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Assumptions About "Terrorism" and the *Brandenburg* Incitement Test

Christina E. Wells[†]

INTRODUCTION

The incitement standard announced in *Brandenburg v. Ohio*[1] is one of the most familiar tests in the Supreme Court's jurisprudence. It prohibits government officials from punishing advocacy of illegal activity unless it is directed and likely to imminently incite such activity.[2] *Brandenburg*'s standard has become a pillar of free speech law, allowing government officials to protect public safety by punishing only speech intended and likely to create an imminent danger of harm, while protecting even the most abhorrent of speakers from suppression of their speech simply because government officials fear or dislike it.[3] Terrorist advocacy, however, is putting pressure on the *Brandenburg* standard. As terrorist organizations increasingly urge non-members to engage in violent acts or otherwise glorify violence, spread propaganda, and recruit individuals to their cause, scholars and policy makers express concern about the dangerousness of such advocacy.[4] Although such terrorist advocacy does not meet *Brandenburg*'s strict requirements, some scholars have suggested altering or working around *Brandenburg*'s incitement standard to counter the dangerous

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

2 *Id.* at 447 (holding government officials cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

3 *See* Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 179–80 (1997); *see also infra* notes 108–111.

4 *See, e.g.*, KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R44626, THE ADVOCACY OF TERRORISM ON THE INTERNET: FREEDOM OF SPEECH ISSUES AND THE MATERIAL SUPPORT STATUTES, at 2, 2 n.20 (2016) (discussing response of individual congress members); Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 654–62 (2017) (discussing how terrorists use social media to influence others).

influence of terrorist advocacy, especially advocacy occurring through online sources. Thus, they have suggested that (1) *Brandenburg*'s imminence requirement does not, or should not, apply to terrorist advocacy,[5] (2) the United States should enact laws prohibiting people from accessing terrorist indoctrination websites,[6] or (3) the government can use laws punishing material support of terrorism to punish terrorist advocacy.[7]

Although scholars pushing this agenda rightfully want to avoid the harm resulting from terrorists' actions, their willingness to alter or work around *Brandenburg* in the context of terrorist advocacy ignores the important role that imminence plays in preventing government officials from using national security crises to suppress dissenting viewpoints.[8] Indeed, the historical context leading up to *Brandenburg* reveals that the decision is largely a response to the malleable "clear and present danger" test that preceded it.[9] That earlier test both failed to protect political dissent and allowed government officials to target disfavored groups, such as labor organizations, socialists and communists, that officials labeled as "dangerous."[10] Removing the imminence requirement raises the very real risk that such abuse could occur again, especially since the justification for the change—i.e., the unique

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[5] *See, e.g.*, Cass R. Sunstein, *Islamic State's Challenge to Free Speech*, BLOOMBERG (Nov. 23, 2015, 12:38 PM), http://www.bloombergview.com/articles/2015-11-23/islamic-state-s-challenge-to-free-speech [https://perma.cc/ST7T-NKPQ]; Tsesis, *supra* note 4, at 667.

[6] *See* Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015, 5:37 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.single.html [https://perma.cc/EM6A-GYF6].

[7] *See* Tsesis, *supra* note 4, at 670–75.

[8] *See* Erik Eckholm, *ISIS Influence on Web Prompts Second Thoughts on First Amendment*, N.Y. TIMES (Dec. 27, 2015), http://www.nytimes.com/2015/12/28/us/isis-influence-on-web-prompts-second-thoughts-on-first-amendment.html [https://perma.cc/47TC-K4XJ] (quoting David Post as stating that "efforts to suppress radical views 'can be far too easily twisted into a prohibition against dissenting viewpoints'"); *id.* (noting Professor Geoffrey Stone's concerns that historical responses to dangerous speech showed "bad judgment"); *see also* Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 390 (2017) ("It is easy for the government to assert abstract national security concerns, and for the public to believe those assertions because citizens generally have limited access to information about the degree and likelihood of current threats."); Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 726–29 (2009) (arguing that *Brandenburg*'s test should prevail even during nation security crises).

[9] *See infra* Part I.

[10] *See* Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333, 1395 (2019) ("Historians and legal scholars have amply documented the out-casting of segments of the population in response to past security fears. In the late nineteenth and early twentieth centuries, government officials and the public regularly conflated aliens with radicals, viewing the foreign-born as security threats to be countered with exclusion, deportation, and restrictive naturalization laws."); *see infra* Part I.

and catastrophic danger of terrorism—is so similar to arguments made in past crises.[11]

Attempting to alter *Brandenburg* based on a concept as nebulous as "terrorism" merely heightens this risk of abuse. Scholars urge changes to *Brandenburg* based on the dangers posed by international jihadist terrorism.[12] But nothing about the term "terrorism" is so limited. Terrorism is a malleable concept, which at its core involves violence committed for a political or ideological purpose designed to coerce or intimidate others.[13] Yet beyond these basic elements, definitions of terrorism are subject to debate, with dozens of different definitions existing.[14] Legal definitions fare little better as many different and overlapping definitions also exist.[15] The malleable nature of the terms "terrorist" and "terrorism" make them susceptible to abuse, as officials use the term to cast certain groups in a disfavored light while refraining from using it against groups about whom they approve.[16] As one observer noted, "the definition of terrorism seems to depend on point of view—it is what the 'bad guys' do."[17]

To rewrite *Brandenburg* in the name of such a subjective and pejorative term is practically to beg officials to misuse the standard. For example, our tendency to equate terrorism with international jihadist terrorism often creates a blind spot regarding the activities of white nationalist or Christian organizations whose activities potentially fall within definitions of terrorism.[18] Furthermore, although such organizations engage in the same sorts of speech about which others express concern when engaged in by international terrorist organizations,[19] there is little discussion of their speech in the context of the *Brandenburg* debate. Rather, most discussion tends to occur in the context of whether their speech

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[11] *See infra* notes 136–137 and accompanying text (discussing similar arguments made about groups during the Red Scare and Cold War).

[12] *See* Posner, *supra* note 6 (referencing ISIS); Sunstein, *supra* note 5 (referencing ISIS); Tsesis, *supra* note 4, at 655 (referencing ISIS and al-Qaeda).

[13] Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEG. 249, 251 (2004).

[14] *Id.*; *see also infra* Section III.A.

[15] *See* Sudha Setty, *Country Report on Counterterrorism: United States of America*, 62 AM. J. COMP. L. 643, 645-46 (2014); *see also infra* Section III.A.

[16] Perry, *supra* note 13, at 253.

[17] BRIAN M. JENKINS, INTERNATIONAL TERRORISM: A NEW KIND OF WARFARE, at 1 (June 1974), https://www.rand.org/pubs/papers/P5261.html [https://perma.cc/F6LZ-N7VA]; *see* Sinnar, *supra* note 10, at 1366 (noting "pernicious feedback loops" that result in the "social constructions of terrorists").

[18] *See* Caroline Mala Corbin, *Terrorists Are Always Muslim but Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455, 457–60 (2017).

[19] *See* JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW, at 48 (2017); *see also* Complaint at 24–45, Sines v. Kessler, 324 F. Supp. 3d 765 (W.D. Va. 2018) (No. 3:17-CV-00072) (detailing online activities of white supremacist and related groups involved in 2017 Charlottesville protests and ensuing violence).

amounts to "hate speech,"[20] an area of speech that largely enjoys broad protection in the United States.[21] In contrast, some law enforcement officials seem increasingly willing to use the term "terrorism" to describe protests and activism of groups advocating on behalf of racial minorities, such as the Black Lives Matter movement, despite a lack of evidence linking them to violence.[22] Officials in the Department of Homeland Security, for example, have raised concerns of links between the movement and international terrorism.[23] Such racialized use of the term terrorism is similar to historic attempts to suppress the speech of labor groups, socialists, communists, and other demonized groups.[24]

Part I of this essay discusses the legal and social history leading up to *Brandenburg*, focusing primarily on the punishment of speakers during World War I, the Red Scare, and the Cold War. It then locates *Brandenburg*'s stringent test as a response to the earlier, less-protective tests that allowed government officials to target and suppress the speech of disfavored groups. Part II discusses scholars' proposals for an exception to *Brandenburg* related to terrorist advocacy. It further examines the manner in which those proposals ignore *Brandenburg*'s place in history and discount the importance of the imminence requirement in protecting the speech of disfavored groups. Part III then examines definitions of terrorism, demonstrating that they are broad and malleable, encompassing more than the narrow, jihadist terrorism assumed by the scholars proposing to alter or work around *Brandenburg*. With an understanding of the malleability of these terrorism definitions, Part III re-examines the impact of weakening *Brandenburg*'s strict requirements and concludes that any attempt to regulate terrorist advocacy is likely to be used in an arbitrary manner.

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[20] *See infra* notes 185–186 (detailing cases and articles referring to online activities of white supremacist organizations as "hate speech").

[21] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (striking down ordinance prohibiting "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion, or gender'"). After *R.A.V.*, the Supreme Court has signaled that "no direct regulation of speech . . . that is drawn explicitly to protect particular groups against offensive or hurtful expression will pass constitutional muster." Geoffrey R. Stone, *Hate Speech and the U.S. Constitution*, 3 E. EUR. CONST. REV. 78, 81 (1994).

[22] *See* Khaled A. Beydoun & Justin Hansford, *The F.B.I.'s Dangerous Crackdown on "Black Identity Extremists*," N.Y. TIMES (Nov. 15, 2017), https://www.nytimes.com/2017/11/15/opinion/black-identity-extremism-fbi-trump.html [https://perma.cc/9TKW-WEFG]; Alice Speri, *Fear of A Black Homeland*, INTERCEPT (Mar. 23. 2019), https://theintercept.com/2019/03/23/black-identity-extremist-fbi-domestic-terrorism/ [https://perma.cc/3F3G-YEG9] [hereinafter Speri, *Black Homeland*].

[23] Alice Speri, *As Black Activists Protested Police Killings, Homeland Security Worried They Might Join ISIS*, INTERCEPT (Apr. 8, 2019), https://theintercept.com/2019/04/08/black-protesters-terrorism-threat-isis/?fbclid=IwAR2xnOPfp4sFFOZTGWzEVOxsAQXoadCdB2SuARPoVnshkC3HHubjOyR0gWU [https://perma.cc/F84H-VB8V] [hereinafter Speri, *Black Activists*].

[24] For discussion of historical attempts to suppress speech, see *infra* Sections I.A, I.B.

I. THE CIRCUITOUS ROAD TO *BRANDENBURG*

The *Brandenburg* standard currently governs whether and when government officials can punish dangerous and subversive speech, but it does not exist in a vacuum. Rather, it evolved from the Supreme Court's "clear and present danger test" created during the World War I era and tweaked over the next fifty years. The evolution of that test, and the history associated with it, reveals why the version adopted today is so important. An examination of these earlier eras reveals strikingly similar patterns: during real or perceived national security crises government officials suppressed the speech of domestic organizations, especially those dominated by immigrants, minorities, or people embracing offensive ideas. Officials rarely had evidence that the speech of these groups posed an extraordinary danger. Instead, they relied on prejudice and paranoia to create fear and hysteria that resulted in public support for their actions. Courts, including the Supreme Court, did not protect civil liberties and in some cases facilitated the suppression of speech.

A. *World War I and the Birth of "Clear and Present Danger"*

During World War I government officials pursued anti-war protestors, bringing prosecutions under the Espionage and Sedition Acts, which prohibited interference with the war effort and disloyal speech.[25] Rather than target actual, physical obstruction of the war effort or espionage, many prosecutions involved criticism of the war.[26] To support prosecutions, the government argued that almost "any publication or any speech to a large group might reach draft-age men; when necessary, it argued that communications to women might be passed onto their sons, brothers, and sweethearts."[27] Thus, any criticism was potentially dangerous. Even more significantly, these prosecutions particularly aimed to destroy disfavored groups, such as the

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[25] The Espionage Act prohibited false reports intending to interfere with the war effort, willfully causing a mutiny, or intentionally obstructing the draft. Espionage Act of 1917, ch. 30, 40 Stat. 217. The Sedition Act prohibited disloyal, profane or scurrilous speech. Sedition Act of 1918, ch. 75, 40 Stat. 553.

[26] For example, the federal government indicted individuals for urging the re-election of officials who had opposed the draft, denouncing the use of Liberty bonds to fund the war, or stating that conscripted men were "virtually condemned to death" or "Christians should not kill in wars." Christina E. Wells, *Discussing the First Amendment*, 101 Mich. L. Rev. 1566, 1583 (2003) (reviewing ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002)).

[27] Douglas Laycock, *The Clear and Present Danger Test*, 25 J. SUP. CT. HIST. 161, 163–64 (2000).

Socialist Party and labor groups, including the International Workers of the World (IWW). People or groups

> who had assured economic and social status, did not question the basis of our economic system, accepted the war as a holy crusade and expressed their views in somewhat temperate language were allowed to criticize the government; those who suffered were those whose views on the war were derived from some objectionable economic or social doctrines . . . regardless of their attitude towards Germany along with obscure individuals who used indiscreet or impolite, sometimes vulgar language to express their views.[28]

Courts convicted nearly half of those prosecuted for criticizing the war.[29] They relied on the prevailing "bad tendency" test, which asked whether the speech had a "natural and probable tendency and effect . . . as [was] calculated to produce the result condemned by the statute."[30] The "bad tendency" test was a product of the English law of seditious libel, where even truthful criticism of the government was prohibited on the theory that such criticism caused people to lose respect for the King and undermine his ability to govern.[31] In the World War I cases, the bad tendency test allowed courts to assume that criticism of the war effort had a tendency to violate the law (e.g., by causing resistance to the draft) and that the speaker intended to cause harm with their criticism regardless of whether evidence existed to support the government's charges.

The Supreme Court eventually grappled with the constitutional implications of these prosecutions in *Schenck v. United States*,[32] which involved an Espionage Act conviction of the Secretary of the Socialist Party for conspiracy to cause insubordination in the military.[33] Schenck and other members of the Socialist Party distributed a leaflet attacking the draft to

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[28] ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA 115 (2001) (internal quotation marks and citations omitted); *see* David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 516, 543–48 (1981) (noting courts' use of bad tendency test in cases involving speech of radical organizations); Laycock, *supra* note 27, at 164 ("The more harsh or radical the criticism the more likely the violation.").

[29] There were approximately two thousand indictments under the Espionage and Seditions Acts. Wells, *supra* note 26, at 1582–84. Nearly one thousand of those indicted were convicted. *Id.*

[30] Shaffer v. United States, 255 F. 886, 887 (9th Cir. 1919).

[31] Laycock, *supra* note 27, at 162–64 (discussing roots of bad tendency in law of English seditious libel); Christina E. Wells, *Lies, Honor and the Government's Good Name: Seditious Libel and the Stolen Valor Act*, 59 UCLA L. REV. DISCOURSE 136, 146–48 (2012) (discussing English law of seditious libel).

[32] Schenck v. United States, 249 U.S. 47 (1919).

[33] *Id.* at 48–49.

potential draftees.[34] The Supreme Court unanimously upheld Schenck's conviction in an opinion by Justice Holmes. Although acknowledging that the case implicated the First Amendment, Holmes believed the wartime circumstances were pertinent to the decision.[35] Accordingly, the appropriate constitutional test was whether words were "used in such circumstances and [were] 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."[36] Although the leaflet's statements arguably urged lawful resistance to the draft, Holmes found they presented a clear and present danger of draft obstruction given the wartime circumstances and the defendant's presumed intent to obstruct the draft by sending the leaflet to potential draftees.[37]

While *Schenck* recognized that dangerous speech could implicate the First Amendment, the clear and present danger test did little to protect speech. Holmes never defined how clear or present a particular danger must be before officials could punish speech. As a result, the test was quite malleable. That Schenck was convicted of vociferous but peaceful criticism of the draft further highlights the ease with which officials could characterize political advocacy as dangerous. As little more than a reformulation of the bad tendency test,[38] the clear and present danger test did not protect criticism of the war effort by disfavored groups like the Socialist Party. In fact, in the period immediately after *Schenck*, the Supreme Court relied on the decision to uphold convictions of unpopular speakers critical of the government.[39]

Ironically, in one of these post-*Schenck* cases, Justice Holmes dissented, arguing that the clear and present danger test

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[34] *Id.* at 51. Specifically, the leaflet argued that the draft was unconstitutional and that those who were silent about the draft were helping to deny or disparage everyone's rights; it also urged people to "Assert Your Rights." *Id.*

[35] *Id.* at 51–52 ("When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight . . . .").

[36] *Id.* at 52.

[37] *Id.* at 51, 53 (noting that one could presume defendant's intent to obstruct because the leaflet "would not have been sent unless it had been intended to have some effect").

[38] *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 195, 195 n.246 (2004) (noting similarity between "bad tendency" and "clear and present danger" tests); Rabban, *supra* note 28, at 585–86 (same).

[39] *See, e.g.*, Frohwerk v. United States, 249 U.S. 204, 208–09 (1919) (upholding Espionage Act conviction and noting that the "circulation of the [newspaper] was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out"); Debs v. United States, 249 U.S. 211, 216 (1919) (upholding Espionage Act conviction and noting that "the words used had as their natural tendency and reasonably probable effect to obstruct the recruiting service"). In both decisions, the language used sounds much like the bad tendency test, which further supports the argument that *Schenck* primarily relied on the "bad tendency" approach.

was more stringent than as applied by the Supreme Court. In *Abrams v. United States*, Holmes argued against upholding the Espionage Act convictions of Russian immigrants who passed out leaflets criticizing the United States government and calling for a strike in support of the Russian Revolution.[40] He concluded that the defendants posed little threat of harm and that it 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."[41] In reaching this iteration of the clear and present danger test, Holmes argued that the First Amendment supplanted the English law of seditious libel.[42] Holmes thus came to see the requirement of imminent harm as necessary to distinguish between truly dangerous speech and merely offensive criticism of government actions.

B. *Tweaking "Clear and Present Danger"—the Red Scare and the Cold War*

1. The Red Scare

The years after *Abrams* reflected continued social and legal repression of unpopular speakers, such as the IWW and socialists. A variety of factors led to this repression. Greater demand for progressive economic reform resulted in increased radical influence within labor organizations but also enormous antipathy from moderate business and labor communities concerned with maintaining the economic status quo.[43] Groups such as the IWW and the Socialist Party also openly sympathized with the Russian Revolution and resulting Bolshevik government about which many Americans were anxious.[44] As a result, opponents engaged in "red-baiting" designed to raise fear of foreign influence in labor activity and distrust of unions.[45]

[40] Abrams v. United States, 250 U.S. 616, 628–29 (1919) (Holmes, J. dissenting). Justice Brandeis joined Justice Holmes's opinion. *Id.* at 631.

[41] *Id.* at 628.

[42] *Id.* at 630.

[43] *See* GOLDSTEIN, *supra* note 28, at 139; Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 654, 654 n.4 (1988); STONE, *supra* note 38, at 221.

[44] *See* STONE, *supra* note 38, at 221.

[45] GOLDSTEIN, *supra* note 28, at 143 ("[Although no] significant sector of the labor movement was infected with communistic or revolutionary ideas . . . [,] the alleged red menace was . . . deliberately used by business forces to smash unions and by politicians to foster their own political careers.").

A series of labor strikes and other events in 1919 sparked further repression.[46] Focusing on "anti-American radicalism," officials argued that Bolshevism (the precursor to Soviet Communism) was the greatest danger facing the country and called for legislation, and investigation of radical organizations.[47] States targeted radical expression by enacting criminal syndicalism laws prohibiting advocacy of overthrow of the government.[48] A subcommittee of the New York legislature investigating seditious activities "became notorious for its . . . repeated irresponsible suggestions of subversive influence among blacks, trade unions and many prominent American persons and organizations."[49] At the federal level, the Attorney General declared that "radical expression threaten[ed] the 'constant spread of a disease of evil thinking.'"[50] Over the course of 1919–1920, government officials rounded up thousands, and deported hundreds of suspected radicals, often based on fabricated or exaggerated charges.[51]

These actions combined to create a feverish anti-radical sentiment in the United States.[52] The term "[r]adical" was not narrowly limited, but "covered the most innocent departure from conventional thought with a suspicion of desperate purpose."[53] People from a variety of areas of life, especially those with liberal orientations, were accused of radical leanings leading them to self-censor their speech and political associations.[54]

Although the Red Scare waned significantly in 1920,[55] the fear associated with it also seemed to affect the Supreme Court, which heard two cases involving the rights of speakers during the

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[46] These events included the radicalization and breakup of the Socialist Party, the Seattle General Strike (along with many others), riots occurring during otherwise peaceful May Day protests, and bombings in several cities. *See* STONE, *supra* note 38, at 221–22; GOLDSTEIN, *supra* note 28, at 144–46.

[47] STONE, *supra* note 38, at 221–22; *see* ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920, at 65 (1955).

[48] GOLDSTEIN, *supra* note 28, at 147. Over half the states also enacted red flag laws prohibiting anyone from displaying the communist flag as a symbol of opposition to organized government. *Id.*

[49] *Id.* Such organizations included the ACLU, the University of Chicago, Vassar, Yale and Barnard (because of their teachings), left-leaning publications such as the *New Republic* and the *Nation*, and individuals who questioned the subcommittee's actions. *See id.*; STONE, *supra* note 38, at 222.

[50] STONE, *supra* note 38, at 222 (citation omitted).

[51] *Id.* at 223; GOLDSTEIN, *supra* note 28, at 150.

[52] *See* MURRAY, *supra* note 47, at 17 (quoting contemporary British journalist as stating that the country was "hag-ridden by the spectre of Bolshevism").

[53] *Id.* at 17.

[54] GOLDSTEIN, *supra* note 28, at 154. Teachers were "abject fools" to exercise their speech rights while others self-censored both their speech and their progressive reading materials for fear of being pilloried. *Id.*

[55] *Id.* at 158–63; STONE, *supra* note 38, at 224–32.

1920s. In the first, *Gitlow v. New York*,[56] Benjamin Gitlow was convicted under the New York criminal syndicalism law, which prohibited "advocat[ing], advis[ing] or teach[ing] the duty, necessity, or propriety of overthrowing or overturning organized government by force or violence."[57] Gitlow's conviction rested on his involvement in publishing and distributing the *Left Wing Manifesto*, which advocated for the necessity of communist revolutionary change.[58] As in earlier cases, the Supreme Court rejected the defendant's claim that the criminal syndicalism law violated his free speech rights. Rather than apply *Schenck*'s clear and present danger test, however, the Court deferred to the state legislature's decision to outlaw subversive speech and organizations.[59] The Court refused to characterize the *Left Wing Manifesto* as a mere abstract discussion of the idea of overthrowing the government, instead characterizing it as a "call to action," even if only at some time in the future.[60] It further found that the state's belief that such "calls to action" posed a "danger of substantive evil" was neither arbitrary nor unreasonable.[61] Thus, Gitlow's conviction for publishing the Manifesto was appropriate.

Two years later, in *Whitney v. California*,[62] the Court also upheld Anita Whitney's conviction against her free speech challenge to the California criminal syndicalism law. Whitney joined the revolutionary faction of the Socialist Party in 1919 as it split into moderate and revolutionary factions.[63] She was convicted under the California law,[64] which was similar to New York's, although it additionally prohibited organizing a group that advocated the violent overthrow of the government.[65] The *Whitney* Court relied on *Gitlow*'s deferential approach[66] in upholding Whitney's conviction for knowingly organizing a group to advocate violent overthrow of the government, despite the fact that Whitney had opposed any platform advocating possible use of violence.[67] In fact, the Court opined that Whitney's "united and joint action [with

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[56] Gitlow, v. New York, 268 U.S. 652 (1925).

[57] *Id.* at 654 (quoting N.Y. PENAL LAW § 161 (1909)).

[58] *Id.* at 655–57.

[59] *Id.* at 668–71.

[60] *Id.* at 665.

[61] *Id.* at 668–70. Because Congress had already determined that this speech was dangerous, the Court saw no need to apply the clear and present danger test to determine if dangerous conditions resulting from speech were actually present. *Id.* at 670–71.

[62] Whitney v. California, 274 U.S. 357 (1927), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

[63] *Id.* at 363–65.

[64] *Id.* at 359–60.

[65] *Id.* at 360 (discussing California Syndicalism Act).

[66] *Id.* at 371.

[67] *Id.* at 365–66.

others] involve[d] even greater danger to the public peace and security than the isolated utterances and acts of individuals."[68]

Not everyone agreed with the deference in *Gitlow* and *Whitney*. As in *Abrams*, Justice Holmes dissented in *Gitlow*, arguing that the clear and present danger test should apply.[69] Holmes noted that the expression of opinion may cause people to change their minds, even in cases involving advocacy of violent regime change; he concluded, however, that "the only meaning of free speech is that [such opinions] should be given their chance and have their way."[70] Because the *Left Wing Manifesto* was merely an attempt to induce an uprising at "some indefinite time in the future," Holmes found that it did not present a clear and present danger of harm.[71]

Justice Brandeis similarly favored a strong application of the clear and present danger test in *Whitney*. Brandeis supported that application by canvassing the many reasons why the state is "denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence."[72] According to Brandeis:

> Those who won our independence . . . . recognized the risks to which all human institutions are subject. 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 path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form.[73]

With these important functions of speech in mind, Brandeis argued that "advocacy of [law] violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."[74] As with Holmes, Justice Brandeis saw the imminence requirement as important to protecting public discussion of even the most noxious doctrine, including advocacy of potential violence.

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[68] *Id.* at 372.
[69] *Gitlow*, 268 U.S. 652, 672 (1925) (Holmes, J. dissenting).
[70] *Id.* at 673.
[71] *Id.*
[72] *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring).
[73] *Id.* at 375–76.
[74] *Id.* at 376.

2. The Cold War

After the Red Scare, the Holmes/Brandeis version of the clear and present danger test seemed to take hold in cases that did not involve subversive advocacy.[75] But the Cold War again led to social and legal repression and court deference to legislation aimed at an unpopular group—domestic communists. As with the Socialist Party and other groups during and after World War I, domestic communists in the United States had an uneven relationship with the public during the economic and political upheaval of the 1930s.[76] Although they rarely did more than teach communist doctrine, fear of domestic communists led states to revive or enact sedition laws under which officials pursued them for advocating overthrow of the government.[77] The Truman administration, which saw the Soviet Union as a serious threat to American stability after World War II, publicly equated domestic communists with Soviet aggression, making domestic communism an issue of national security.[78] Herbert Hoover argued that "communists were infiltrating every aspect of life in the United States."[79] Congress's infamous House Un-American Activities Committee, along with Senator Joseph McCarthy, held hearings to expose communist sympathizers who allegedly threatened the American way of life.[80] By the end of the 1940s, although there was no evidence that domestic communists planned a violent overthrow

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[75] *See, e.g.*, Bridges v. California, 314 U.S. 252, 263 (1941) (holding that "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished"); Cantwell v. Connecticut, 310 U.S. 296, 308–09 (1940) (finding the state has power to regulate speech when a "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears" but the state cannot regulate speech "under the guise of conserving desirable conditions"); Thornhill v. Alabama, 310 U.S. 88, 105 (1940) (punishment of speech "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion"). For a discussion of these cases, see Laycock, *supra* note 27, at 174–77.

[76] Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 121–27 (discussing the events in the 1930s that led to domestic communists' increased influence and popularity while also raising fears of that increased influence). For an in-depth history surrounding the treatment of domestic communists, see MICHAL R. BELKNAP, COLD WAR POLITICAL JUSTICE: THE SMITH ACT, THE COMMUNIST PARTY, AND AMERICAN CIVIL LIBERTIES (1977); ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998); PETER L. STEINBERG, THE GREAT "RED MENACE": UNITED STATES PROSECUTION OF AMERICAN COMMUNISTS, 1947–1952 (1984).

[77] Wells, *supra* note 76, at 122 n.36, 122–23.

[78] *Id.* at 128. World War II eased some of the public hostility toward domestic communists while the United States and Soviet Union were allies but hostility again increased once the war ended. *See* BELKNAP, *supra* note 76, at 35, 37–38.

[79] Wells, *supra* note 76, at 131 (quoting STEINBERG, *supra* note 76, at x.).

[80] *Id.* at 131, 131 n.101.

of the United States, Americans held a significant and pervasive fear that domestic communists posed a threat to the nation.[81]

In this atmosphere, the federal government charged the leaders of the Communist Party USA (CPUSA) under the Smith Act, a federal law prohibiting "knowingly or willfully advocat[ing], abet[ting], advis[ing], or teach[ing] the duty, necessity, desirability or propriety of overthrowing or destroying the government of the United States or . . . the government of any political subdivision therein, by force or violence."[82] Because of the lack of evidence,[83] the government charged the defendants not with advocacy of overthrow, but rather with conspiracy to advocate overthrow of the government.[84] This charge allowed the government to argue that "by virtue of its adherence to Marxist-Leninist principles . . . [,] the CPUSA was itself a conspiracy to advocate overthrow of the government."[85] Between this government theory and the prevailing atmosphere of fear, the defendants were easily convicted.[86]

Defendants appealed their convictions, claiming they violated the First Amendment.[87] Justice Vinson, writing for a plurality of the Supreme Court in *Dennis v. United States*, explicitly rejected the deference of *Gitlow* and *Whitney* and acknowledged that the Smith Act violated the First Amendment if it punished speech that did not present a clear and present danger of harm.[88] Justice Vinson's version of the clear and present danger test, however, differed from Justices Holmes and Brandeis's more stringent version. According to Justice Vinson, 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."[89] The test operated on a sliding scale, allowing punishment of speech causing less imminent or less probable harm if the harm was very serious. Justice Vinson found this version of the test

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[81] *Id.* at 133–41.

[82] 18 U.S.C. § 2385.

[83] Although the FBI spent years gathering information on the defendants, Wells, *supra* note 76, at 142, even the government's lawyers acknowledged that there was no solid evidence that defendants advocated forceful overthrow of the United States. BELKNAP, *supra* note 76, at 80–82; STEINBERG, *supra* note 76, at 108.

[84] Dennis v. United States, 341 U.S. 494, 497 (1951).

[85] Wells, *supra* note 76, at 143.

[86] *See id.* at 148–49.

[87] Many critics of the criminal trial argued that defendants were convicted of little more than "organizing a group to commit a speech crime." HARRY KALVEN, JR., A WORTHY TRADITION 193 (Jamie Kalven ed., 1988); *see also* STEINBERG, *supra* note 76, at 157 (describing the trial of the CPUSA leaders as a "Trial of Ideas"). Defendants initially appealed to the Second Circuit Court of Appeals, where they lost, *see* United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), and then eventually were granted a writ of certiorari by the Supreme Court. *See Dennis*, 314 U.S. at 495.

[88] *Dennis*, 341 U.S. at 505–08.

[89] *Id.* at 510.

easily met because the significant danger ostensibly posed by the communist conspiracy, which was highly organized, rigidly disciplined, and waiting for instructions to act when the time was right, far outweighed the lack of imminence with respect to potential overthrow of the government.[90]

As with earlier Supreme Court decisions, there were dissenters, this time accusing their colleagues of sacrificing the clear and present danger test to the fear permeating the times.[91] Justice Black argued that defendants were convicted of conspiring to do nothing more than organize the Communist Party and use legal publications to advocate the overthrow of the government.[92] Such punishment, he argued, "is a virulent form of prior censorship of speech and press" which required a repudiation of the clear and present danger test.[93] Justice Douglas similarly lamented defendants' conviction, noting that "never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested."[94] Douglas concluded that "[n]either prejudice nor hate nor senseless fear should be the basis" of a conviction and that free speech "should not be sacrificed on anything less than plain and objective proof of danger that the evil advocated is imminent."[95]

C. Brandenburg*—the Culmination of "Clear and Present Danger"*

As the hysteria of the early Cold War waned, the Court backed away from its deferential approach. Initially, it did so indirectly—e.g., by narrowly interpreting the Smith Act and *Dennis* to allow punishment only for incitement of overthrow supported by specific evidence related to those charged with a crime.[96] In 1969, however, the Court revisited the clear and present danger test in *Brandenburg v. Ohio*.[97]

Brandenburg involved a Ku Klux Klan leader charged under an Ohio criminal syndicalism law similar to those in *Whitney* and

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[90] *Id.* at 510–11.

[91] *See id.* at 581 (Black, J., dissenting); *id.* at 589–90 (Douglas, J., dissenting).

[92] *Id.* at 579 (Black, J., dissenting).

[93] *Id.*

[94] *Id.* at 584 (Douglas, J., dissenting).

[95] *Id.* at 589–90.

[96] *See* Yates v. United States, 354 U.S. 298, 318, 324–30 (1957) (refusing to uphold convictions based on evidence nearly identical to that in *Dennis*); *see also* Laycock, *supra* note 27, at 179 (discussing implications of *Yates*).

[97] *See* Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (per curiam).

Dennis.[98] Specifically, the law prohibited "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'"[99] For nearly a hundred years, the Klan had terrorized Black and Jewish citizens, as well as Klan opponents, with acts of violence at various times up through the 1960s.[100] In *Brandenburg*, however, the charges were based on speech occurring at an isolated, rural rally involving approximately twelve hooded individuals (some carrying weapons).[101] At the rally, the participants used racial epithets, made derogatory statements against black and Jewish persons, and also used slogans such as "Save America" and "Freedom for the whites."[102] In a speech to those present, the defendant said: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[103]

The lower court convicted defendant of advocating violence as a means of accomplishing political reform and voluntarily assembling with a group to do so; the Supreme Court reversed.[104] The Supreme Court noted 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."[105] Accordingly, it held that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[106] Because the Ohio law did not distinguish between permissible advocacy and impermissible incitement as the Court had defined those terms, it "impermissibly intrude[d]" upon the defendant's freedom of speech.[107]

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[98] *Id.* at 444–45.

[99] *Id.* (alteration in original) (quoting OHIO REV. CODE ANN. § 2923.13 (1919)).

[100] *See* Virginia v. Black, 538 U.S. 343, 352–57 (2003) (generally describing Ku Klux Klan activities); *see generally* S. POVERTY LAW CTR., KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE (2011), https://www.splcenter.org/20110228/ku-klux-klan-history-racism [https://perma.cc/59EU-VSPC] (describing three periods of Klan strength, including the Civil Rights era of the 1960s).

[101] *Brandenburg*, 395 U.S. at 445.

[102] *Id.* at 446 n.1.

[103] *Id.* at 446.

[104] *Id.* at 445.

[105] *Id.* at 448 (quoting Noto v. United States 367 U.S. 290, 297–98 (1961)).

[106] *Id.* at 447.

[107] *Id.* at 448.

Observers agree that the *Brandenburg* standard is difficult to satisfy. It is designed to protect political advocacy—no matter how abhorrent—while allowing punishment of speech that is intended and likely to cause imminent harm.[108] *Brandenburg* thus represents a significant change from earlier clear and present danger tests. By requiring proof that a speaker intend to cause harm and that this harm be imminent and likely, the test builds on the Holmes/Brandeis tradition and is significantly more speech protective than earlier versions. *Brandenburg* does not allow government officials to claim that political advocacy is dangerous based on unwarranted or unprovable causal inferences, or because officials have magnified possible resulting harm.[109] The imminence requirement is especially important in this regard. By requiring that the speaker intend to cause imminent harm and that imminent harm will likely result from said speech, the Court's carefully worded incitement test protects even the most virulent political rhetoric. Under *Brandenburg*,

> [i]t is thus permissible to stir up opposition to government policy even with the specific intent that members of the audience be favorably disposed to lawless action at some future time. And it is permissible to expressly advocate lawless action if no one is likely to act on the advice, a principal that protects much emotionally fulfilling radical rhetoric about imaginary resistance.[110]

In this sense, observers generally agree that *Brandenburg* represents the Court's response to previous tests that both failed to protect speech and allowed persecution of unpopular groups.[111]

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[108] *See* Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1358–59 (1997) (describing *Brandenburg* standard as designed to prohibit punishment of ideas); Steven G. Gey, *The* Brandenburg *Paradigm and Other First Amendments*, 12 U. PA. J. CONST. L. 971, 978 (2010) (noting that *Brandenburg* standard provides "virtually absolute protection of political speech"); Bernard Schwartz, *Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240 (noting *Brandenburg*'s requirements make it difficult to punish simple advocacy); Healy, *supra* note 8, at 665.

[109] *See* Blasi, *supra* note 108, at 1358–59 (noting that *Brandenburg* imposes strict causation requirements); Schwartz, *supra* note 108, at 240 (noting that *Brandenburg*'s requirements make it difficult to show the required nexus between speech and harm).

[110] Laycock, *supra* note 27, at 181.

[111] *See* David Strauss, *Freedom of Speech and the Common Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 32, 57 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) ("The *Brandenburg* Court, following the critics of clear and present danger, had apparently . . . . recognized the limitations of that approach and the need to supplement it."); Wells, *supra* note 26, at 1577 ("[*Brandenburg*] was a response to the decisions . . . that came before, which the Court began to view as mistaken applications of a test that proved far too malleable and subject to political pressure, especially during certain crisis periods."); STONE, *supra* note 38, at 524 (arguing that "*Brandenburg* represents the (contemporary) culmination" of a process of reflection and evolution of the Court's tests to better protect against the hysteria of earlier eras).

II. A TERRORISM EXCEPTION TO *BRANDENBURG*?

A. Scholars' Arguments to Change the Brandenburg *Standard*

Although *Brandenburg* "is . . . one of the most well-established aspects of modern constitutional doctrine,"[112] terrorist advocacy, especially on the internet, arguably puts pressure on application of this standard. Terrorist organizations have increasingly spread propaganda, glorified violence, and/or urged others "to go to war with perceived enemies of Islam."[113] Many such organizations have sophisticated electronic media campaigns, allowing them to recruit and influence potential followers:

> The broad reach of the internet has made it easier than ever to establish terrorist contacts; groups that were formerly so geographically dispersed that communications between them were either impractical or impossible now have the means to collaborate, share membership lists, recruit new members, and advise each other.
>
> . . . .
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> . . . Technically adept terrorist organizations and their devotees exploit social networking sites to spread ideologies, disseminate instructional videos, consolidate power, and threaten enemies.[114]

For example, the teachings and lectures of radical Muslim cleric, Anwar Al-Awlaki, were distributed through the internet and have arguably influenced, even after his death, several terrorists who attacked within the United States.[115]

Fearing the radicalization of those exposed to terrorist advocacy, observers make various suggestions for change. Some call for social media platforms to self-regulate to "prevent violent extremists from using social media and the Internet to advance their hateful ideology."[116] Several prominent legal scholars in the

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[112] Gey, *supra* note 108, at 977.

[113] David S. Han, *Terrorist Advocacy and Exceptional Circumstances*, 86 FORDHAM L. REV. 487, 490 (2017).

[114] Tsesis, *supra* note 4, at 654–55; *see also* KATHLEEN ANN RUANE, CONG. RESEARCH SERV., R44626, THE ADVOCACY OF TERRORISM ON THE INTERNET: FREEDOM OF SPEECH ISSUES AND THE MATERIAL SUPPORT STATUTES, at 2 (2016) ("[T]he Islamic State organization has been known to use popular Internet services such as Twitter and YouTube to disseminate videos of its fighters executing prisoners, claim credit for organizing terrorist attacks such as the attack that occurred in Paris in November of 2015, and recruit new members to their cause.").

[115] Han, *supra* note 113, at 490–91; Tsesis, *supra* note 4, at 657.

[116] Press Release, House Foreign Affairs Comm., Poe, Sherman, Royce Engel: Shut Down Terrorists on Twitter (Mar. 12, 2015), https://sherman.house.gov/media-center/press-releases/poe-sherman-royce-engel-shut-down-terrorists-on-twitter [https://perma.cc/4MNL-C45H].

free speech area, however, additionally urge us to rethink *Brandenburg*'s role in the regulation of terrorist advocacy.

Professor Cass Sunstein, for example, argues that "terrorism, and . . . [the] Islamic State in particular, pose[] a fresh challenge to the greatest American contribution to the theory and practice of free speech: the clear and present danger test."[117] He acknowledges that regulation of terrorist recruitment and propaganda would not meet the *Brandenburg* standard because most terrorist advocacy does not present an imminent threat of harm.[118] He further notes that "there may be value in even the most extreme and hateful forms of speech" if for no other reason than that we "can learn what other people believe."[119] Although he approves of the stringent standard generally, he argues that it is a relatively recent iteration of the Court's doctrine and that "it might not be so well-suited to the present."[120] Thus we must ask "whether [the] benefit" of terrorist advocacy outweighs "the genuine risk[s] of large numbers of deaths."[121] To deal with this new threat, Sunstein proposes a modified version of *Brandenburg* that allows punishment if an individual explicitly incites violence that produces a genuine risk to public safety, regardless of whether the harm is imminent.[122]

Professor Eric Posner also argues that "[n]ever before in our history have enemies outside the United States been able to propagate genuinely dangerous ideas on American territory in such an effective way . . . [i.e.,] ideas that lead directly to terrorist attacks that kill people."[123] Posner suggests a framework of criminal penalties for those who "access websites that glorify, express support for, or provide encouragement for ISIS or support recruitment by ISIS," or who distribute links to such websites or encourage others to access them.[124] His proposal is designed to deter innocent yet curious readers from accessing such websites, which will prevent their radicalization.[125] Posner acknowledges that *Brandenburg* is currently an obstacle to his proposal, but like Sunstein, argues that the decision is relatively new and should be

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[117] Sunstein, *supra* note 5.

[118] *See id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See id.*

[123] Posner, *supra* note 6.

[124] *Id.* Posner acknowledges concerns by those "journalists, academics, private security agencies, and the like," who have "legitimate" reasons for accessing terrorist advocacy websites. *Id.* His proposal would exempt persons "who can show that they have a legitimate interest in viewing ISIS websites." *Id.* He suggests that credentials, employment records and a "track record" of public commentary could serve as proof of legitimate interest. *Id.*

[125] *Id.*

considered in light of numerous pre-*Brandenburg* cases that allowed punishment of "dangerous" speech regardless of whether harm is imminent.[126] "[A]nti-propaganda laws," Posner argues, may be warranted "because of the unique challenge posed by ISIS's sophisticated exploitation of modern technology."[127]

In contrast, Professor Alexander Tsesis argues that *Brandenburg* does not prevent criminalizing terrorist advocacy. According to Professor Tsesis, the *Brandenburg* standard should apply only to those situations where it was meant to apply—imminently dangerous statements.[128] Recognizing that most terrorist advocacy does not involve such speech and instead "seeks long-term indoctrination, mentoring, recruitment, and so on,"[129] Tsesis argues that other Supreme Court decisions permit laws punishing such speech. First, he relies on the deferential clear and present danger standard announced in *Dennis v. United States*,[130] which similarly involved a group engaged in long-term indoctrination and which *Brandenburg* did not explicitly overrule.[131] Second, he relies on a recent decision, *Holder v. Humanitarian Law Project*,[132] which rejected a free speech challenge to a federal law criminalizing material support of designated terrorist organizations even though the government included some speech within the definition of material support.[133] Such decisions, he argues, distinguish between "agitating for change," which is protected by the First Amendment, and speech that incites or directly supports violence through the use of propaganda or recruitment efforts, which is not protected by the First Amendment.[134]

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[126] *See id.* For discussion of those cases, see *infra* notes 130–134 and accompanying text.

[127] Posner, *supra* note 6.

[128] Tsesis, *supra* note 4, at 667.

[129] *Id.*

[130] Dennis v. United States, 341 U.S. 494, 508 (1951). Professor Tsesis does not argue in favor of convicting the *Dennis* defendants (for which he acknowledges there was little supporting evidence). Tsesis, *supra* note 4, at 663. Rather he seems to favor the statement of law in the case, which minimized the need for imminent harm when the danger posed by speech urging people to action is arguably large (such as violence or overthrow of the government). *Id.* Although Professor Tsesis seems to view *Dennis* as in line with *Brandenburg*'s standard, the two cases are not consistent with one another. *See* Laycock, *supra* note 27, at 179–80 (discussing differences between *Brandenburg* and *Dennis*). Reliance on *Dennis* to support regulating terrorist propaganda is, thus, in tension with *Brandenburg*.

[131] *See Dennis*, 341 U.S. at 497–99; *Brandenburg*, 395 U.S. at 447 n.2 (interpreting *Dennis* through the lens of *Yates* in order to support the Court's holding).

[132] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[133] *See Humanitarian Law Project*, 561 U.S. at 39; Tsesis, *supra* note 4, at 670–75. According to federal law, material support can take the form of money, weapons or speech, such as counseling or coordinated advocacy on behalf of a designated terrorist organization. See *infra* Section III.B.2 for additional discussion of the material support statute.

[134] Tsesis, *supra* note 4, at 663, 675.

B. Locating Scholars' Arguments in Brandenburg*'s History*

Although the above scholars' concern about terrorism advocacy is understandable, their proposal to alter or work around *Brandenburg* is misguided. Their arguments ignore the social and legal history leading up to *Brandenburg*. The idea that terrorist indoctrination or propaganda is different and uniquely dangerous ignores that the nearly identical arguments were made about the speech of socialists and communists during the Red Scare and Cold War.[135] For example, during the Cold War officials argued communism was "a far greater threat to our existence than any other threat," and if the United States "does not successfully cope with the communist threat, then it need not worry about any other threat to the internal security of this nation, because it is not impossible that there will be no nation."[136] Similarly, fears about the ease with which the internet allows terrorists to influence others are not terribly different from earlier eras. Even without the internet, officials during World War I and the Cold War warned of foreign actors who had created sophisticated networks of operatives willing to do their work (sometimes unwittingly) to undermine the country.[137] Thus, we should closely scrutinize the argument that terrorism is somehow exceptional and a reason to alter *Brandenburg*.

Arguments that the imminence requirement is unnecessary because terrorists seek long-term indoctrination also ignore that identical arguments supported the *Dennis* Court's extraordinarily deferential approach to the clear and present danger test.[138] That test has been criticized for its distortion of the Holmes/Brandeis clear and present danger test on which it purported to rely.[139] In fact, the ease with which it was manipulated to fit the fears of the

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[135] *See supra* Sections I.B.1, I.B.2.

[136] SCHRECKER, *supra* note 76, at 48. Other eras reflect similar existential fears. *See supra* note 47 and accompanying text (describing Bolshevism as the "greatest danger" facing the country during the Red Scare).

[137] *See* Dennis v. United States, 341 U.S. 494, 510–11 (1951) ("The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, 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."); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 914–15 (2004) ("President [Woodrow] Wilson cited German aggression around the world to argue that the 'military masters of Germany' were filling 'our unsuspecting communities with vicious spies and conspirators' and that they were using 'liberals in their enterprise. . . . — socialists, the leaders of labor' to sow disloyalty in America." (citation omitted)).

[138] *See supra* notes 88–95 and accompanying text.

[139] *See* Strauss, *supra* note 111, at 56–57; Laycock, *supra* note 27, at 179 ("The clear and present danger test never recovered from *Dennis*. The majority's reformulation fundamentally changed the nature of the test from two requirements to one sliding scale.").

moment is a particular vice of the clear and present danger test,[140] and precisely why the Court adopted the *Brandenburg* test. Scholars urging us to abandon the imminence requirement thus discount the role that imminence plays in helping judges and juries determine intent, causation, and the presence of harm by ensuring adequate evidence exists and by preventing fear from skewing decision-making.[141] Accordingly, the imminence requirement is not an aspect of *Brandenburg* that courts can easily remove without ill effects. Rather, its removal potentially subjects speakers to a wide variety of abuses at the hands of the government as history has repeatedly shown.[142]

Arguments for changing or working around *Brandenburg* are especially problematic given that there is little evidence that such changes are required to protect against the harms of terrorism. Professor Alan Chen has argued, for example, that the government often satisfies *Brandenburg*'s requirements in terrorism trials and that the most serious dangers posed by terrorists' speech are "direct, step-by-step incitement and hand-holding" that clearly subject individuals to prosecution.[143] After examining recent terrorism cases, he concluded: "[I]f there are grave concerns about national security and the internet leading to tangible social harms that cannot be addressed in any way

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[140] Wells, *supra* note 76, at 201–02 ("The amorphous balancing required in the clear and present danger test made it particularly susceptible to . . . skewing effects . . . . Such a test is no guard against overestimation of an event's probability, especially one that supposedly involved violent overthrow of the government, an evil that 'was as great as could be imagined.'" (citations omitted)).

[141] *See* Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 45 (2003) (noting that the imminence portion of *Brandenburg* "require[s] a jury to balance its passionate assessment of risk with the actual outcome"); Frederick M. Lawrence, *The Collision of Rights in Violence-Conducive Speech*, 19 CARDOZO L. REV. 1333, 1347 (1998) (noting that imminence requirement of *Brandenburg* makes harm evaluation more objective than previous tests allowing evaluation of long range harm).

[142] This does not mean that *Brandenburg* is a perfect test. There remains ambiguity about the standard, such as whether one must expressly use words of incitement and the degree of imminence required. Chen, *supra* note 8, at 384; *see* Laycock, *supra* note 27, at 180. Similarly, the *Brandenburg* Court overruled *Whitney* but treated *Dennis* (viewed through the narrowing interpretive lens of *Yates v. United States*) as a contributing precedent; as a result, there exists the possibility of confusion regarding the relationship of *Brandenburg* and past precedent. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam). Nevertheless, it seems clear that *Brandenburg* meant to change the pre-existing law and to strengthen the clear and present danger test. Healy, *supra* note 8, at 664–66 (noting that *Brandenburg* changed the earlier law in several ways but caused some confusion by its unexplained reliance on older cases).

[143] Chen, *supra* note 8, at 398. Nathaniel Barr, a terrorism expert, noted that in many of these virtual relationships, "you will see that there is a direct line of communication to the point where they are egging them on minutes, even seconds, before the individual carries out an attack." Rukmini Callimachi, *Not 'Lone Wolves' After All: How ISIS Guides World's Terror Plots from Afar*, N.Y. TIMES (Feb. 4, 2017), https://www.nytimes.com/2017/02/04/world/asia/isis-messaging-app-terror-plot.html [https://perma.cc/D5RQ-Y2WX].

other than relaxing the *Brandenburg* standard, the evidence of such a problem has yet to emerge in any concrete way."[144] Given the woeful history of lesser standards, Professor Chen's findings solidify the need for skepticism regarding changes to the *Brandenburg* standard.

III. TERRORISM DEFINITIONS EXACERBATE THE PROBLEMS WITH EXCEPTIONS TO *BRANDENBURG*

If removing the imminence requirement renders the *Brandenburg* test malleable and subject to abuse, doing so in the name of "terrorism" is even more problematic. Scholars advocating for change do so because of the unique and potentially catastrophic harm they believe international jihadist terrorism poses.[145] Yet nothing limits the definition of terrorism to jihadist terrorists. Terrorism is instead a malleable concept susceptible to abuse as officials use the term to cast certain groups in a disfavored light while refraining from using it against groups about whom they approve.[146] Attempts to alter *Brandenburg* based on this nebulous concept would simply inject yet another layer of arbitrariness into the application of a newly revised *Brandenburg* test, as officials subjectively decide which groups are and are not terrorists. Indeed, the arbitrariness and discretion associated with punishing terrorist advocacy is reminiscent of officials' actions against labor, socialist, and communist groups in the 20th century. Many such actions were directed at groups that the government wanted to demonize rather than groups that posed serious danger.[147] As this Part highlights, the risk that such abuse could occur again remains very real, especially given the nebulous concept of the term "terrorism."

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[144] Chen, *supra* note 8, at 397. Professor Chen examined all reported federal cases involving *Brandenburg* since the September 11th terrorist attacks. He noted that most do not involve terrorism but of those that do the courts either rejected a *Brandenburg* defense or found the *Brandenburg* elements met. *Id.* at 397–98. These results stem from the courts' findings that the defendants' speech in such cases was akin to direction and control rather than simple advocacy. *Id.* at 398.

[145] *See* Tsesis, *supra* note 4, at 654–62 (discussing activities of international terrorist organizations); Posner, *supra* note 6 (discussing internet advocacy of "terrorist groups such as ISIS"); Sunstein, *supra* note 5 (referring to the Islamic State).

[146] Perry, *supra* note 13, at 253 ("A person or group is politically and socially degraded when described as terrorist, and governments have labeled opponents 'terrorists' in order to maintain power." (footnotes omitted)).

[147] *See supra* notes 28, 45; *see generally* Wells, *supra* note 137 (discussing historical and psychological phenomenon allowing government officials to target disfavored groups).

A. *The Difficulty with Defining Terrorism*

There is no single definition of terrorism. Commentators over several decades have instead catalogued hundreds of definitions of that term.[148] Common elements exist; thus, one can generally define terrorism as encompassing intentionally violent action against innocents that is politically or ideologically motivated and designed to intimidate or coerce.[149] Disagreement exists, however, about various aspects of these definitions. For example, almost everyone agrees that violence and political or ideological motivation are necessary aspects of terrorism.[150] Beyond that, disagreement exists about the necessity of various elements—e.g., must terrorist activity target innocents[151] or must it involve group activity?[152]

This plethora of definitions, along with their generality, leads commentators to note that labeling acts of violence as terrorism is a subjective exercise.[153] More than this, however, there are pejorative overtones associated with the term, the very use of which "assigns a moral judgment to the act and the actor, a moral judgment, which is nearly universally negative."[154] It is thus tempting to use the term against those one wants to degrade socially, while at the same time not applying it towards perpetrators of violence with which one sympathizes.[155] Not surprisingly, governments use the term terrorism against opponents in order to maintain power.[156] Indeed, the use of "terrorist" or "terrorism" often is a means of identifying those against whom the government should bring the full force of its

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[148] *See, e.g.*, ALEX P. SCHMID, POLITICAL TERRORISM: A RESEARCH GUIDE TO CONCEPTS, THEORIES, DATA BASES AND LITERATURE 119–52 (1983); Robert J. Beck & Anthony Clark Arend, *"Don't Tread on Us": International Law and Forcible State Responses to Terrorism*, 12 WIS. INT'L L.J. 153, 161 (1994); Perry, *supra* note 13, at 249.

[149] *See* Setty, *supra* note 15, at 644–45; JENKINS, *supra* note 17, at 1–2.

[150] Perry, *supra* note 13, at 251.

[151] *Compare* Ileana M. Porras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 129 (noting that innocence of victims is often part of terrorism definition), *and* JENKINS, *supra* note 17, at 2 (noting that terrorism is usually targeted at civilians), *with* Theodore P. Seto, *The Morality of Terrorism*, 35 LOYOLA L.A. L. REV. 1227, 1236–39 (2002) (discussing difficulty in limiting terrorism to innocent victims).

[152] *See* Perry, *supra* note 13, at 251, 251 n.20 (discussing debate).

[153] *See, e.g.*, JENKINS, *supra* note 17, at 1 ("[T]he definition of terrorism seems to depend on point of view . . . ."); Perry, *supra* note 13, at 250 (likening approaches to terrorism to the "I know it when I see it" approach of the Supreme Court to obscenity (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (Stewart, J., concurring))).

[154] Perry, *supra* note 13, at 252; *see* JENKINS, *supra* note 17, at 1.

[155] Perry, *supra* note 13, at 252–53; *see also* Porras, *supra* note 151, at 124 ("What changes [with terrorism] is not the meaning of the word, but rather the groups and activities that each person would include or exclude from the list."); JENKINS, *supra* note 17, at 1 (noting that terrorism "is what the 'bad guys' do.").

[156] Perry, *supra* note 13, at 253.

authority: "To label a person, group, or activity 'terrorist' serves not just as a shorthand description, nor even simply as a statement of moral indignation, but primarily as a call to action—a demand for elimination."[157]

One might be able to alleviate some of the subjectivity associated with the term terrorism by using an appropriately specific legal definition. For example, Section 2331 of the federal criminal code defines "international terrorism" as activities that:

> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of [those entities];
>
> (B) appear to be intended—
>
> > (i) to intimidate or coerce a civilian population;
> >
> > (ii) to influence the policy of a government by intimidation or coercion; or
> >
> > (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.[158]

Yet Section 2331's definition, although more structured than the more general definition discussed earlier in this Part, is strikingly similar to it. As a result, it still leaves a great deal of discretion to officials in its application. It has the advantage of incorporation within various other provisions of federal law that give additional guidance as to when and how it will be used.[159] Unfortunately, federal law alone contains at least nineteen different legal definitions of terrorism, all of which take their own approach.[160] In contrast to Section 2331, for example, Section 2332b of the federal criminal code defines the "Federal crime of terrorism" by listing a series of federal criminal violations that amount to terrorism if the actor commits them in a manner "calculated to

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[157] Porras, *supra* note 151, at 122.

[158] 18 U.S.C. § 2331(1). This section of the criminal code substantially mirrors the definition in the Foreign Intelligence Surveillance Act, which authorizes executive branch officials to seek orders allowing them to engage in electronic surveillance to obtain information for foreign intelligence purposes. *See* 50 U.S.C. §§ 1801(c), 1804(a). Section 2331(1), however, is referenced in numerous federal statutes with a variety of purposes, although most of them are not criminal statutes. Perry, *supra* note 13, at 257 (surveying statutes).

[159] Perry, *supra* note 13, at 257 (surveying statutes that reference Section 2331(1)).

[160] *See* Perry, *supra* note 13, at 255–61.

influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[161]

These multiple and potentially overlapping definitions cause confusion about whether particular actions amount to terrorism, since actions considered terrorism under one provision may not be considered terrorism under another.[162] Furthermore, this multitude of definitions fuels longstanding criticism that government officials selectively and inconsistently apply the term "terrorism"—by, for example, charging some actors under domestic criminal laws and other, more disfavored actors, under terrorism laws.[163] The legal definitions, then, provide little more protection from selective or subjective application than the general definitions.

B. Arbitrary Applications of Terrorism Definitions to Regulate Speech

The nebulous definition of terrorism combined with scholars' proposed reworking of *Brandenburg* poses a significant threat to activists within the United States. Although scholars used specific examples of terrorist groups and their leaders, such as ISIS and Anwar Al-Awlaki,[164] terrorism definitions generally do not specifically identify groups. Rather, as discussed below, the broad definition of terrorism can include the activities of groups within the United States. If courts apply a version of *Brandenburg* unencumbered by a requirement of imminent harm, officials can use the terrorism label to selectively punish the political advocacy of unpopular groups just as they did in earlier eras.[165] This Part explores more specifically how the foundation for such arbitrary application already exists.

1. Domestic Groups and the "Terrorism" Label

The activities of numerous groups within the United States arguably fit within the definition of "domestic terrorism," which federal law defines nearly identically to international

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[161] 18 U.S.C. § 2332b(g)(5)(A)–(B).

[162] *See* Aaron J. Noteboom, Comment, *Terrorism: I Know It When I See It*, 81 OR. L. REV. 553, 568 (2002) (noting confusion and ambiguity resulting from multiple definitions); Setty, *supra* note 15, at 645–46 (noting the "uncertainty surrounding the application of conflicting definitions of terrorism, including the potential lack of notice to individuals as to whether they will be categorized as a terrorist"); Perry, *supra* note 13, at 270 (noting the notice problems accompanying ambiguous and overlapping definitions).

[163] Perry, *supra* note 13, at 270; For an in-depth review of this differential treatment, see Sinnar, *supra* note 10, at 1335–36, 1343–66.

[164] *See supra* Section II.A.

[165] *See supra* Sections I.A, B.

terrorism, the jurisdictional component being the only difference.[166] The Department of Justice "has identified domestic terrorism threats to include criminal activity by animal rights extremists, ecoterrorists, anarchists, anti-government extremists such as 'sovereign citizens' and unauthorized militias, black separatists, white supremacists, and abortion extremists."[167] Scholars have noted that the activities of a variety of white supremacists and Christian nationalist organizations especially fit within this definition.[168] In June 2019, FBI officials noted that white supremacists were responsible "for the most lethal incidents among domestic terrorists in recent years."[169]

Nevertheless, there has been a distinct reluctance to address violence by such groups as terrorism.[170] Some of this reluctance may

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[166] 18 U.S.C. § 2331(5) defines domestic terrorism as activities that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
>
> (B) appear to be intended—
>
> > (i) to intimidate or coerce a civilian population;
> >
> > (ii) to influence the policy of a government by intimidation or coercion; or
> >
> > (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2331(5). Federal regulations similarly define domestic terrorism as including "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives." 28 C.F.R. § 0.85.

[167] JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW, at 10 (2017).

[168] *See* Corbin, *supra* note 18, at 460–62 (compiling lengthy list of domestic terrorism incidents committed by white supremacists and Christian Nationalists).

[169] *Confronting White Supremacy Before the H. Oversight and Reform Comm., Subcomm. on Civil Rights and Civil Liberties*, 116th Cong. (2019) (statement of Michael C. McGarrity, Ass't Dir., Counterterrorism Div. & Calvin A. Shivers, Deputy Ass'n Dir., Criminal Investigative Div.), https://www.fbi.gov/news/testimony/confronting-white-supremacy [https://perma.cc/J7DW-ABVR].

[170] MICHAEL GERMAN & SARA ROBINSON, BRENNAN CTR. FOR JUSTICE, WRONG PRIORITIES ON FIGHTING TERRORISM (2018) (discussing FBI's reluctance to describe racially-based domestic violence as terrorism), https://www.brennancenter.org/sites/default/files/publications/2018_10_DomesticTerrorism_V2%20%281%29.pdf [https://perma.cc/LAX5-45Y2]; Corbin, *supra* note 18, at 466–72 (discussing reluctance to describe white supremacist and Christian nationalists as terrorists). After the August 2019 mass shootings in El Paso, Texas and Dayton, Ohio in a 24-hour period, the public and officials increasingly seem willing to use the term "domestic terrorist" when discussing atrocities motivated by white supremacist ideology. *See, e.g.*, Robert Moore & Mark Berman, *Officials Call El Paso Shooting a Domestic Terrorism Case, Weigh Hate Crime Charges*, WASH. POST (Aug. 4, 2019), https://www.washingtonpost.com/nation/2019/08/04/investigators-search-answers-after-gunman-kills-el-paso [https://perma.cc/Y3MW-2XLD]; Mike Giglio, *The Fight Against White Nationalism Is Different*, ATLANTIC (Aug. 7, 2019), https://www.theatlantic.com/politics/archive/2019/08/the-difficulties-of-fighting-white-nationalism/595609/ [https://perma.cc/6GXM-B97W]; Editorial Board, *We*

result from the common perception that no specific laws punish the crime of domestic terrorism in contrast to numerous laws that punish the crime of international terrorism.[171] Yet, numerous legal tools already exist to combat domestic terrorism.[172] Observers thus note that "far-right violence . . . is severely under-addressed as a matter of Justice Department policy and practice, rather than a lack of statutory authority."[173] As a result, some officials are reluctant to apply the term "domestic terrorism," to those groups whose actions meet a legal definition of terrorism.[174] Other officials simply resist the notion that white supremacy poses a domestic terrorism threat.[175]

Additional reasons contribute to the differential treatment of international jihadist and domestic white supremacist terrorism. Federal government officials more commonly release information about international terrorism prosecutions and convictions, reinforcing that international jihadist terrorism dominates.[176] Historical concerns about unwarranted surveillance

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Have a White Nationalist Terrorist Problem, N.Y. TIMES (Aug. 4, 2019), https://www.nytimes.com/2019/08/04/opinion/mass-shootings-domestic-terrorism.html [https://perma.cc/9F3C-F9WL].

[171] *See* Brian Pascus, *U.S. Laws Fall Short in Confronting Domestic Terrorism, Former DOJ Official Says*, CBS NEWS (Aug. 6, 2019), https://www.cbsnews.com/news/domestic-terrorism-definition-department-of-justice-official-el-paso-mass-shooting-white-supremacy/ [https://perma.cc/8RUD-R89W] (quoting former DOJ official as stating that the U.S. Code "lacks a statute that allows this to be prosecuted as domestic terrorism"); Ryan J. Reilly et al., *Americans Are Surprised Domestic Terrorism Isn't a Crime. Most Think It Should Be*, HUFFPOST (Apr. 12, 2018), https://www.huffpost.com/entry/domestic-terrorism-federal-law-poll-doj-fbi_n_5acd1c78e4b09212968c8907 [https://perma.cc/AR9K-5AMW] (noting that federal law defines domestic terrorism "but there's not a criminal statute that lays out penalties for attacks motivated by extremist ideologies"); Ryan J. Reilly, *There's a Good Reason Feds Don't Call White Guys Terrorists, Says DOJ Domestic Terror Chief*, HUFFPOST (Jan. 11, 2018), https://www.huffpost.com/entry/white-terrorists-domestic-extremists_n_5a550158e4b003133ecceb74 [https://perma.cc/W6D7-ZEYR].

[172] Trevor Aaronson, *Why New Laws Against White Supremacist Violence Are the Wrong Response to El Paso*, INTERCEPT (Aug. 8, 2019), https://theintercept.com/2019/08/08/el-paso-fbi-domestic-terrorism/ [https://perma.cc/2JBC-X2KG] ("[T]he FBI has all the authorities it needs to investigate and prosecute white supremacist violence effectively." (quoting Hina Shamsi, director of the ACLU Nat'l Sec. Project)); GERMAN & ROBINSON, *supra* note 170, at 6–7 (listing criminal laws available to pursue domestic terrorism charges). For in-depth discussion of the differences in federal and state law, see Sinnar, *supra* note 10, at 1333, 1344–60.

[173] GERMAN & ROBINSON, *supra* note 170, at 1.

[174] Reilly, *supra* note 171 (noting the Justice Department "is going to be somewhat reluctant to . . . name someone as a domestic terrorist" when a defendant is charged with an ordinary crime (quoting Justice Dep't official)).

[175] *See* Jake Tapper, *White House Rebuffed Attempts by DHS to Make Combating Domestic Terrorism a Higher Priority*, CNN (Aug. 7, 2019), https://www.cnn.com/2019/08/07/politics/white-house-domestic-terrorism/index.html [https://perma.cc/29PK-4WP9] (describing White House unwillingness to acknowledge threat of domestic terrorism).

[176] *See* JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW, at 5 (2017) ("[T]here is little clear sense of the scope of the domestic terrorist threat based on publicly available U.S. government information."); Sinnar, *supra* note

of domestic groups in the mid-20th century, which led to legal compartmentalization of such surveillance, may also lead to differentiation between domestic and international terrorism.[177] Much of the public debate about such surveillance centers on the preservation of U.S. citizens' civil rights, while allowing surveillance of persons associated with "foreign" terrorism, further reinforcing the potential threat that international groups pose.[178] Finally, the United States has a long history of ignoring or tolerating white violence against minorities, even as it was pursuing action against the anarchist and socialist groups discussed in Part I.[179] Thus, we simply do not conceive of such violence as terrorism. Ultimately, all of these factors combine to create a racialized narrative in which terrorism is committed by Muslims, rather than white people.[180]

Arbitrary treatment of the terrorism label extends to speech as well. The online speech activities of white supremacist and white Christian nationalist organizations, for example, are quite similar to those attributed to international jihadist organizations. "White supremacists have long been using computer technology to communicate and interact."[181] They use Facebook, Twitter and other social media to make and post plans about future violence and to boast of past violence at rallies against people opposed to their ideologies and actions.[182] White

10, at 1337 ("[T]he Justice Department only publishes statistics on international terrorism convictions, which reinforces perceptions that terrorists are primarily Muslim and foreign.").

[177] *See* Sinnar, *supra* note 10, at 1361–62. For a discussion of the FBI's surveillance of domestic groups in the 20th century, see Christina E. Wells, *Information Control in Times of Crisis: The Tools of Repression*, 30 OHIO N.U. L. REV. 451 (2004).

[178] *See, e.g.*, Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the* Keith *Case*, 41 U.C. DAVIS L. REV. 1259, 1304–20 (2008) (discussing constitutional issues associated with warrantless foreign surveillance program).

[179] *See* Beverly Gage, *Terrorism and the American Experience: A State of the Field*, 98 J. AM. HIST. 73, 88 (2011). Professor Gage notes that:

> Beginning in the 1880s, bombings attributed to anarchists or labor activists often served to justify widespread campaigns of suppression against radical movements. Lynchings and race riots, by contrast, generally met with inaction, even approval, in official circles. . . . Normative judgments, not simply law enforcement strategy, have long shaped how and if acts of terrorism become national emergencies.

Id.

[180] *See* Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825, 2849 (2001) ("The perception of Arabs as terrorists has come to dominate the public imagination."); Corbin, *supra* note 18, at 458 ("[T]errorists are regularly linked to a racialized group now termed 'Muslim,' which includes Muslims as well as those who appear Arab or Middle Eastern." (footnote omitted)).

[181] JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW, at 48 (2017).

[182] *See, e.g.*, Order Granting Defendants Robert Rundo, Robert Boman, and Aaron Eason's Joint Motion to Dismiss the Indictment, Slip Op. at 3, Case No.: CR 18-

supremacist organizations also use social media to recruit potential members.[183] Finally, noting that "extremist groups are able to quickly normalize their messages by delivering a never-ending stream of hateful propaganda to the masses," observers have catalogued acts of violence perpetrated by individuals exposed to this propaganda online.[184]

Nevertheless, nearly everyone—courts, scholars, and the public—resist labeling this speech as "terrorist advocacy" and few have suggested regulation under a modified *Brandenburg* standard.[185] Rather, we tend to classify such speech as "hate speech" given that it often involves explicit derogation of, or calls to act against, racial or religious minorities.[186] Once we enter the

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00759-CJC (C.D. Cal. June 3, 2019) (detailing members of a white supremacist and national identity movement's use of the internet to "post videos and pictures of themselves conducting training in hand-to-hand combat" and "boast[ ] about their actions at . . . rallies in text messages and on social media"); Complaint, Sines v. Kessler (W.D. Va., filed Oct. 12, 2017) (No. 3:17-CV-00072) (detailing online activities of groups involved in 2017 Charlottesville protests and ensuing violence); Dahlia Lithwick, *Lawyers vs. White Supremacists*, SLATE (Oct. 12, 2017), https://slate.com/news-and-politics/2017/10/two-new-lawsuits-against-the-organizers-of-charlottesvilles-unite-the-right-rally.html [https://perma.cc/5G9J-U42F] (describing particular online comments made by groups attending and planning Charlottesville rally).

[183] *See* Jesselyn Cook, *Far Right Activists Are Taking Their Message to Gen Z on TikTok*, HUFFPOST (Apr. 16, 2019), https://www.huffpost.com/entry/far-right-tiktok-gen-z_n_5cb63040e4b082aab08da0d3 [https://perma.cc/G4LR-7MJ7] (discussing "blatant, violent white supremacy and Nazism" that flourishes on TikTok, a social media platform aimed at young users).

[184] Rachel Hatzipanagos, *How Online Hate Turns into Real Life Violence*, WASH. POST (Nov. 30, 2018), https://www.washingtonpost.com/nation/2018/11/30/how-online-hate-speech-is-fueling-real-life-violence/?utm_term=.840512222393 [https://perma.cc/L6XQ-NQEM]; *see* Marc Fisher, *A Weekend of Mass Murder Reflects How American Violence Goes Viral*, WASH. POST (Aug. 4, 2019), https://www.washingtonpost.com/politics/a-weekend-of-mass-murder-reflects-how-american-violence-goes-viral/2019/08/04/d2ecfa3a-b6d7-11e9-b3b4-2bb69e8c4e39_story.html [https://perma.cc/57M6-UQAA]; Bharath Ganesh, *Jihadis Go to Jail, White Supremacists Go Free*, FOREIGN POL'Y (May 15, 2019), https://foreignpolicy.com/2019/05/15/jihadis-go-to-jail-neo-nazis-walk-free-christchurch-call-social-media-dignity-digital-hate-culture-tarrant-breivik-bowers-white-supremacists-ardern-macron/ [https://perma.cc/47EA-7H2Y].

[185] *See* Drew Harwell & Craig Timberg, *8chan Looks Like a Terrorist Recruiting Site After the New Zealand Shootings. Should the Government Treat It Like One?*, WASH. POST (Mar. 22, 2019), https://www.washingtonpost.com/technology/2019/03/22/chan-looks-like-terrorist-recruiting-site-after-new-zealand-shooting-should-government-treat-it-like-one/ (discussing difficulty in confronting online racist extremism because "U.S. law enforcement and intelligence agencies have been reluctant to treat white supremacists and right-wing groups as terrorist organizations because they typically include Americans among their ranks").

[186] *See, e.g.*, *Rundo*, slip op. at 12 (referring to the organization's "hateful and toxic ideology"); Cook, *supra* note 183 (referring to message of white supremacists as "[h]ate speech"); Hatzipanagos, *supra* note 184 (referring to white supremacists speech as "online hate"). Even Professor Tsesis who advocates for punishing terrorist advocacy and propaganda does not appear to use these or similar terms for speech of white supremacist organizations, instead referring to them as hate groups and their speech as hate speech. He does, however, argue for regulating such speech. *See* Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5 (2002). Nevertheless, using the term terrorist for one group but

realm of hate speech, regulation is much more controversial. The Supreme Court has a long tradition of protecting incendiary, raucous and offensive speech.[187] As it recently observed, "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[188] Calls to regulate the arguable terrorist advocacy of white nationalist organizations are frequently characterized as attempts to censor rather than as a legitimate approach to protect public security.[189] Such characterizations fit within the general sentiment that "[b]anning 'hate speech' without restricting political speech is prohibitively difficult because of the target's inherent subjectivity."[190]

This discussion highlighting the differential treatment between international jihadist and white supremacist speech is not an argument to extend a *Brandenburg* exception to white nationalist organizations. As discussed earlier,[191] existing First Amendment doctrine provides officials with sufficient tools to punish the most dangerous speech.[192] Other legal tools also exist

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not another can have profound effects on how one views such groups. *See* Corbin, *supra* note 18, at 480–85; *see also supra* notes 154–157 and accompanying text.

[187] *See* Snyder v. Phelps, 562 U.S. 443 (2011), Hill v. Colorado, 530 U.S. 703, 716 (2000); *see also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992); Texas v. Johnson, 491 U.S. 397, 414 (1989); Boos v. Barry, 485 U.S. 312, 322 (1988); Hustler Magazine v. Falwell, 485 U.S. 46, 55–56 (1988); Cohen v. California, 403 U.S. 15, 21 (1971); Street v. New York, 394 U.S. 576, 592 (1969); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). For discussion of First Amendment protection of offensive speech, see Christina E. Wells, *Regulating Offensiveness,* Snyder v. Phelps*, Offensiveness, and the First Amendment*, 1 CAL. L. REV. CIR. 71 (2010).

[188] Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

[189] *See* David French, *Journalists Overreach in Their Quest to Purge 'Hate' from the Web*, NAT'L REV. (Aug. 21, 2017), https://www.nationalreview.com/2017/08/white-supremacist-free-speech-ban-sets-dangerous-precedent/ [https://perma.cc/22R4-YSCJ]; *see also* Ganesh, *supra* note 184, at 3–4, 6–7 (noting that far right and nationalist figures increasingly accuse online platforms of censorship when they attempt to enforce platform rules against hate speech).

[190] *Hate Speech*, FIRE (Mar. 28, 2019), https://www.thefire.org/issues/hate-speech/ [https://perma.cc/W6TW-FBPZ].

[191] *See supra* notes 143–144 and accompanying text.

[192] In the aftermath of the violence associated with the Unite the Right rally in Charlottesville, Virginia, individuals injured in the rally sued organizers and promoters of the event, and members and leaders of various white nationalist groups, for violating the Ku Klux Klan Act by conspiring to commit acts of violence against minorities and others. Complaint at 87–88, Sines v. Kessler, 324 F. Supp. 3d 765 (W.D. Va. 2018) (No. 3:17-CV-00072). The district court rejected the defendants' motion to dismiss the complaint based on the argument that the First Amendment protected their activity. The court noted that "if Plaintiffs alleged Defendants only engaged in 'abstract' advocacy of violence, those statements would be protected." Sines v. Kessler, 324 F. Supp. 3d 765, 802 (W.D. Va. 2018). But rather that defendants engaged in specific unlawful conduct, such as assault, or speech that amounted to direction and control of the activities that occurred at the rally, which is not protected by the First Amendment. *Id.* at 802–03.

to punish potentially violent activities of white supremacist organizations.[193] The above discussion does illustrate, however, the arbitrary and pejorative use of the term "terrorism" and the manner in which it is subject to hidden narrative frames, racial bias, and politicization. Altering *Brandenburg*'s standard based on concerns about "terrorism" gives government officials a powerful tool with which to persecute domestic groups it wants to destroy or save groups of which it approves.

That some federal officials increasingly use the term "terrorist" to describe leftist activists within the United States suggests they are keenly aware of the terrorist label's power. For example, in late 2017, the FBI's Domestic Terrorism Analysis Unit concluded that the "Black Identity Extremist" movement posed a "violent threat" because "black activists' grievances about racialized police violence and inequities in the criminal justice system have spurred retaliatory violence against law enforcement officers."[194] The FBI's statement referred only to isolated incidents of violence and contained no reference to an African-American organization committing violence against a police officer.[195] In fact, existing data suggests that left-leaning organizations commit low levels of violence.[196] The lack of evidence to support the existence of a "Black Identity Extremist" movement prompted a former FBI agent to declare that the term seemed primarily to refer to "black people who scare [the FBI]."[197]

Government officials also apply the terrorist label to refer to other activists. President Trump recently announced that he was considering designating Antifa, a militant left-wing organization that sometimes clashes violently with white

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[193] *See* Order Granting Defendants Robert Rundo, Robert Boman, and Aaron Eason's Joint Motion to Dismiss the Indictment, United States v. Rundo, Slip Op. at 7, 11, Case No.: CR 18-00759-CJC, (C.D. Cal. June 3, 2019) (noting that Anti-Riot Act violated *Brandenburg* because it lacked an imminence requirement but that there existed other legal tools, such as civil rights and assault statutes, to deal with potential violence). Courts have also recognized that the First Amendment does not protect speech amounting to conspiracy, solicitation, or aiding and abetting of violent conduct. *See, e.g.*, United States v. Rahman, 189 F.3d 88, 115 (2d Cir. 1999) (noting that the state may "outlaw encouragement, inducement, or conspiracy to take violent action"); United States v. Sattar, 272 F. Supp. 2d 348, 374 (S.D.N.Y. 2003) (stating that "such acts and statements that instruct, solicit, or persuade others to commit crimes of violence are not protected by the First Amendment and may be prosecuted" (internal quotation marks omitted)).

[194] Beydoun & Hansford, *supra* note 22.

[195] *Id.*

[196] Sinnar, *supra* note 10, at 1389 n.309 (discussing statistics revealing low levels of violence committed by left-leaning organizations in comparison to jihadist and white supremacist organizations).

[197] Beydoun & Hansford, *supra* note 22 (quoting Michael German, former FBI agent and Brennan Center fellow).

supremacist organizations at rallies, as a terrorist organization.[198] Senator Ted Cruz introduced a resolution with similar sentiments.[199] Reports also suggest that the FBI has opened domestic terrorism investigations into environmental protestors to whom the FBI has referred as extremists.[200] Violence or property damage occasionally occurs when the targeted groups attend rallies or other events but such violence is often a by-product of the protest rather than the purpose of it.[201] Lack of purposeful violence means that a critical requirement of the terrorism definition is missing for these groups' actions.[202] Given the stigmatizing effect of the terrorism label, observers are increasingly concerned that officials will extend the term "terrorist" to quell the government's critics, much as officials attempted to delegitimize dissent in earlier eras.[203] This concern arises while the *Brandenburg* rule still exists. If one were to create an exception to *Brandenburg* for terrorist advocacy, officials would have considerably greater ability to manipulate the label to quell dissent.

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[198] Zeeshan Aleem, *Ahead of a Far-Right Rally in Portland, Trump Tweets a Warning to Antifa*, VOX (Aug. 17, 2019), https://www.vox.com/policy-and-politics/2019/8/17/20810221/portland-rally-donald-trump-alt-right-proud-boys-antifa-terror-organization [https://perma.cc/Y679-WFD7].

[199] Mary Papenfuss, *As Far-Right Violence Surges, Ted Cruz Seeks to Brand Antifa a Terrorist Organization*, HUFFPOST (July 21, 2019), https://www.huffpost.com/entry/antifa-right-wing-violence-ted-cruz-bill-cassidy-resolution_n_5d33c982e4b0419fd32de46b [https://perma.cc/M4XS-QSD9].

[200] *See* Adam Federman, *Revealed: How the FBI Targeted Environmental Activists in Domestic Terror Investigations*, GUARDIAN (Sept. 24, 2019), https://www.theguardian.com/us-news/2019/sep/23/revealed-how-the-fbi-targeted-environmental-activists-in-domestic-terror-investigations [https://perma.cc/9YWC-S8PC].

[201] *See* Susie Cagle, *'Protesters as Terrorists' Growing Number of States Turn Anti-pipeline Activism into a Crime*, GUARDIAN (July 8, 2019), https://www.theguardian.com/environment/2019/jul/08/wave-of-new-laws-aim-to-stifle-anti-pipeline-protests-activists-say [https://perma.cc/X8N5-626U] (quoting ACLU attorney as stating that laws "miscast[ ] . . . protesters as economic terrorists and saboteurs when in fact they're going out and having their voices heard about why these pipelines are problematic for their communities and the environment"); *see also* Papenfuss, *supra* note 199 (discussing difference between Antifa's use of violence and white supremacist organizations' use of violence).

[202] *See supra* note 149 and accompanying text.

[203] Kate Irby, *Protestors Are Increasingly Being Labeled Domestic Terrorist Threats, Experts Worry*, SACRAMENTO BEE (Oct. 27, 2017), https://www.sacbee.com/news/nation-world/national/article181359016.html (statement of Hina Shamsi, ACLU National Security Project Director) ("We are worried that protestors are increasingly being labeled as terrorism threats."). There are additionally significant legal consequences, including militarized security at protests, enhanced surveillance of protestors, and as discussed more fully below, attempts to link activist groups with international terrorism. *Id.*; Speri, *Black Homeland*, *supra* note 22.

2. The Federal Material Support Statute

The material support law under which Professor Tsesis urges punishment of terrorist advocacy is also subject to abuse by government officials.[204] The law on which he relies, 18 U.S.C. § 2339B, makes it illegal to provide, attempt to provide or conspire to provide material support to a designated foreign terrorist organization.[205] As interpreted by the Supreme Court in *Holder v. Humanitarian Law Project*,[206] coordinated political advocacy can amount to material support of terrorism.[207] Thus, one who wants to engage in political advocacy on behalf of a designated foreign terrorist organization violates the material support statute as long as advocacy is coordinated with that organization; independent advocacy is protected by the First Amendment.[208]

Professor Tsesis acknowledges the First Amendment issues raised by the material support law and that the *Humanitarian Law Project* Court used a "more deferential" standard of review "than it might have . . . under ordinary circumstances" in upholding the law.[209] But Tsesis argues that the outcome likely would have been the same even had the Court used strict scrutiny because the national security interest in preventing support of terrorism is compelling and the category of speech punished—coordinated support of foreign terrorist organizations—is narrow.[210] Accordingly, Professor Tsesis argues that *Humanitarian*

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[204] *See* Tsesis, *supra* note 4, at 670–75.

[205] 18 U.S.C. § 2339B(a)(1). Material support can include, among other things, tangible property and money, advice and assistance, training, personnel, or service. *See* § 2339B(g)(4); § 2339A(b)(1)–(3).

[206] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[207] The plaintiffs in *Humanitarian Law Project* wanted to (1) train members of the Partiya Karkeran Kurdistan (PKK) to use international law to resolve disputes peacefully, (2) teach PKK members to petition the United Nations for relief, and (3) advocate on behalf of Kurds living in Turkey and Tamils living in Sri Lanka, all of which was deemed material support of organizations that had been designated as foreign terrorist organizations. *Id.* at 14–15, 39.

[208] *Id.* at 39 ("In particular, we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations."); *id.* at 24 ("[I]ndependently advocating for a cause is different from providing a service to a group that is advocating for that cause.").

[209] Tsesis, *supra* note 4, at 672.

[210] *Id.* at 673. The Court typically uses strict scrutiny to review regulations of speech based on their content, which the *Humanitarian Law Project* Court acknowledged the law involved. *Humanitarian Law Project*, 561 U.S. at 27. That standard requires the government prove a law is narrowly drawn to meet a compelling state interest. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015). Most observers agree with Professor Tsesis that the Court seemed more deferential in its review than an application of strict scrutiny would warrant. *Humanitarian Law Project*, 561 U.S. at 62 (Breyer, J., dissenting); Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 589 (2014); Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 29 (2012); Heidi Kitrosser, *Free Speech and National Security Bootstraps*, 86 FORDHAM L. REV. 509, 515 (2017).

Law Project provides a template to legislators wanting to draft narrow laws banning terrorist propaganda.[211]

A closer look at the statute, however, reveals that officials can use material support of terrorism charges in a selective and arbitrary manner, much as officials used laws in earlier eras.[212] First, the process of designating an organization as a foreign terrorist organization is already opaque.[213] Those accused of material support cannot challenge that designation no matter how strongly they believe that it is incorrect.[214] They must refrain from any coordinated activity—including legal advice, political or humanitarian advocacy—if their goal is simply to further the humanitarian ends of the organization.[215] Observers persuasively argue that the statute "render[s] meaningless" the First Amendment's right to association as it makes illegal "virtually any action" on behalf of a designated organization.[216] Thus, the statute has much the same effect as earlier criminal

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[211] Tsesis, *supra* note 4, at 675.

[212] *See supra* Sections I.A, I.B.

[213] *See* Kitrosser, *supra* note 210, at 512–14 (discussing federal regulations and court cases governing the designation process).

[214] Federal law allows only the designated organization to appeal its designation. *See* 8 U.S.C. § 1189(c)(1); 8 U.S.C. § 1189(a)(8). Organizations have many reasons for challenging their designation:

> Many FTOs do not consider themselves terrorists or malevolent actors; yes, they engage in violence, but it is, in their view, justified, and they typically engage in a variety of other practices that, for example, includes education, tending to the wellbeing of their communities, and advancing the social capital of their historically oppressed subgroup.

Abdulrahman Alwattar, *The Material Support Statutes and Their Tenuous Relationship with the Constitution*, 20 J. CONST. L. 473, 478 (2017). The definition of terrorist activity in the material support statute can include violence that was never intended to make a political statement against the United States. Thus, the designation of many organizations may be utterly inconsistent with their view of themselves or of those helping them. *See* Wadie Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 570–75 (2011).

[215] The *Humanitarian Law Project* Court rejected plaintiffs' argument that their speech would "advance only the legitimate activities of the designated terrorist organizations." *Humanitarian Law Project*, 561 U.S. at 29. Instead it accepted the government's argument that humanitarian assistance, such as teaching or international advocacy on an organization's behalf, could nevertheless aid a group's terrorist ends by freeing up resources to use for terrorism. *Id.* at 29–30.

[216] Wadie E. Said, Humanitarian Law Project *and the Supreme Court's Construction of Terrorism*, 2011 BYU L. REV. 1455, 1507 [hereinafter Said, *Construction of Terrorism*]; *see Humanitarian Law Project*, 561 U.S. at 42–43 (Breyer, J. dissenting) ("That this speech and association for political purposes is the *kind* of activity to which the First Amendment ordinarily offers its strongest protection is elementary. . . . [T]he simple fact of 'coordination' alone cannot readily remove protection that the First Amendment would otherwise grant."); *see also* David Cole, *The First Amendment's Border: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 149 (2012).

syndicalism laws aimed at breaking up dangerous groups during the Red Scare and Cold War.[217]

Second, it is unclear the extent to which the exception for independent advocacy on behalf of a designated foreign terrorist organization actually protects speech. *Humanitarian Law Project* gave little content to its distinction between coordinated and independent advocacy.[218] At least one lower court found such coordination based on little more than an individual's unilateral decision to translate and post a terrorist propaganda video.[219] Under *Brandenburg*, such speech would be protected absent a clear intent and likelihood of causing imminent harm.[220] Yet a finding of coordinated support allows a court to work around that requirement. As the line between coordinated and independent advocacy increasingly blurs, scholars express concern about the material support statute's effect on political advocacy.[221] Accordingly, far from being a narrow template allowing directed punishment of speech, *Humanitarian Law Project* risks returning us to pre-*Brandenburg* state of affairs that allows arbitrary punishment of unpopular groups.

Finally, despite *Humanitarian Law Project*'s focus on foreign terrorist groups, nothing prevents application of the material support laws to domestic activists. The *Humanitarian Law Project* Court was clearly concerned about the First Amendment rights of domestic groups. It emphasized that the material support law prohibited support of "foreign terrorist organizations" and intimated that a law prohibiting material support of domestic terrorism would meet a different fate.[222] But the foreign versus domestic distinction is not terribly useful in this context. Many white supremacist organizations, for example, have

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[217] *See generally* Said, *Construction of Terrorism*, *supra* note 216 (reviewing the relationship between the notions of terrorism in those earlier syndicalism laws and the material support law).

[218] Kitrosser, *supra* note 210, at 516–17.

[219] United States v. Mehanna, 735 F.3d 32, 44–46 (1st Cir. 2013).

[220] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

[221] *See, e.g.*, Bhagwat, *supra* note 210, at 610 (noting that government can apparently find coordination simply by one-sided advocacy of speaker); Cole, *supra* note 216, at 148–49 (noting that *Humanitarian Law Project*'s interpretation of the material support statute encroaches on *Brandenburg*'s principles); Kitrosser, *supra* note 210, at 518 (noting that post-*Mehanna* prosecutions view coordination so expansively as to "encompass unilateral efforts to convince others of the rightness" of a designated organization's cause).

[222] Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010) ("We also do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations."). The Court may have been trying to preserve the First Amendment rights of domestic advocacy groups given the centrality of free expression to self-governance. *See* Cole, *supra* note 216, at 172–73. This notion of self-governance was a strong theme in Justice Brandeis's version of the clear and present danger test in his concurring opinion in *Whitney v. California*. *See supra* notes 72–74 and accompanying text.

international ties that qualify their actions as international terrorism (or their organizations as foreign terrorist organizations) under statutory definitions of those terms, which often depend on the location of certain activities.[223] Yet, rather than view groups based on legal definitions, law enforcement officials persist in "distinguish[ing] cases as domestic or international primarily based on the perpetrators' perceived ideologies, rather than where their attack occurred or whether they crossed United States or international borders to commit it."[224] This shorthand allows officials to ignore the arguable terrorist activities of white supremacist organizations while treating American Muslims "with no direct connection to foreign terrorist groups" as engaging in international terrorism or engaging in material support of international terrorism.[225]

Furthermore, as discussed in the above section, officials do not consistently apply this working distinction to all domestic groups. Recent reports suggest that Department of Homeland Security officials attempted to link the Black Lives Matter movement to ISIS and Al Qaeda.[226] The reports were based on isolated social media activity, primarily among foreign accounts, none of which necessarily found their intended audience.[227] Nevertheless, officials worried that users "seize[d] on the protests [against police misconduct] to urge 'Black Americans to take up arms' and 'start armed war against the US government.'"[228] One memo warned of attempts to exploit racial issues in American society and highlighted posts that urged "'indigenous peoples' of

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[223] For example, the jurisdictional requirement in the definition of international terrorism in 18 U.S.C. § 2331(1) states that the acts of terrorism must occur "primarily" outside the United States or "transcend national boundaries in terms of the means by which they are accomplished." 18 U.S.C. § 2331(1); *see supra* note 158 and accompanying text. The international ties and activities of numerous white supremacist and ethno-national organizations and could bring them within the definition of international terrorist activity. *See* GERMAN & ROBINSON, *supra* note 170, at 3; *see also* JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW, at 3–4 (2017).

[224] GERMAN & ROBINSON, *supra* note 170, at 3. The common shorthand identifies domestic terrorism as "Americans attacking Americans based on U.S.-based extremist ideologies." JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW, at 4 (2017) (quoting FBI website).

[225] GERMAN & ROBINSON, *supra* note 170, at 4. Law enforcement officials label such groups as "homegrown violent extremists" and "as a form of 'international' terrorism due to their purported 'inspiration' from designated foreign terrorist groups." *Id.*; *see also* JEROME P. BJELOPERA, CONG. RESEARCH SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW, at 8 (2017).

[226] Speri, *Black Activists*, *supra* note 23. In prior years, the Center for Security and Policy attempted to link the Black Lives Matter Movement and Hamas. Lee Kaplan, *Hamas and Black Lives Matter: A Marriage Made in Hell*, CTR. FOR SEC. POL'Y (Sept. 23, 2016), https://www.centerforsecuritypolicy.org/2016/09/23/hamas-and-black-lives-matter-a-marriage-made-in-hell/ [https://perma.cc/8BFM-D6WY].

[227] Speri, *Black Activists*, *supra* note 23.

[228] *Id.*

the Americas and 'Afro-Americans who are oppressed' to attack 'Anglo-American supremacists.'"[229] Officials' concerns spread to law enforcement agencies throughout the country despite the lack of "evidence that anyone associated with protests in the U.S. had responded to the exhortations of Islamic extremists - or that [protestors] had . . . seen those calls in the first place."[230]

As has been historically true, there continues to be arbitrary and racialized treatment of various activist groups. The power to manipulate the "terrorist" label, the nebulous distinction between domestic and foreign organizations, and the Court's deferential approach to the material support statute, will simply exacerbate that problem. Officials who want to find methods to punish the dissent of unpopular groups will do so if presented with tools that give them that opportunity.

CONCLUSION

Acts of terrorism are, and should be, the subject of our concern and condemnation. But focusing on terrorism as a reason to alter or otherwise work around application of *Brandenburg*'s incitement standard is simply a distraction. The standard exists to protect against precisely what altering it in the name of terrorism would allow—arbitrary and punitive repression of the speech of unpopular and outsider organizations. To guard against the abuses associated with pre-*Brandenburg* tests, law enforcement officials should not punish advocacy, even that of so-called terrorist organizations, if it falls short of the *Brandenburg* standard. To do so treads far too close to the abuses of the first half of the twentieth century.

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[229] *Id.*
[230] *Id.*