* Tona Trollinger, *Reconceptualizing the Free Speech Clause: From a Refuse of Dualism to the Reason of Holism*, 3 GEO. MASON INDEP. L. REV. 137, 146 (1994) (criticizing the marketplace metaphor as it applies to hate speech because it only invites confrontation and conflict rather than permitting the harmony and balance that is meant to be encouraged by the "marketplace of ideas"). Trollinger points out several analytical shortcomings of the marketplace theory, such as "market failure in the marketplace of ideas[,] glorification of competition . . . and inversion of the causal relationship between individual and societal health." *Id.* at 142.

123. *See* Firester & Jones, *supra* note 88, at 11 (observing that most scholars narrow the imminence requirement from *Brandenburg* to temporal imminence alone, thus requiring that the unlawful action must immediately follow the utterance).

124. *Id.* at 11-12 (describing two tests for imminence proposed by scholars in reaction to the failure of the Court to clearly define the term); *see also* Marc Rohr, *The* Brandenburg *Test and Speech that Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 3 (2002) (decrying *Brandenburg* as "laced with ambiguity despite its veneer of clarity").

decades, and none of them have addressed the War on Terror.[125] In *Hess v. Indiana*,[126] the Court attempted to clarify "imminence" by holding that "advocacy of illegal action at some indefinite future time" did not trigger the *Brandenburg* exception.[127] In *Hess*, the Court found want of advocacy because the defendant did not direct his statements to any specific person or group.[128] Further, the Court noted that "there was no evidence . . . that his words were intended to produce, and likely to produce, *imminent* disorder," even if the defendant's speech had a tendency to lead to violence.[129]

In *NAACP v. Claiborne Hardware*,[130] the Court came closest to assigning a strict temporal definition of "imminence," reasoning that advocacy of violence "weeks or months" down the road did not satisfy the *Brandenburg* exception.[131] *Hess* and *Claiborne Hardware* illustrated that speech advocating lawless action must be likely to incite such action within a close timeframe and the speech must convey more than a vague or ambiguous message.[132]

Although the Court struggled for several decades in emphasizing its analysis of the context of speech, the temporal limits of the

125. *But cf.* United States v. Rahman, 189 F.3d 88, 115 (2d Cir. 1999) (rejecting Rahman's free speech claims because the seditious conspiracy statute fell outside the realm of the constitutionally protected speech dealt with in *Brandenburg*). Sheikh Abdel Rahman and nine other defendants were convicted of seditious conspiracy and other crimes associated with plans to bomb sites in New York City and assassinate the President of Egypt and an Israeli citizen. The Second Circuit upheld their convictions. *Id.* at 103-04. Sheikh Rahman, from his headquarters in Jersey City, helped facilitate the Egyptian Islamist movement by instructing the murder of non-believers and serving as an inspiration for the assassination of Egyptian President Anwar Sadat in 1981. 9/11 COMMISSION, *supra* note 17, at 56-57.

126. 414 U.S. 105 (1973).

127. *Id.* at 108.

128. *See id.* at 108-09 (concluding that, since the defendant's statement was ambiguous and not directed toward any person or group, the defendant was not actually advocating any action, and thus the speech is protected by the First Amendment).

129. *Id.* at 109. *But see* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the* Brandenburg *Test*, 29 GA. L. REV. 1, 16-19 (1994) (criticizing the majority's decision in *Hess* as a distortion of the actual facts of the case, which, if properly analyzed, would have satisfied the *Brandenburg* exception). Furthermore, Crump asserts that "[t]he majority's application of the *Brandenburg* test to the case is rhetoric, not analysis." *Id.* at 15. He concludes "the *Hess* majority failed to recognize that there can be such a phenomenon as camouflaged incitement." *Id.* at 18.

130. 458 U.S. 886 (1982).

131. *Id.* at 928. The speaker called for a boycott of white storeowners and threatened those who did not join the boycott by saying, "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Id.* at 902.

132. *See also* Watts v. United States, 394 U.S. 705, 708 (1968) (per curiam) (invalidating the conviction of a defendant for threatening to shoot the president because the defendant's threat was too indefinite and not meant to literally be a threat to kill the president).

"marketplace of ideas" largely won out.[133] Still, *Brandenburg* did not discard context, but rather incorporated a circumstantial inquiry into a wider temporal analysis.[134] For example, while *Dennis* employed a balancing test that looked at the magnitude of the threatened harm,[135] *Brandenburg* did not evaluate the magnitude of the speaker's threats.[136] However, examining context still plays a role in the temporal analysis, particularly in determining whether speech is likely to cause or incite imminent lawless action.[137] Analyzing *al-Timimi* under *Brandenburg* will illustrate how circumstances determine the applicability of the "marketplace" in the War on Terror.

II. ANALYSIS: *BRANDENBURG* APPLIED TO *AL-TIMIMI*

A. The Imminence Challenge Presented by al-Timimi's Conviction

The evidence provided by the indictment and the earlier conviction of al-Timimi's followers in *United States v. Khan*[138] suggests that al-Timimi easily met the first prong of the *Brandenburg* test by expressly advocating violation of the law.[139] Unlike the defendant in *Hess* whose statement was not directed at a particular person,[140] al-

133. *See supra* text accompanying notes 80-89 (concluding that, even though Holmes and Brandeis were not alive to see the adoption of their "marketplace" reasoning by the Court, their reasoning provided the basis for the current temporal analysis to the imminence requirement).

134. *See* Rohr, *supra* note 124, at 19 (maintaining that the context of the speech helps determine how wide a latitude is given to temporal limits). This means that if it cannot be shown that the speaker intended to incite illegal action by the speech, the speech will remain protected even if it does in fact incite illegal action. For instance, the *Brandenburg* test has been used to prevent civil actions related to situations where an audience member of a concert or movie is compelled to commit a dangerous or illegal act by the performance. *Id.* at 20.

135. *See supra* text accompanying notes 99-103 (asserting that the Court weighed the magnitude of the threatened harm against the probability of the harm occurring to determine if it fell within the "clear and present danger" test).

136. *See* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 827 (2001) (opining "what is decisive about the *Brandenburg* formulation is that it allows speech to be prohibited *not* because of its harmfulness, but because the speaker *seeks there and then to bring about a particularized, prohibited, and prohibitable* [sic] *course of conduct*").

137. *See* Firester & Jones, *supra* note 88, at 10 (acknowledging that "[f]oreseeability will be measured by the facts and circumstances of each case"). *But see* Crump, *supra* note 129, at 59-60 (arguing that "imminent" refers only to the predictability of the unlawful action occurring, and not to any limits in time).

138. 309 F. Supp. 2d 789 (2004).

139. *See* Indictment, *supra* note 1, at 4-5 (charging al-Timimi on six counts, including "unlawfully and knowingly aid[ing], abet[ting], counsel[ing], and induc[ing]" his followers to "combine, conspire, confederate and agree together and with others known and unknown to the grand jury, to unlawfully and knowingly commit the following offenses against" the United States). Four specific violations of U.S. law follow. *Id.* at 5.

140. *See supra* note 128 and accompanying text (explaining that the Court

Timimi directed his statements to a specific group of listeners.[141] In these statements, al-Timimi explicitly promoted violation of the law by advocating training at L.E.T., joining the Taliban, and fighting American forces.[142]

However, under a strict temporal interpretation of *Brandenburg*'s "imminence" test, it is harder to show that al-Timimi met the second and third prongs of the *Brandenburg* test—that he intended to incite imminent lawless action and that imminent lawless action was likely to occur.[143] The definition of "imminence" determines the applicability of the second and third prongs of *Brandenburg*.[144] According to the Supreme Court, the temporal gap in time and space between the speech and the likelihood of action must not be too attenuated to warrant criminalization of speech.[145] Here, al-Timimi instructed his followers on his view of the Islamic legality of fighting American forces, as well as on details to achieve this objective.[146] However, obtaining training in Pakistan and facing American troops could still have occurred weeks or months down the road.[147] Further, al-Timimi directed lawless action halfway across the globe, telling his followers to join the fight against American troops in Afghanistan.[148] If "imminence" is constrained by strict temporal limits in space and

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determined the speech was protected for a number of reasons, including its vagueness and the fact that it was not directed at a particular listener).

141. *See Khan*, 309 F. Supp. 2d at 809-10 (noting that the September 16, 2001 meeting where al-Timimi made the statements at question in this case included eight other specific individuals: Yong Kwon, Randall Royer, Masoud Khan, Hammad Abdur-Raheem, Caliph Basha Ibn Abdur-Raheem, Muhammed Aatique, Nabil Gharbieh, and Khwaja Hasan).

142. *See id.* at 796 (listing the thirty-two counts charged against the defendants).

143. *See* STONE, *supra* note 61, at 523 (dividing the holding in *Brandenburg* into three separate elements that must be met to satisfy the *Brandenburg* exception analysis).

144. *See* Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., opinion denying the petition for writ of cert.) (framing *Brandenburg* around the question of imminence and questioning whether *Brandenburg* applies to "oral advice, training exercises, and perhaps the preparation of written materials").

145. *See supra* Part I.B (describing how the "marketplace of ideas" approach served as the basis for adopting the temporal requirement that the speech and the action not be separated by a significant amount of time).

146. *See Khan*, 309 F. Supp. 2d at 810 (explaining how al-Timimi cited religious rulings called "fatwas" to support the need for, and legality of, his followers fighting American forces).

147. *See* Defendant's Reply to the Government's Response to Defendant's Post-Trial Motions at 18, United States v. Ali Al-Timimi, No. 04-385-A (E.D. Va. June 28, 2005), *available at* http://www.altimimi.org/images/stories/Legal/reply.pdf (comparing the facts from the *Rahman* case to al-Timimi's case and arguing that al-Timimi's advocacy was not for an imminent action since he was "advocating the use of force in a conflict that had not yet begun, in a place that was thousands of miles away, against an enemy that may or may not ever arrive").

148. *Khan*, 309 F. Supp. 2d at 809-10.

time and the absence of a consideration of context, it is difficult to prove that al-Timimi intended imminent lawless action.

B. Al-Timimi Satisfies the Brandenburg *Exception When Analyzed in the Context of the War on Terror*

Unlike the line of cases from *Schenck* to *Brandenburg* that addressed public speech,[149] *al-Timimi* deals with private, secretive speech advocating acts dependent on a global network.[150] These characteristics distinguish some speech scenarios in the War on Terror from the public, localized characteristics of previous free speech cases.[151] Whereas the defendants in *Abrams* dispersed leaflets in a city street to persuade the "marketplace" to rise to their cause in a proximate, domestic setting,[152] Islamist terrorists achieve their goals through subversion and violations of the law that transcend American borders.[153] After all, al-Timimi did not disseminate his plan in public or call for an attack on a nearby target. Given this scenario, the *Brandenburg* "imminence" test must be understood contextually, and not proscribed by strict temporal limits.[154] Just as the Court first fashioned the imminence exception for speech that did not have sufficient time to face competition in the "marketplace of ideas,"

149. *See supra* Part I.A-D (outlining the development of this line of cases).

150. *See* Indictment, *supra* note 1, at 4-5 (offering details on the charges against al-Timimi and detailing the meeting and the laws that he was advocating for his followers to break). *See generally* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "conspiracy" as "[a]n agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective, and . . . action or conduct that furthers the agreement; a combination for an unlawful purpose"). Al-Timimi's conviction touches on conspiracy. While private, secretive, and unlawful speech constitutes "conspiracy" in common law, this Comment draws out the specific elements that render al-Timimi's words incitement to imminent lawless action. "Conspiracy" is not used because the term risks confusion with just one element of his charge, whereas "private, secretive speech" encompasses all the elements at issue in this Comment.

151. *See supra* note 21 (explaining how the term "War on Terror" is used in this Comment).

152. *See* Abrams v. United States, 250 U.S. 616, 623 (1920) (concluding that the distribution of leaflets by Russian émigrés occurred for the purpose of inciting "disaffection, sedition, riots, and, as they hoped, revolution, in this country"). While the goal of distributing the leaflets was to aid the cause of the Russian Revolution, the intent was to incite lawless action domestically. *Id.* at 621.

153. *See infra* note 193 and accompanying text (explaining how the global war against terrorism is more complex because of its worldwide nature).

154. *See* Firester & Jones, *supra* note 88, at 7 n.31 (observing that part of the contextual consideration is the gravity of the threatened harm, even though gravity is not an "official" requirement). *But see* S. Elizabeth Wilborn Malloy, *Taming Terrorists But Not "Natural Born Killers"*, 27 N. KY. L. REV. 81, 85 (2000) (contending that the imminence requirement from *Brandenburg* means that it is not the harm itself that is important in considering whether *Brandenburg* controls the speech, but rather "*Brandenburg*, properly understood . . . governs abstract exhortations to lawless action which might incite a sufficiently susceptible person to action").

secretive speech detailing lawless action dependent on a global network and ideology[155] should not find constitutional cover.[156]

1. Al-Timimi intended to incite imminent lawless action because he advocated secretive, global, and detailed action

The second prong of *Brandenburg* questions the speaker's intentions.[157] Specifically, did the speaker intend his words to incite immediate action? In *Noto v. United States*,[158] the Court held that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."[159] Here, al-Timimi offered more than abstract guidance on his interpretation of jihad[160] in Islamic law. Al-Timimi offered specific directions to his followers to achieve the jihadist objectives.[161]

155. *See infra* notes 170-171 (describing the tenets of Wahhabism).

156. *Cf.* Lyrissa Barnett Lidsky, Brandenburg *and the United States' War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1031-32 (2002) (reasoning that the context of the totalitarian Arab world renders the "marketplace of ideas" ineffectual, and thus recommending that a revised understanding of *Brandenburg* is warranted to address those circumstances). *See generally* U.N. GAOR, 56th Sess., 44th plen. mtg. at 10, U.N. Doc. A/56/PV.44 (Nov. 10, 2001) (President George W. Bush's remarks to the United Nations General Assembly) ("[E]very nation must have avenues for the peaceful expression of opinion and dissent. When these avenues are closed, the temptation to speak through violence grows.").

157. *See* STONE, *supra* note 61, at 523 (stating that the second condition that must be satisfied to permit the punishment of subversive advocacy under *Brandenburg* is that "the advocacy must call for immediate law violation") (emphasis omitted).

158. 367 U.S. 290 (1961).

159. *See id.* at 297-99 (finding that the defendant's Communist Party activities did not include the present advocacy of a violent overthrow of the government, but rather his activities merely showed a purpose to possibly advocate such a position in the future).

160. *See* Lance S. Lehnhof, Note, *Freedom of Religious Association: The Right of Religious Organizations to Obtain Legal Entity Status Under the European Convention*, 2002 BYU L. REV. 561, 575 (finding that most scholars agree that "[t]he most common definition of jihad is a struggle, usually a struggle for justice, righteousness, or a better way of life"); *see also* RUDOLPH PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM 122-23 (1996) (contrasting the modernist interpretation of jihad, which focuses on the defensive aspects of the concept, with the so-called fundamentalist approach which mirrors the classical doctrines that focused on the expansionist aspect of jihad). However, the modernist approach is probably a lot older than commonly thought due to the historical stagnation of Islamic expansionism, whereby the concept of jihad became internalized as a moral or spiritual struggle, propounding jihad as a defensive war against enemy attacks on Islamic territory. *Id.* at 187 n.52. For some in the Western media, however, jihad is commonly referred to as a purely violent undertaking. *See, e.g.*, C.J. Chivers, *A Call for Islamic Revolt Spreads in Central Asia*, N.Y. TIMES, Oct. 9, 2005, at 20 (referring to "armed jihad" as the alternative to nonviolence which is publicly espoused by the Hizbut Tahrir, a political party that has been banned in the United Kingdom but does not actively seek a violent overthrow of the current capitalist and democratic order even though it preaches that such an order should be replaced). *But see, e.g.*, Bernard Lewis, *The Revolt of Islam*, NEW YORKER, Nov. 19, 2001, at 50, 53 (observing in the context of the early history of Islam, that "[t]he application of jihad wasn't always rigorous or violent").

A Department of Justice news release alleged "[a]l-Timimi believed that an American invasion of Afghanistan was imminent because the Taliban refused the demands of the United States to turn over Usama Bin Laden."[162] Al-Timimi directed his followers to obtain training in anticipation of the arrival of American forces to achieve a time-sensitive goal, not "at some indefinite future time."[163] For example, after his meeting with five followers, al-Timimi met again with two of them the very next day and specified how to reach L.E.T.[164] Further, al-Timimi's insistence on the mission's furtiveness offers support for his unlawful intentions. The window blinds were drawn, the phones were disconnected, and al-Timimi ordered the burning of the fatwas.[165]

Although al-Timimi advocated action to be taken abroad, the characteristics of the War on Terror—covert acts on a global scale—support his conviction.[166] Al-Timimi did not intend for the public to learn of his advice. Rather, al-Timimi intended that his followers act as soon as possible before the "marketplace" could deter his unlawful solicitation.

2. The Wahhabi ideology of al-Timimi's followers promotes global jihad that, when coupled with a detailed sanction from the Imam, is "likely to produce" imminent lawless action

The third prong of the *Brandenburg* analysis measures the likely effect of the preacher's words on his followers' behavior.[167]

The *Al-Timimi* Indictment described "jihad" as "a religious obligation of Muslims to struggle or strive for the defense of and advancement of Islam." Indictment, *supra* note 1, at 1.

161. *See* Indictment, *supra* note 1, at 5-6 (containing a list of the many topics al-Timimi discussed with his followers at the September 16, 2001 meeting).

162. DEP'T OF JUSTICE, NEWS RELEASE 1 (Sept. 23, 2004), *available at* http://www.usdoj.gov/usao/vae/ArchivePress/SeptemberPDFArchive/04/TimimiPR092304.pdf.

163. *See* Hess v. Indiana, 414 U.S. 105, 108 (1973) (finding the defendant's speech was protected since, at best, his speech only advocated illegal activity in the future and was directed at no particular individual or group of individuals).

164. *See* Indictment, *supra* note 1, at 6 (alleging that al-Timimi and his followers discussed how to obtain military training from the L.E.T.); *see also supra* notes 8-9 (defining the L.E.T. and describing its background).

165. United States v. Khan, 309 F. Supp. 2d 789, 809-10 (2004).

166. *Cf.* Rodney A. Smolla, *From Hit Man to Encyclopedia of Jihad: How to Distinguish Freedom of Speech from Terrorist Training*, 22 LOY. L.A. ENT. L. REV. 479, 484 (2002) (questioning "to what extent do we take into account social and historical context . . . to determine if a person has gone beyond mere 'membership' or 'abstract advocacy'").

167. *See* Firester & Jones, *supra* note 88, at 10 (summing up this portion of the *Brandenburg* test by observing that "if the speaker targets an individual or a group prone to violent behavior and vulnerable to outside influences that might exacerbate such violent proclivity, it may be highly foreseeable that certain speech will likely incite unlawful conduct").

According to *Khan*, al-Timimi's followers subscribed to the teachings of global jihad and were prepared to act as soon as the time was ripe.[168] The justification for their global jihad derived from the strictures of Wahhabism,[169] a religious movement that originated from the 18th-century teachings of Mohammed ibn Abdul Wahhab.[170] In Wahhabism, al-Timimi's followers learned of an ideology that promotes global jihad as a path to spread the sphere of believers.[171] Like Communism, which divides the globe into the worker's world and the capitalist world,[172] Wahhabism divides the world into two

168. *See* 309 F. Supp. 2d at 806 (finding that the defendants used paintball to train for military activity that may be needed in the future to fight what they believed was an impending jihad).

169. *But cf.* Ralph Peters, *Turn East from Mecca: Islam's Future Will Be Decided on Its Frontiers*, WASH. POST, Dec. 1, 2002, at B1 (averring that American intelligence analysts have historically refused to accept religious doctrine as a cause of political behavior, wishing instead to myopically explain terrorism as based on economic, strategic, or tribal factors); NOAH FELDMAN, AFTER JIHAD: AMERICA AND THE STRUGGLE FOR ISLAMIC DEMOCRACY 232 (2003) (noting that most Muslims do not share these reactionary views, and that "the option of holy war now seems spent, peripheral, unrealistic, and indeed distasteful in light of the violence of September 11").

170. *See* BERNARD LEWIS, THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS 333 (1995) (portraying Wahhabism's tenets as centered on "a return to the pure, authentic Islam of the Prophet, and the rejection of the accretions that had corrupted and distorted it—superstitions, false beliefs, evil practices, and the regimes that upheld and encouraged them"); *see also* Dov S. Zakheim, *Blending Democracy: The Generational Project in the Middle East*, NAT'L INTEREST, Oct. 1, 2005, at 43 (accrediting Wahhabism with a "mass" counter-reformation following "against the perceived dilution of Islamic fundamentals"). *But see* Letter from Sahr Muhammad Hatem, *Our Culture of Demagogy Has Engendered bin Laden, al-Zawahiri, and Their Ilk*, AL-SHARQ AL-AWSAT, Dec. 21, 2001, http://www.memri.org/bin/articles.cgi?Area=sd&ID=SP33102 (disagreeing that Wahhabism seeks a genuine return to early Islam, believing that the "solution" is "the Islam taught by the Prophet of this nation—an Islam of tolerance—and not the Islam of [Wahhabism]").

171. *See* LEWIS, *supra* note 170, at 310 (depicting Wahhabi doctrine as "puritanical in precept, militant in practice"); DORE GOLD, HATRED'S KINGDOM: HOW SAUDI ARABIA SUPPORTS THE NEW GLOBAL TERRORISM 24-25 (2003) (claiming that although jihad is "*not* one of the five pillars required by Islamic faith . . . [Wahhabism] elevated jihad to a central obligation of Islam"). *But see* Blaine Harden, *Saudis Seek to Add U.S. Muslims to Their Sect*, N.Y. TIMES, Oct. 20, 2001, at A1 (explaining that followers of Wahhabism believe they are obligated to defend Islam, with violence if necessary, only in places where it is already well established); James Reston, Jr., *Seeking Meaning from a Grand Imam*, WASH. POST, Mar 31, 2002, at B4 (restating the words of Mohammed Sayed Tantawi, the grand imam of Egypt's al-Azhar mosque who condemned the attacks of 9/11 and the killing of innocent civilians, that jihad is purely defensive and cannot be aggressive).

172. President Bush has compared al-Qaeda's ideology to Nazism and Communism:

> We are not deceived by their pretenses to piety. We have seen their kind before. They are the heirs of all the murderous ideologies of the twentieth century. By sacrificing human life to serve their radical visions, by abandoning every value except the will to power, they follow in the path of fascism, and Nazism, and totalitarianism. And they will follow that path all the way to where it ends: in history's unmarked grave of discarded lies.

President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010

abodes: the *dar al-Islamiyyah* (peace) and the *dar al-harb* (war).[173] The latter represents the world of all those who have yet to adhere to the will of Allah.[174] The determination to carry jihad to the *dar al-harb* may involve the sanction of the religious leader, or imam.[175] Like funding and military training, the imam's approval is sometimes a material element for global jihad.[176]

In al-Timimi, his followers met "the unsurpassable poster boy for the Wahhabi lobby."[177] Al-Timimi's words in mid-September 2001 were not "mere abstract doctrine,"[178] because his followers did not seek knowledge on the virtues of their beliefs alone. Instead, in keeping with Wahhabi-Islamist doctrine, al-Timimi asserted that the global end-of-time battle[179] had begun and specified where and how

920-8.html.

173. *See* 9/11 COMMISSION, *supra* note 17, at 51 (referring to the Egyptian writer Sayyid Qutb, who served as an inspiration to mid-twentieth century Muslim Brotherhood, and to Bin Laden and Islamism generally: "No middle ground exists in what Qutb conceived as a struggle between God and Satan"). *But cf.* SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 32 (1996) (permitting that a "two-world" theme pervades human history, and is not relegated only to Islam). For example, at the end of the Cold War, American scholars divided the world into "zones of peace" and "zones of turmoil". *Id.*

174. *See* GOLD, *supra* note 171, at 25 (citing SHEIKH-UL-ISLAM MUHAMMAD BIN ABDUL-WHHAB, KITAB AL-TAWHID 97 (Dar-us-Salam Publ'ns 1996) (estimate 1750)) (referring to an old Wahhabi writing advancing a *hadith*, or oral tradition, that the punishment for the non-adherent is "that he be struck with the sword," wherever he may be). *But see* Neil MacFarquhar, *A Few Saudis Defy a Rigid Islam to Debate Their Own Intolerance*, N.Y. TIMES, July 12, 2002, at A1 (reporting on a Saudi professor's challenge to prove the nexus between hatred and violent action: "Well, of course I hate you because you are Christian, but that doesn't mean I want to kill you").

175. *See* Reston, *supra* note 171, at B4 (invoking the explanation of Mohammed Sayed Tantawi, the grand imam of Egypt's al-Azhar mosque, that a central political-religious authority is needed to declare jihad); *cf.* GOLD, *supra* note 171, at 26 (writing that the Muslim embrace of jihad allows Wahhabism to grant its warriors immediate entry into Paradise).

176. *See, e.g.*, James Bennet, *The Mideast Turmoil: Protests; Palestinians Swear Vengeance for Killing of Cleric*, N.Y. TIMES, Mar. 23, 2004, at A1 (stating that, according to Israeli officials, Sheik Yassin, the former spiritual leader of Hamas who was killed in an Israeli missile attack, approved attacks and motivated suicide bombers); Noor Huda Ismail, *Schooled For Jihad; They Turned To Terrorism; I Wanted to Know Why*, WASH. POST, June 26, 2005, at B1 (reporting that the *emir* of *Jemaah Islamiyyah*, Abu-bakar Baasyir, allegedly gave his approval to terrorists before they bombed Bali, killing 202 people). *But see* Dan Eggen & Scott Wilson, *Suicide Bombs Potent Tools of Terrorists*, WASH. POST, July 17, 2005, at A1 (accounting that religious recruitment does not sufficiently explain the decision to embark on terrorism).

177. Stephen Schwartz, "Wahhabism—the Syphilis of Islam," FRONT PAGE MAG., May 2, 2005 http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=17907 (explaining al-Timimi's and his follower's motives).

178. *See* Noto v. United States, 367 U.S. 290, 297-98 (1961) (finding that the mere teaching of a Communist theory, including when or why followers should resort to force and violence, did not support a conviction for illegal Communist Party advocacy).

179. *See* supra text accompanying note 173 (discussing the struggle in Wahhabism between the worlds of war and peace). But cf. Natana J. DeLong-Bas, WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD 8-13 (Oxford Univ. 2004)

his followers should carry out their jihad.[180] The meeting took place in secret and only those who were prepared to wage immediate jihad were invited.[181] To those in the room, al-Timimi was their imam[182]—"like a rock star," whose words were dynamite to their ears.[183] Under these conditions, al-Timimi's advice was likely to inspire immediate action.[184]

Although *Brandenburg* does not inquire into whether a violation of the law actually took place,[185] evidence of his followers' behavior after the September meetings supports al-Timimi's conviction.[186] Al-Timimi's followers did not break the law within moments of their preacher's speech. However, al-Timimi did not direct them to walk out the door and attack the Pentagon.[187] Instead, al-Timimi directed them to leave the United States and commit their unlawful deeds abroad—acts that necessarily take longer than a call to proximate violence.[188] Still, to this end, his followers acted immediately. Within four days of the meeting, four individuals obtained visas to Pakistan,

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(suggesting that the "end of time" battle is a metaphysical struggle derived from the Qur'an, which "teaches that at the end of time, human beings will be judged not on the sole basis of what they believe, but on how they lived their lives.").

180. United States v. Khan, 309 F. Supp. 2d 789, 809-10 (E.D. Va. 2004).

181. *See id.* (recounting that only those al-Timimi followers who trained in paintball exercises and knew how to fire a weapon participated in the meeting).

182. *See* United States v. Khan, 309 F. Supp. 2d 789, 802-12 (E.D.Va. 2004) (reciting that al-Timimi founded the Dar al-Arqam Center, his followers' mosque in Falls Church, Virginia).

183. *See* Debra Erdley, *Scholar 'Rock Star' to Young*, PITT. TRIB. REV., Apr. 5, 2005, http://pittsburghlive.com/x/tribunereview/trib/regional/s_320656.html (quoting Assistant U.S. Attorney Gordon Kromberg, who told the jury that al-Timimi was "like a rock star" to his followers).

184. *Al-Timimi* is not the first case where the government prosecuted a Wahhabi cleric. The first World Trade Center bombers of 1993 awaited a necessary sanction from Sheikh 'Abd ar-Rahman. *See* Andrew C. McCarthy, *Prosecuting the New York Sheikh*, MIDDLE E. Q., Mar. 1997, http://www.meforum.org/article/336 ("Rahman believes [his followers] will defeat the Americans through superior will. He urges a battle of attrition . . . . [H]e counsels patience; [O]peratives should lie in wait for opportune moments . . . ."); *see also* Keehn, *supra* note 22, at 1253 (applying *Brandenburg* to Raman's case and explaining why that case would fail the *Brandenburg* exception because Rahman's sermons were aimed at the "indeterminable future").

185. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (analyzing whether action is "*likely* to produce" imminent lawless action) (emphasis added).

186. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 902 (1982) (reasoning that if a speech, which includes strong language, is followed by acts of violence, there is a substantial question whether the speaker is liable for the consequences of the unlawful conduct). The Court believed that evidence of lawless action actually occurring would increase the likelihood of finding unlawful incitement. *Id.*

187. Brief of Defendant, Defendant's Reply to the Government's Response to Defendant's Post-Trial Motions at 18, United States v. Al-Timimi, No. 04-385-A (E.D. June 28, 2005), *available at* http://www.altimimi.org/images/stories/Legal/reply.pdf.

188. *See* Indictment, *supra* note 1, at 5-6 (alleging that al-Timimi told his followers to obtain military training at L.E.T. and engage in jihad against American troops in Afghanistan).

drove six hours to New York's J.F.K. airport, and flew around the world to Karachi.[189] Within another two weeks, these four broke federal law and trained at L.E.T.[190] It is difficult to argue that al-Timimi's speech was not likely to cause imminent lawless action when it in fact did.

In sum, the context of al-Timimi's ideology and his standing amongst his students must contribute to a broader understanding of temporal "imminence." The Wahhabi doctrine of al-Timimi and his followers laid the foundation for extraterritorial action.[191] Yet, unlike the scenario envisioned by the *Brandenburg* "imminence" test,[192] the violation of the law at issue was not limited to American soil or al-Timimi's immediate environs. Due to the global nature of the War on Terror, the violation of the law occurred farther away and took longer to achieve than ordinary incitement-type cases.[193] However, whereas in other contexts such temporal gaps in space and time normally demonstrate the efficacy of the "marketplace of ideas,"[194] the War on Terror's additional characteristic—subversion—illustrates the ineffectiveness of the ordinary "marketplace" safeguard. Did al-Timimi's speech face competition in the "marketplace of ideas"? This Comment argues that his private words did not, and this question is addressed in detail next.

When al-Timimi gave detailed instructions to his followers to carry out global jihad, his words (1) expressly advocated violation of the

189. *See id.* at 6-7. The speedy action undertaken by four of al-Timimi's followers is further underscored by the fact that in the days following 9/11, all flights were suspended, and when flights finally did resume, airlines did not immediately resume a normal schedule. *See* Dean E. Murphy, *After the Attacks; A Wounded City Struggles to Discover How to Carry On*, N.Y. TIMES, Sept. 16, 2001, at A12 (stating that "airplanes were grounded" during the week after 9/11).

190. *See* Indictment, *supra* note 1, at 6-7 (alleging that the four traveled to L.E.T. and fired weapons there). Similar to the heightened state of alert in America, the security scene in Pakistan was abnormally strict in the weeks following 9/11, lending further support to the speed and detail with which al-Timimi's followers acted. *See* 9/11 COMMISSION, *supra* note 17, at 368 (noting that Pakistan arrested more than 500 al Qaeda and Taliban operatives after 9/11); *see also* Steven R. Weisman, *On the Front Lines in the Global War Against Terrorism*, N.Y. TIMES, Sept. 21, 2001, at A34 (discussing President Pervez Musharaff's decision to deploy Pakistani forces and help the United States combat terrorism).

191. *See supra* text accompanying notes 170-173 (explaining that the Wahhabi doctrine promotes global jihad to spread the will of Allah).

192. *See* Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring) (stating "this is, however, a classic case where speech is brigaded with action," and the two are "inseparable").

193. *Cf.* Crocco, *supra* note 23, at 457 (noting *Brandenburg*'s "modern application has been to situations more akin to the real-time characteristics of a soapbox").

194. *See* David F. McGowen & Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 CAL. L. REV. 825, 858 (commenting that *Brandenburg* forbids punishment of speech where the listener has "sufficient space" to consider and reject the message and any unlawful conduct for which it advocates).

law, (2) were intended to incite imminent lawless action, and, due to al-Timimi's leadership and his follower's global motives, (3) were "likely to produce" imminent lawless action.[195]

III. DOES *BRANDENBURG* APPLY TO *AL-TIMIMI*? RECOMMENDATIONS: BROADEN THE DEFENITION OF "IMMINENCE" OR DEVELOP A DIFFERENT STANDARD TO ADDRESS PRIVATE ADVOCACY

The history of free speech jurisprudence bespeaks a struggle between the idealistic "marketplace of ideas" and the wartime abridgement of free speech liberties.[196] In this struggle, wartime represents the merging of the nation's vulnerabilities with unique possibilities for detractors to exploit those vulnerabilities.[197] However, this Comment does not argue that the War on Terror necessitates the restraint of free speech and a return to a pre-*Brandenburg* model. As Justice O'Connor wrote in June 2004: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested . . . ."[198]

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195. *See supra* text accompanying note 121 (explaining that speech may only be punished under *Brandenburg* if (1) the speaker expressly advocates law violation, (2) the speaker calls for immediate law violation, and (3) immediate lawless action is likely to occur).

196. *See supra* text Parts I.A, I.B, and I.C (discussing the application of the "clear and present danger" test during World War I, Justices Holmes' and Brandeis' "marketplace of ideas" theory and insistence on requiring an imminent threat of harm as part of the "clear and present danger" test, and the Supreme Court's adoption of an approach similar to that of Holmes and Brandeis during the Cold War).

197. *See* Hannigan, *supra* note 36, at 1375 (recounting Justice Brennan's understanding of why a crisis leads to the abridgement of civil liberties).

> First, the crisis creates a 'national fervor,' which in turn leads to an exaggeration of the 'security risks posed by allowing individuals to exercise their civil liberties.' This exaggeration results in a public willingness to accept restraints on civil rights in the short term while the national crisis lasts. Inexperienced decision-makers are generally 'reluctant to question the factual bases underlying asserted security threats.' This reluctance leads to an inability on the part of decision-makers to distinguish the true security risks from the exaggerated ones, allowing for repetition of the cycle.

Id. (citing William J. Brennan, Jr., The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises, Speech at the Law School of The Hebrew University of Jerusalem, at 1-2 (Dec. 22, 1987), http://www.capaa.wa.gov/pdf/brennan.pdf). *See also* Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting) (stating "war opens dangers that do not exist in other times").

198. Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004) (O'Connor, J.) (commenting that, for purposes of national defense, we should not take away any of those liberties that "make the defense of our nation worthwhile"); *see also* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional*, 112 YALE L.J. 1011, 1030-31 (2003) (asserting that the true challenge of terrorism is that it will cause democracies "to embrace and employ authoritarian measures").

Instead, this Comment recommends that the Court employ the same "marketplace" reasoning underlying *Brandenburg* by broadening the understanding of "imminence" to include the criminalization of detailed incitement to immediate and global acts of terrorism.[199] *Brandenburg* symbolized the Court's adoption of the "marketplace" doctrine that "built a 'fortress' around core political speech,"[200] and only permitted the punishing of speech that was so imminently linked to harm that it did not face competition in the "marketplace."[201] The War on Terror also presents a context where subversive speech does not reach the "marketplace."[202] In other words, if the "marketplace" is a forum of open debate where all opinions are heard, a harmful, private opinion that does not reach the public forum should not be allowed the ordinary safeguards that only punish speech closely linked to unlawful acts in space and time.[203]

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199. *Cf.* Ollman v. Evans, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (Bork, J., concurring) (acknowledging that judges should "adapt their doctrines" to new causes of action that "threat[en] . . . the central meaning of the First Amendment"). In *Ollman*, Judge Bork pointed out that the framers did not fathom the threat of libel actions to free speech. *Id.* at 996. Similarly, the framers of the First Amendment and the authors of the "marketplace of ideas" extrapolation may not have imagined the global terrorism that employs mass fear to threaten free societies. Yet, by adapting the doctrine to *Al-Timimi*, the Court can distinguish free speech from criminal speech masquerading as free speech so as to preserve basic attributes of a democratic system, like free enterprise and freedom of movement. *Cf.* Fouad Ajami, *Heart of Darkness*, WALL ST. J., Sept. 28, 2005, at A16 (inferring that Sunni terrorism's goal in Iraq is to prevent the ascent of a fair and democratic order).

200. STONE, *supra* note 61, at 524.

201. *See* Arielle D. Kane, *Sticks and Stones: How Words Can Hurt*, 43 B.C. L. REV. 159, 160 (2001) (asserting that prior restraint of speech is permissible under *Brandenburg* only where harmful or illegal conduct will follow so immediately from the speech that there is no time for debate to stop such conduct); *see also* Rabban, *supra* note 63, at 1352 (recognizing that *Brandenburg* does not distinguish between "public ideological solicitation" and "private non-ideological solicitation," and suggesting that private speech may warrant a less protective standard because it varies significantly from principled political resistance).

202. *Cf.* Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CAL. L. REV. 1159, 1162 (1982) (questioning the effectiveness of applying the "marketplace" protection to all speech categories because "[t]here may be inadequate time or opportunity for response, the 'false' speech may be more persuasively phrased, or the audience may simply not be sufficiently sophisticated or sufficiently interested to ascertain the difference [between the true speech and the false speech]"); Thomas F. Ditzler, *Malevolent Minds: The Teleology of Terrorism*, *in* UNDERSTANDING TERRORISM 204 (Fathali M. Moghaddam & Anthony J. Marsella eds., 2004) (implying that even if Islamists participated in the marketplace, they are unreceptive to public debate because "in a world of absolute truth . . . there is no room for dissent and no room for theological doubt").

203. *See supra* Part I.B (observing that some speech never reaches or otherwise competes in the "marketplace," and that if such speech is likely to cause immediate harm, it does not receive the protections of the First Amendment); *cf.* 9/11 COMMISSION, *supra* note 17, at 375 (suggesting that those committed to violent Islam

Applying the earlier *NAACP* reasoning[204] to a different twist on the *al-Timimi* facts, suppose al-Timimi delivered a public sermon imparting his general beliefs on the meaning of jihad.[205] The preacher would be immune from prosecution because in theory, the public "marketplace" would have the opportunity to rebut his reasoning and win over his listeners.[206] The answer becomes more difficult if al-Timimi gave the same *detailed* advice as he did in September 2001,[207] but in public, subject to the "marketplace." Employing ordinary temporal limits on "imminence," this speech may not satisfy the *Brandenburg* exception. In that case, the level of detail offered and the reception entertained by the preacher's listeners may determine whether the speech counseled criminal behavior.[208]

If the courts cannot successfully apply the public speech *Brandenburg* exception to al-Timimi's private speech,[209] then the Court should develop a non-*Brandenburg* standard to cover the secret advocacy of a detailed call to lawless action that has no opportunity for rebuttal in the "marketplace of ideas."[210] Such a recommendation is consistent with the Holmes-Brandeis jurisprudence, because those

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are "impervious to persuasion," even if the inciting speech competed in the libertarian marketplace).

204. *See* NAACP v. Claiborne Hardware, 458 U.S. 886, 928 (1982) (holding that speech advocating lawless action weeks or months down the road cannot be punished, thus ascribing temporal limits to speech that lingers in the "marketplace").

205. *See generally* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 112 (2002) (applying marketplace principles to various scenarios where Islamic preachers advocate terrorism).

206. *But see id.* at 213 (grappling with the limits of applying the "marketplace" to radical Islamic leaders and potential terrorists: "[T]hese potential murderers live in closed societies where the flow of information to them is carefully controlled by those determined to use these vulnerable people as human weapons").

207. *See* Indictment, *supra* note 1, at 6, 8 (alleging that al-Timimi advised his followers to obtain military training at L.E.T., to reach L.E.T. undetected, and to carry out jihad against American troops in Afghanistan).

208. *See* DERSHOWITZ, *supra* note 205, at 112 (speculating that, if a case where an Islamic leader advocated for terrorist attacks came before a court, it would be decided on its particular facts, including "how close in time the terrorism followed . . . , how specific the religious command was, and how free the potential terrorists felt to reject it").

209. *See* Charles H. Jones, *Proscribing Hate: Distinctions Between Criminal Harm and Protecting Expression*, 18 WM. MITCHELL L. REV. 935, 949 (1992) (contending that *Brandenburg* does not apply to private consensual acts because it was "purely a political advocacy case"); *see also* Carey v. Population Serv. Int'l, 431 U.S. 678, 701 (1977) (refusing to apply *Brandenburg* to the prosecution of advertisers for illegal contraceptives because the unlawful act could not be characterized as an attempt to promote imminent lawless action).

210. *Cf.* Bruce Fein, *Tackling a Root Cause of Terrorism*, WASH. TIMES, Dec. 21, 2004, at A16 (calling on the United States to criminalize the advocacy of jihad or similar terrorist activity that has the specific intent of bringing about terrorism).

Jurists believed that speech that does not compete in the "marketplace" should not find constitutional cover.[211]

The theory underlying this alternative recommendation is that *Brandenburg*'s reach is limited to "soapbox" speech—public advocacy.[212] Simply put, *Brandenburg* has never been applied to a private speech case.[213] A non-*Brandenburg* approach to private speech allows for wider latitude outside strict temporal considerations in determining whether, and/or at what point, private speech may be prosecuted.[214] In al-Timimi's case, this alternative recommendation posits that his speech did not compete in the "marketplace" before unlawful action occurred.

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211. *See supra* text accompanying notes 80-89 (explaining the view of Justices Holmes and Brandeis that some speech does not reach or otherwise compete in the "marketplace," and that such speech should not be afforded the protections of the First Amendment).

212. *See, e.g.*, Herceg v. Hustler Mag., 814 F.2d 1017, 1020-23 (5th Cir. 1987) (differentiating *Brandenburg*'s concern over public "arousal" from cases dealing with written material and implying that the state interest in regulating public speech is much less than the state interest in regulating private speech); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 829 (commenting that the First Amendment rights of speakers arise most often in the context of public debate, and citing, as an example, "[t]he soapbox orator and loan pamphleteer . . . disseminating their views about matters of public concern to whomever chooses to stop and listen").

213. *See* Kent Greenwalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 12 (1992) (noting that the Supreme Court has thus far only applied the *Brandenburg* test in public advocacy cases). Greenwalt steps back to suggest:

> [The] extent of the . . . test's applicability remains unclear . . . . Does the test also set a general constitutional limit on punishment for urging criminal acts? If a sister writes her brother urging that he steal money from their parents, is that protected speech if the theft is not to happen for a few weeks or the brother is unlikely to do what the sister asks? American cases have generally assumed that ordinary criminal solicitation does not present a serious [F]irst [A]mendment problem, and I have argued that *Brandenburg* should not cover such situations; but no case contains a developed or satisfactory explanation of the distinction between public advocacy and private solicitaiton.

Id.

214. *See generally* Redish, *supra* note 202, at 1180-81 (criticizing the application of a *Brandenburg*-style (*i.e.*, "stringent") imminence requirement in unlawful advocacy cases because opportunity for reasoned response will not always defuse such advocacy, and advocating for a more flexible imminence requirement). *But cf.* Trollinger, *supra* note 122, at 198 (questioning the underpinnings of "marketplace" theory because it "cannot conceive that private speech which inflicts acute social and individual harm is an 'abridgement' of speech" when it does not otherwise fall within the condemnation of the First Amendment). There is a difference between words not gaining protection from the "marketplace" and the basic application of "marketplace" theory altogether. In the former, speech is criminalized *pursuant* to "marketplace" reasoning, *i.e.*, the speech did not face competition. Redish, *supra* note 202, at 1162-63. In the latter, the very notion that speech is protected because it faces competition in the "marketplace" is questioned. *Id.* at 1162.

Although this recommendation is fact-sensitive and dependent on how speech is understood to reach the "marketplace," it would be a significant step in advancing the War on Terror.[215] Thwarting terrorists is immediately important. Thwarting their source—a hateful ideology and the ability to obtain support to carry out attacks—is a long-term imperative if America is to retain a government *of* the people, *for* the people.

CONCLUSION

At his sentencing hearing on July 13, al-Timimi delivered an impassioned speech, reading from the Preamble of the Constitution.[216] His homily was ironic, considering al-Timimi's disdain for his home country, the "greatest enemy."[217] Al-Timimi wishes to destroy America by wrapping his vitriol in the cloak of the Constitution. Al-Timimi is allowed to hate the United States. But he is not allowed to solicit treason. Like him, preachers who advocate in detail and in privacy the violation of law should not find a free haven in America. With preachers like al-Timimi subject to the full power of the law, the War on Terror will take a definitive step forward.

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215. *See* Rohan Gunaratna, *The Post-Madrid Face of al-Qaeda*, WASH. Q., Summer 2004, at 95, www.twq.com (follow "Archives" hyperlink; then follow "Terrorism" hyperlink under the heading "Topic"; then follow "*The Post-Madrid Face of al-Qaeda*" hyperlink under the heading "Threats, Sponsors, Trends") (recommending a proactive pursuit of Islamic extremists who "disseminate propaganda, recruit members . . . [and] facilitate travel").

216. Ali al-Timimi, Statement in Court (July 13, 2005), *available at* http://www.altimimi.org (follow the hyperlink under the heading "Dr. Al-Timimi's Statement in Court after the judge denied his motions"); Eric Lichtblau, *Scholar is Given Life Sentence in 'Virginia Jihad' Case*, N.Y. TIMES, July 14, 2005, at A21, *available at* http:// www.nytimes.com/2005/07/14/national/14cleric.html?.

217. Following the Columbia shuttle disaster in 2003, al-Timimi published the following:

> There is no doubt that Muslims were overjoyed because of the adversity that befell their greatest enemy. Upon hearing the news, my heart felt good omens that I liked to spread to my brothers . . . The Columbia crash made me feel, and God is the only One to know, that this is a strong signal that Western supremacy (especially that of America) . . . is coming to a quick end, God Willing, as occurred to the shuttle.

Indictment, *supra* note 1, at 8-9.