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## DIGITIZING *BRANDENBURG*: COMMON LAW DRIFT TOWARD A CAUSAL THEORY OF IMMINENCE

J. Remy Green<sup>†</sup>

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### INTRODUCTION

*“Too much magic could wrap time and space around itself, and that wasn’t good news for the kind of person who had grown used to things like effects following things like causes.”<sup>1</sup>*

It should surprise no one when at long last we have some perspective on the latest magical “hooziwhatzit” or “thingamaturg”; our new technology is often not somehow fundamentally different than papyrus, the printing press, the assembly line, or any number of other technological leaps forward. Of course, that is not to attempt to refute the

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1. TERRY PRATCHETT, *SORCERY* 30 (1988).

obvious: facts on the ground do change with technology and the billiard balls of cause and effect behave observably and meaningfully different before and after a technological shift.<sup>2</sup> And so it is with the internet and free speech: causes and effects can be separated by previously unheard of degrees of time and space, and those effects can be myriad and spread far and wide.<sup>3</sup>

I do not imagine, reader, that I am telling you something new here.<sup>4</sup> The assertion that the internet poses a few problems for the free speech doctrine is almost as facially obvious as the assertion that things are a little nippy out in the vacuum of space. I use these examples because both are also notable for the fact that, while they seem obvious to us now, they have not always been so—Fritz Lang’s 1929 *Woman in the Moon* had space explorers tromping across the surface of the moon without helmets in fall sweaters,<sup>5</sup> while Orson Scott Card’s 1985 *Ender’s Game* spectacularly fails to predict the horrible, mundane reality of Twitter and Myspace when it imagines a tidy and orderly discourse on a global information network in which two pseudonymous teens (taking on the names of philosophers Locke and Demosthenes) gain fame and influence for writing compelling and well-informed essays.<sup>6</sup> Put somewhat tautologically, these examples are especially notable in that they are only

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2. See, e.g., DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 40–55 (Charles W. Hendel, ed., Bobbs-Merrill Co. 1955) (1748) (discussing necessary connections between causes and effects).

3. See generally Karsten Müller & Carlo Schwarz, *Making America Hate Again? Twitter and Hate Crime Under Trump* (May 14, 2018) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3149103](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149103) (finding robust correlation between regions with high consumption of the 45th President’s Islamophobic tweets and regions seeing increases in anti-Muslim hate crimes).

4. Indeed, one of the primary “problem” cases I identify in this Article is a case involving a book and no internet use at all (*Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 249 (4th Cir. 1997)), but the result and difficulty in that case predict exactly the dilemma that is unavoidable in a post-internet age. See also JONATHAN WALLACE AND MARK MANGAN, SEX, LAWS, AND CYBERSPACE: FREEDOM AND CENSORSHIP ON THE FRONTIERS OF THE ONLINE REVOLUTION 194 (1996) (in 1996, arguing “[t]hroughout history, each major innovation in communications technology has caused distress and confusion similar to what society is experiencing today about the Internet. The introduction of writing, the printing press, the telegraph, the telephone, the radio, and the television all raised similar issues.”).

5. See generally WOMAN IN THE MOON (Universum-Film Aktiengesellschaft (UFA) 1929).

6. See generally ORSON SCOTT CARD, ENDER’S GAME (1985). While this seems implausible as applied to the general population, it is worth noting that occasionally legal scholars do try to create such discourse on Twitter through sheer force of will, personality, and good writing. See Carissa Byrne Hessick, *Towards a Series of Academic Norms for #LawprofTwitter*, 101 MARQ. L. REV. 903, 904–05 (“With its rigid character limits and focus on ‘hot takes,’ Twitter is arguably the antithesis of scholarship. . . . [L]aw professors, as a group, come to a consensus about how we, as a group, ought to behave on Twitter.”). As an aside, I believe it was from this Hessick article that I subconsciously aped the title to this piece.

obvious as soon as they are obvious.<sup>7</sup> In this Article, I argue that the same will be true for speech that incites violence—such violence can be causally “imminent” even when it is separated by wide chasms of space and time, and the fact of such causal imminence is a sufficient basis to allow restriction of speech without limiting its freedom.

Stepping back, the protections our Constitution offers for speech doctrinally depend upon whether there is a clear and present danger of imminent lawless activity.<sup>8</sup> Checking for imminence before restraining speech is the second element of *Brandenburg v. Ohio*’s two-part test—speech receives no protection where it (1) is directed to inciting or producing imminent lawless action, and (2) is likely to incite or produce such action—and is by now black letter constitutional law.<sup>9</sup> The presence vel non of imminence is classically analyzed in terms of spatial and temporal imminence.<sup>10</sup> To use the *Oxford English Dictionary*’s definition, courts evaluate “[t]he state or fact of being *about* to happen.”<sup>11</sup> But this way of looking at things has caused all sorts of theoretical problems for legal thinkers. For example, consider the irony of the

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7. See Randall Munroe, *Honor Societies*, XKCD, <https://xkcd.com/703/> (last visited Mar. 1, 2019) (“*Listen up!* The first rule of Tautology Club is the first rule of Tautology Club.”).

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

9. See *id.*; see also Timothy E. D. Horley, Note, *Rethinking the Heckler’s Veto After Charlottesville*, 104 VA. L. REV. ONLINE 8, 13 (2018).

10. One leading treatise explains:

For example, let’s say a speaker posts a column on the internet critical of a certain racial minority, and calls on another racial group to rise up, defend their nationality and protect the sanctity of his race. This hateful language could cause someone to inflict violence on other racial groups. However, the speech would likely be protected by the First Amendment because it did not incite *imminent* lawless action. At best, the speech contributed to unlawful action at some indefinite point in the future.

On the other hand, let’s say that, at a political rally, a speaker gets up and addresses the angry crowd. The speaker fulminates against deplorable conditions in the government and then says, “Let’s move on these police officers now.” Such a statement would constitute incitement to imminent lawless action, because it would incite people to break the law and attack the surrounding police officers.

DAVID L. HUDSON, JR., *THE FIRST AMENDMENT: FREEDOM OF SPEECH* § 3:2 (2012); see also Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 240 (noting that *Brandenburg* has three requirements, the second of which being described as requiring “the advocacy [to] call for *immediate* law violation”).

11. *Imminence*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/imminence> (last visited Mar. 1, 2019) (emphasis added); see also *Imminent*, MERRIAM-WEBSTER’S LEARNER’S DICTIONARY, <http://www.learnersdictionary.com/definition/imminent> (last visited Mar. 1, 2019) (defining imminent as “happening very soon”).

“hostile audience cases”<sup>12</sup>—cases where harm is obviously “imminent” in the sense of being temporally “about to happen”—where courts twist themselves into yogic knots to avoid the (obviously undesirable) result that a hostile audience might police the content of public speech.<sup>13</sup>

Yet, imminence has a range of meanings and it is not even true that its primary or original meaning has anything to do with space and/or time. One of imminence’s Latin roots—“*minēre*”—draws upon words meaning “mountain,” and archaically it means “overhanging”;<sup>14</sup> thus, perhaps suggesting more of an inevitability-based relationship than one of spatial or temporal closeness—something overhanging *will* fall, it is just a question of when. *Merriam-Webster’s Dictionary* even uses a first definition that describes imminence as a state of being “*ready to take place.*”<sup>15</sup> Why, then, should we think that *Brandenburg*’s imminence element should be limited to spatiotemporal imminence?

My answer (to my own, obviously rhetorical question) is that we should not. In this Article, I propose that imminence is better understood as a causal question; it is a question of, for lack of a more artful description, the “ready-to-take-place-ness” of the requisite lawless activity. That is, the radical—though firmly grounded in common law methodology<sup>16</sup>—shift I imagine is one that involves analysis of causal proximity in terms of links in a causal chain. Rather than applying the

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12. See Horley, *supra* note 9, at 12 (“The heckler’s veto or hostile audience problem arises when speech is met with an audience that is likely to turn violent on the speaker—in such a scenario, can the government shut down the speech, or must it allow the speaker to continue? This problem is vexing and active.”).

13. See *infra* Appendix I (listing cases applying *Brandenburg* and their results); see also *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 137 (1992) (finding imposing a fee for permits based on the expected law enforcement costs of protecting white supremacists from counter protestors was inconsistent with the Constitution); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)) (introducing the “clear and present danger” test, and, in effect, though not in so many words, overturning *Feiner v. New York*); *Watson v. Memphis*, 373 U.S. 526, 535 (1963) (“[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.”); *Feiner v. New York*, 340 U.S. 315, 317, 320 (1951) (upholding a conviction for disorderly conduct where the speech at issue was alleged as being dangerous because it served “to arouse the Negro people against the whites,” and marking the first appearance of the phrase “hostile audience”); *Terminiello*, 337 U.S. at 6 (overturning a conviction based on a statute that criminalized “merely . . . invit[ing] dispute or . . . bring[ing] about a condition of unrest”); HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 89 (Jamie Kalven ed., 1988); Frederick Schauer, *The Hostile Audience Revisited*, EMERGING THREATS, Nov. 2017, at 3, [https://knightcolumbia.org/sites/default/files/content/Schauer\\_Hostile\\_Audience.pdf](https://knightcolumbia.org/sites/default/files/content/Schauer_Hostile_Audience.pdf).

14. See *Imminent (adj.)*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/imminent> (last visited Mar. 1, 2019).

15. *Imminent*, MERRIAM-WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/imminent> (last visited Mar. 1, 2019) (emphasis added).

16. See David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996).

ostensibly spatiotemporal analysis with its concomitant variety of carve-outs and exceptions that have developed since *Brandenburg*, I argue that better and more readily predictable results come from the analysis of the ready-to-take-place-ness of lawless activity. I further argue that, like in the classic common law case lines,<sup>17</sup> courts are already gravitating towards this result.<sup>18</sup> Thus, this Article provides examples where the causal approach solves many of the cases that present theorists with difficulty, in addition to dealing ably with emerging problems presented by free speech online. I believe the results my approach generate square well not only with common, a priori intuitions about correct decisions, but also with the results in past watershed cases that have been either lionized or importantly abandoned.<sup>19</sup>

Part I describes and clarifies the “spatiotemporal approach” currently in use, including its questionable use in a number of cases that seem to reach the right result despite tension with the stated rule. Part II

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17. See, e.g., *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1054 (N.Y. 1916) (discussing the legal definition of imminence in the tort context).

18. See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 263–67 (4th Cir. 1997) (avoiding use of the *Brandenburg* test in ruling that civil liability could exist for the publication of the book *Hit Man*, which included detailed instructions on how to engage in murder for hire); see also *State v. Holland*, No. CR-95-53, 1995 Mont. Dist. LEXIS 930, at \*16 (D. Mont. Nov. 8, 1995) (“Immediacy in time of result cannot be the entire test. . . . ‘Imminent’ harm means a result that is highly predictable.”); DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE 203–05 (2014) (using *Rice* as an illustration that some internet speech is analyzed under a “crime-facilitating-speech” exception to the First Amendment, and that constitutional protection does not extend to the “intentional enablement of crime”).

19. More specifically, I think one common problem in this space is that it is extraordinarily difficult not to throw the baby out with the bathwater in reforming imminence tests. There are plenty of scholars and judges who argue that imminence has *no* place in modern *Brandenburg* analysis anymore. See, e.g., *Rice*, 128 F.3d at 265 (“And, of course, to understand the Court as addressing itself to speech other than advocacy would be to ascribe to it an intent to revolutionize the criminal law, in a several paragraph per curiam opinion, by subjecting prosecutions to the demands of *Brandenburg*’s ‘imminence’ and ‘likelihood’ requirements whenever the predicate conduct takes, in whole or in part, the form of speech—an intent that no lower court has discerned and that . . . we would hesitate to impute to the Supreme Court.”); Tiffany Komasa, Comment, *Planting the Seeds of Hatred: Why Imminence Should No Longer Be Required to Impose Liability on Internet Communications*, 29 CAP. U.L. REV. 835, 848–49 (2002) (internal footnote omitted) (“It is the . . . requirement that the action be imminent that creates an impossible hurdle to imposing liability on internet communications. . . . The importance of the imminence standard is to justify a restraint on speech prior to the outbreak of violent conduct. There is no need for the imminence requirement when imposing civil liability on illegal conduct that has already occurred.”); O. Lee Reed, *The State is Strong but I am Weak: Why the “Imminent Lawless Action” Standard Should Not Apply to Targeted Speech that Threatens Individuals with Violence*, 38 AM. BUS. L.J. 177, 207–08 (2000) (“The [imminence] standard is ill-suited as a general category defining harm both in the context of incitement or threat against the state and in the context of incitement, threat, intimidation, or harassment against individuals. It should not apply to targeted speech that threatens or substantially harms individuals.”).

explains the common law theory of the development of law that is actually at work in the way courts analyze imminence and argues that the current state of First Amendment imminence fits neatly into the transitional stage of the common law model. Finally, Part III sets out the causal approach I believe better explains the cases, explains more in depth how my approach would resolve cases, and applies it to the problem cases identified in Parts I and II. Part III also discusses some of the broader social and political implications of the causal theory.

*An aside:* I am somewhat unsure where exactly to put this, but I would be remiss if this went unsaid. Another viable explanation for a good share of the cases—and one that is present at the very least beginning with *Brandenburg* itself—is that the Supreme Court’s (and other courts’) determinations have often been driven by latent and explicit white supremacist sympathies on one hand and discomfort with leftist and socialist ideology on the other.<sup>20</sup> I should also make explicit that I think rejecting white supremacy poses no great First Amendment problem, while the rejection of leftist and/or anarchist thought that exists in our First Amendment jurisprudence is largely doctrinally unsupportable.<sup>21</sup>

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20. I will not spend *too* much ink on this. See ELENA L. COHEN, “I’D RATHER GO NAKED”: THE CASE FOR PROTECTING SEXUALITY (forthcoming 2019) (discussing how the United States’ extraordinarily high protection of speech when compared with other constitutional democracies is based in part on history of racism and anti-Semitism in the United States generally, and in attitudes of Supreme Court justices); MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION (forthcoming 2019) (exploring how the ACLU has helped white supremacy maintain its monopoly on free speech). Compare *Brandenburg v. Ohio*, 395 U.S. 444, 446 n.1, 448–49 (1969) (per curiam) (finding no imminence where speaker lead a rally that involved Klu Klux Klan members chanting “bury the niggers” and promising “revengeance”), and *United States v. Turner*, 720 F.3d 411, 434–35 (2d Cir. 2013) (Pooler, J., dissenting) (arguing that the majority should have applied *Brandenburg*, rather than the “true threat” doctrine, and finding no imminence in the exhortations of a white supremacist with a popular blog toward “free men willing to walk up to them and kill” three judges), and *United States v. Henry (In re White)*, No. 2:07cv342, 2013 U.S. Dist. LEXIS 133148, at \*222 (E.D. Va. Sept. 13, 2013) (citing *Brandenburg*, 395 U.S. at 447) (finding no imminence where speaker posted personal details of people to be harassed on white supremacist internet forums), with *People v. Rubin*, 158 Cal. Rptr. 488, 488, 493 (1979) (finding imminence where the speaker offered a reward for anyone “who kills, maims, or seriously injures a member of the American Nazi Party” at an event five weeks away). Additionally, note the examples used in the treatise cited *supra* note 10.

21. That particular point, however, is entirely orthogonal to my purposes here, and I do want to stay focused on the task at hand. Another day, in another article, perhaps. See generally Mary Anne Franks, *Beyond ‘Free Speech for the White Man’: Feminism and the First Amendment*, in RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE (Cynthia Bowman & Robin West eds., Edward Elgar Pub. 2019).

I. BRIEF HISTORY OF [THE SPATIOTEMPORAL APPROACH]<sup>22</sup>

In *Brandenburg*, and about four years later in *Hess v. Indiana*, the Supreme Court articulated the test that has become known as the *Brandenburg* test.<sup>23</sup> It consists of three sufficient conditions<sup>24</sup> for the government to restrict speech when it does not fall into any of the narrowly limited classes of speech that may permissibly be restricted: “[(1)] advocacy . . . directed to inciting or producing [(2)] imminent lawless action [that] is [(3)] likely to incite or produce such action.”<sup>25</sup> This test has generally been lauded as a high water mark in the Court’s First Amendment jurisprudence.<sup>26</sup>

A. Arriving at *Brandenburg*

In brief,<sup>27</sup> the *Brandenburg* formulation arrives at the end of half a century of free speech cases in which various tests were adopted and abandoned. Judge Learned Hand and Justice Oliver Wendell Holmes famously debated their respective *Masses Publishing Co. v. Patten*<sup>28</sup> and clear and present danger<sup>29</sup> tests in a series of letters following a chance

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22. I am certain there is a good play on the title of the late Stephen Hawking’s *A Brief History of Time* that *should* be the title of this Part, but for the life of me, I cannot seem to find it.

23. 414 U.S. 105, 108 (1973) (quoting *Brandenburg*, 395 U.S. at 447).

24. The test is also sometimes framed as a two-part test, with the first two elements combined into “directed to inciting or producing imminent lawless action,” and leaving “likely to incite or produce” as the second element. See, e.g., Legal Info. Inst., *Brandenburg Test*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/brandenburg\\_test](https://www.law.cornell.edu/wex/brandenburg_test) (last visited Mar. 1, 2019).

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

26. See Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 754 (1975) (“*Brandenburg* combines the most protective ingredient of the *Masses* incitement emphasis with the most useful elements of the clear and present danger heritage.”).

27. While there is much significance and interest in the history of the *Brandenburg* test, the task of recording and explaining that history has long since been handled by many far more able than I. See, e.g., Schwartz, *supra* note 10, at 236–41 (chronicling the U.S. Supreme Court’s drafting of the *Brandenburg* opinion and the subsequent effects of the holding); Andrianna D. Kastanek, Comment, *From Hit Man to a Military Takeover of New York City: The Evolving Effects of Rice v. Paladin Enterprises on Internet Censorship*, 99 NW. U.L. REV. 383, 395–409 (2004) (analyzing how more recent cases have undermined protections provided under *Brandenburg*).

28. 244 F. 535, 540, 542 (S.D.N.Y. 1917), *rev’d*, 246 F. 24, 38 (2d Cir. 1917). If words “directly advocated” violation of the law, they can be prohibited, but “[i]f one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.” *Id.*

29. *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”).



encounter between the two on a train from New York to Massachusetts.<sup>30</sup> Following this conversation, Justice Holmes penned a fiery dissent in *Abrams v. United States*,<sup>31</sup> which marks both the first and second appearance of the words “imminent” and “imminence” in the Supreme Court’s First Amendment jurisprudence:

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a *clear and imminent danger* that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . .

. . . .

. . . While that experiment is part of our system[,] I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so *imminently threaten immediate interference with the lawful and pressing purposes of the law* that an immediate check is required to save the country.<sup>32</sup>

Curiously for our purposes, the use in the dissent’s concluding passage suggests that perhaps Justice Holmes saw “immin[ence]” as something distinct from the temporal “immedia[cy]” he invokes two words later as part of “immediate interference.”<sup>33</sup> In his own time, however, Justice Holmes’s test never moved beyond a dissent.<sup>34</sup>

In 1969, when the initial *Brandenburg* opinion was assigned to Justice Abe Fortas, he drew upon Justice Holmes’s *Abrams* dissent for an imminence-based formulation of the test: speech could be “proscribed only where it [is] ‘directed to inciting or producing imminent lawless action and is attended by present danger that such action may in fact be provoked.’”<sup>35</sup> Justice Hugo Black objected to this formulation, and any formulation that reflected the clear and present danger test, but Justice Fortas refused to strike the test.<sup>36</sup> However, Justice Fortas was ultimately

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30. Sometimes truth is stranger than fiction could possibly be, I suppose. See Schwartz, *supra* note 10, at 218–19.

31. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

32. *Id.* at 627, 630 (emphasis added).

33. See *id.* at 630.

34. Justice Holmes died in 1935. See G. Edward White, *Holmes as Correspondent*, 43 VAND. L. REV. 1707, 1710 (1990). Justice Holmes’s imminence test was adopted in 1969. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

35. Schwartz, *supra* note 10, at 237 (quoting *Brandenburg v. Ohio*, draft opinion of Justice Fortas, Apr. 11, 1969, at 5 (Thurgood Marshall Papers, Library of Cong.)).

36. *Id.*

forced to resign before the opinion could be issued.<sup>37</sup> Thus, Justice William Brennan took on the task of redrafting the opinion, which the Court issued per curiam.<sup>38</sup> Justice Brennan's redrafted opinion contains the now familiar *Brandenburg* test:

[T]he constitutional guarantees of free speech and free press do 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.<sup>39</sup>

In 1973, the Supreme Court took an early opportunity to refine and clarify the *Brandenburg* test in *Hess*.<sup>40</sup> In applying *Brandenburg*, *Hess* added that “since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had ‘a tendency to lead to violence.’”<sup>41</sup>

The formulation in *Hess* has, by and large, held. Thus, the Supreme Court still cites *Brandenburg* for the proposition that “the First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action.”<sup>42</sup> But *Brandenburg* came about in a world where even a fax machine might have seemed space age, and the instantaneous and permanent transmission of large quantities of information was neigh unthinkable.<sup>43</sup>

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37. *Id.*

38. *Id.*

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

40. *Hess v. Indiana*, 414 U.S. 105, 108 (1973) (quoting *Brandenburg*, 395 U.S. at 447). The modern rule is, in fact, sometimes called “the *Brandenburg-Hess* test.” See Russell W. Galloway, *Basic Free Speech Analysis*, 31 SANTA CLARA L. REV. 883, 967 (1991).

41. *Hess*, 414 U.S. at 109 (emphasis added) (quoting *Hess v. State*, 297 N.E.2d 413, 415 (Ind. 1973)).

42. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 43–44 (2010) (Breyer, J., dissenting) (quoting *Brandenburg*, 395 U.S. at 447); see also *United States v. Alvarez*, 567 U.S. 709, 717 (2012) (first citing *United States v. Stevens*, 559 U.S. 460, 468 (2010); and then citing *Brandenburg*, 395 U.S. at 447–48) (“[C]ontent-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar. . . . Among these categories are advocacy intended, and likely, to incite imminent lawless action.”); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 791 (2011) (first citing *Stevens*, 559 U.S. at 468; then citing *Brandenburg*, 395 U.S. at 447–48; and then citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)) (“[T]he First Amendment has ‘permitted restrictions upon the content of speech in a few limited areas,’ and has never ‘include[d] a freedom to disregard these traditional limitations.’ These limited areas—such as . . . incitement . . . represent ‘well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem.’”).

43. See, e.g., Hannah L. Cook, *Flagging the Middle Ground of the Right to Be Forgotten*:

### B. *Brandenburg and the Internet*

Modern applications of *Brandenburg*—especially in cases involving the internet—have found courts wringing their hands over what they see as *Brandenburg*'s demand for spatiotemporal imminence. What is most notable in these cases is the palpable discomfort the courts (or the clerks) have in wrestling with some of the forward-looking implications of their decisions. Courts have found lawless activity is spatiotemporally imminent where the speaker:<sup>44</sup> sent an email encouraging “electronic civil disobedience” on a specified date;<sup>45</sup> published a book with detailed instructions on how to become a “hit man”;<sup>46</sup> counseled and directly assisted preparing false tax returns;<sup>47</sup> held up a sign on television at a school event proclaiming “BONG HiTS 4 JESUS”;<sup>48</sup> and offered a

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*Combating Old News with Search Engine Flags*, 20 VAND. J. ENT. & TECH. L. 1, 3 (2017) (“[T]here are more and more pieces of data available to help search engines connect subjects’ past and present lives. At a New York arts festival, almost four hundred people gave away pieces of identifying information—such as their home addresses, fingerprints, or the last four digits of their Social Security numbers—in exchange for a cookie. The printed terms of use, which were signed by all but twenty of the people who took a form, gave the collector ‘the right to do almost anything she wanted with the information.’”).

44. Since the cases encompass a variety of postures, for simplicity, I will discuss the cases with reference to the person whose speech the government seeks to restrict.

45. *United States v. Fullmer*, 584 F.3d 132, 155 (3d Cir. 2009).

Electronic civil disobedience involves a coordinated campaign by a large number of individuals to inundate websites, e-mail servers, and the telephone service of a targeted company. Electronic civil disobedience also includes the use of “black faxes,” repeatedly faxing a black piece of paper to the same fax machine to exhaust the toner or ink supply. . . .

. . . .

. . . When SHAC’s website included links to the tools necessary to carry out virtual sit-ins, those posts were clearly intended to incite imminent, lawless conduct that was likely to occur. . . . [an] e-mail titled “Electronic Civil Disobedience,” urged SHAC supporters to participate in electronic civil disobedience *at a specified time*. This message encouraged and compelled an imminent, unlawful act that was not only likely to occur, but *provided the schedule by which the unlawful act was to occur*.

*Id.* at 141, 155 (emphasis added). Note that this result does not actually depend on the temporal imminence of the urged conduct, but on the fact that a time was specified at all.

46. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 266–67 (4th Cir. 1997).

47. *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990); *see also* *United States v. Freeman*, 761 F.2d 549, 551–52 (9th Cir. 1985) (holding aiding-and-abetting liability possible even if the speech “spring[s] from the anterior motive to effect political or social change”).

48. *Morse v. Frederick*, 551 U.S. 393, 397, 410 (2007). Note, however, that because *Morse* is in the school context, the *Brandenburg* test is applied in a somewhat relaxed form. *See id.* In his dissenting opinion, Justice John Paul Stevens criticizes the majority opinion on the ground “that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible.” *Id.* at 444

reward to anyone “who kills, maims, or seriously injures a member of the American Nazi Party” at an event five weeks away.<sup>49</sup> However, courts have found lawless activity *not* to be spatiotemporally imminent where the speaker(s): posted a list of “Top Twenty Terror Tactics” online;<sup>50</sup> led a Klu Klux Klan (KKK) rally where members were wielding fire arms, burning a cross, and chanting “bury the niggers” and promising “revengeance” (this being *Brandenburg* itself);<sup>51</sup> created violent video games and pornography that purportedly inspired violence in the real world;<sup>52</sup> were fundamentalist preachers who preached that the Bible commands that Christians must violate truancy laws;<sup>53</sup> published an article painting autoerotic asphyxiation in glowing terms;<sup>54</sup> created digitally synthesized child pornography;<sup>55</sup> created posters celebrating the killing of abortion doctors and identifying doctors who had not yet been killed;<sup>56</sup> posted personal information combined with racist and

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(Stevens, J. dissenting).

49. *People v. Rubin*, 158 Cal. Rptr. 488, 488 (Cal. Ct. App. 1979) The court found that “solicitation of murder in connection with a public event of this notoriety, even though five weeks away, [could] qualify as incitement to imminent lawless action.” *Id.* at 493.

50. *Fullmer*, 584 F.3d at 155–56 (noting the posting and specific lawless activities the posting could be linked to). In a footnote, the court further noted that “[t]he government [was] attempt[ing] to connect the posting of the ‘Top Twenty Terror Tactics,’ which occurred on March 6, 2001, to later unlawful conduct, the earliest of which occurred on March 31, 2001. These events occurred a minimum of three weeks apart, which does not meet the ‘imminence’ required by the *Brandenburg* standard.” *Id.* at 155 n.10.

51. *Brandenburg v. Ohio*, 395 U.S. 444, 446 n.1, 448–49 (1969) (per curiam).

52. *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (emphasis added) (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002)) (“Even the theory of causation in this case is that persistent exposure to the defendants’ media gradually undermined Carneal’s moral discomfort with violence to the point that he solved his social disputes with a gun. This glacial process of personality development is far from the temporal imminence that we have required to satisfy the *Brandenburg* test.”); see also *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002) (“Plaintiffs cannot, as a matter of law, demonstrate that the video games and movie were ‘likely’ to cause any harm, let alone imminent lawless action.”).

53. *Bangor Baptist Church v. Maine*, 576 F. Supp. 1299, 1334 (D. Me. 1983) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (“Any action brought against plaintiff pastors, administrators or church schools for inducing truancy by ‘preaching’ that the Bible commands fundamentalist Christians to send their children to schools regulated solely by fundamentalist Christians would certainly ‘restrain orderly discussion and persuasion.’”)).

54. *Herceg v. Hustler Mag., Inc.*, 814 F.2d 1017, 1022–23 (5th Cir. 1987) (“Even if the article paints in glowing terms the pleasures supposedly achieved by the practice it describes, as the plaintiffs contend, no fair reading of it can make its content advocacy, let alone incitement to engage in the practice.”).

55. *Ashcroft*, 535 U.S. at 253 (quoting *Stanley v. Georgia*, 349 U.S. 557, 566 (1969)).

56. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1092 n.5 (9th Cir. 2002) (Kozinski, J., dissenting) (“Under *Brandenburg*, advocacy can be made illegal if it amounts to incitement. But incitement requires an immediacy of action that simply does not exist here, which is doubtless why plaintiffs did not premise their claims on an incitement theory.”), *aff’d in part, rev’d in part, vacated*, 422 F.3d 949 (9th

homophobic rhetoric on white supremacist forums;<sup>57</sup> recorded and released the song “Suicide Solution” advocating suicide;<sup>58</sup> called for a strike in a newspaper advertisement in violation of a court order;<sup>59</sup> sold books and magazines whose “primary purpose [encouraged] illegal drug use” at self-identified “head shops”;<sup>60</sup> and urged killing a judge on a public blog<sup>61</sup> (if you are a more visually oriented reader, please see the table in Appendix I).

The odd and contradictory dimensions of this debate are even clearer when one compares two opposing formulations of the imminence rule as applied to terrorism:

*Imminent*: “The freedom to speak is not absolute; the teaching of methods of terror . . . should be beyond the pale.”<sup>62</sup>

*Not Imminent*: “[T]he publication of the ‘Top Twenty Terror Tactics,’ without more, is also protected, because although it lists illegal conduct, there is no suggestion that [Stop Huntingdon Animal Cruelty (SHAC)] planned to imminently implement these tactics.”<sup>63</sup>

Note the irony that these cases taken together seemingly offer *more* protection to speech online, as in *United States v. Fullmer*, than in print, as in *Rice v. Paladin Enterprises, Inc.*, even as so many commentators suggest that it is *online* speech that presents the real problem.<sup>64</sup> However,

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Cir. 2005).

57. *United States v. Henry (In re White)*, No. 2:07cv342, 2013 U.S. Dist. LEXIS 133148, at \*222 (E.D. Va. Sept. 13, 2013).

58. *Waller v. Osbourne*, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991) (citing *Noto v. United States* 367 U.S. 290, 297–98 (1960)).

59. *Glen v. Hongisto*, 438 F. Supp. 10, 12–13, 12 n.2 (N.D. Cal. 1977).

60. *High Ol’ Times, Inc. v. Busbee*, 449 F. Supp. 364, 366, 369–70 (N.D. Ga. 1978), *rev’d*, 621 F.2d 135 (5th Cir. 1980). “[S]o-called ‘head shops’ tend to include among their inventories: pipes, rolling papers, drug testing kits and cutting kits, small spoons, ornate straws, decorative mirrors, tweezers and clips, records, books, magazines, posters, and tapes-tries.” *Id.* at 366 n.2.

61. *United States v. Turner*, No. 09-00650, 2009 U.S. Dist. LEXIS 131244, at \*6–7 (E.D.N.Y. Oct. 5, 2009) (“In the world in which we live, speech has no geographical boundaries. The fact that Defendant issued his statements on his blog rather than in person only served to ensure that an indefinite audience had access to his remarks, and enlarged the group of individuals subject to incitement.”), *aff’d*, 720 F.3d 411, 429 (2d Cir. 2013).

62. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 249 (4th Cir. 1997) (quoting *United States v. Dennis*, 341 U.S. 494, 581 (1951) (Douglas, J. dissenting)).

63. *United States v. Fullmer*, 584 F.3d 132, 141 (3d Cir. 2009).

64. *See, e.g., Rodney A. Smolla, Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 15 (2000) (“A legal standard designed to preserve the right of dissenters to advocate in the abstract the desirability of violence as a method of social and political change simply bears no strong contextual relationship to disputes involving violent video games, surprise television, violent movies, internet ‘wanted’ posters or murder instruction manuals.”); Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1166 (2013) (“The imminent threat of harm test is

this result makes perfect sense if we consider that traditional print media are often taken as more authoritative and are more likely to be relied upon—that is, they are *causally* closer to the relevant acts of “terror,” even if the digital speech has both more theoretical reach and shelf life.<sup>65</sup> Critically, the formulations here in *Fullmer* and in *Rice* simply cannot be squared; *Rice* says that certain “teaching” is unprotected because it incites imminent lawless activity, while *Fullmer* suggests that a *plan* to “implement” the teachings (something the publisher in *Rice* obviously did not have) is required to find the imminence necessary to restrain speech.<sup>66</sup> But, enough high level discussion—let us dive into some of the cases themselves.

In *Rice*, the U.S. Court of Appeals for the Fourth Circuit found lawless activity to be imminent.<sup>67</sup> The court wrestled with a pre-internet version of the imminence dilemma, addressing a state-law wrongful death action brought against the publisher (Paladin) of the book “*Hit Man*,” on the theory that the publisher should be held liable for a triple murder that carefully followed instructions found in *Hit Man*.<sup>68</sup> Thinking itself secure in the spatiotemporal formulation of *Brandenburg*, Paladin stipulated that the murderer followed the “instructions from *Hit Man* . . . in planning, executing, and attempting to cover up the murders of Mildred and Trevor Horn and Janice Saunders” and that “it actually *intended* to provide assistance to murderers and would-be murderers which would be used by them ‘upon receipt.’”<sup>69</sup> Instead, however, the *Rice* court refused to bite the doctrinal bullet, and instead—after a seemingly odd aside noting that numerous courts had “concluded that the First Amendment is generally inapplicable to charges of aiding and abetting violations of the tax

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too narrow in scope to regulate the dissemination of public threats streaming on the internet.”); Thomas E. Crocco, Comment, *Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451, 482 (2004) (“Until terrorism is removed from the world, there exists a ‘threshold of imminence’ such that the potential for additional terrorist acts is so great that they must be considered imminent. . . . [T]errorist websites advocating acts intended to destroy our society do not warrant the protection of the First Amendment.”).

65. See Bayan AlSutari, *Which One Has More Influence on Society, Traditional Media or New Media?*, MEDIUM.COM (Nov. 19, 2017), <https://medium.com/@bayan.alsutari/which-one-has-more-influence-on-society-traditional-media-or-new-media-2790fad84822>.

66. *Compare Rice*, 128 F.3d at 249, with *Fullmer*, 584 F.3d at 155.

67. 128 F.3d at 265.

68. *Id.* at 241.

69. *Id.* at 241–42. This case might also be explained by the principle that being too clever does not impress judges at all. See J. Remy Green, *All Your Works Are Belong to Us: New Frontiers for the Derivative Work Right in Video Games*, 19 N.C. J.L. & TECH. 393, 431 n.129 (2018) (“This case might also simply be best seen as standing for the principle that being too clever rarely works out well for anyone.”).

laws”<sup>70</sup>—rested its decision on whether the government was attempting to restrict “advocacy *as such*.”<sup>71</sup> Leaning heavily on pre-*Brandenburg* cases, the court found that “detailed, focused instructional assistance to those contemplating or in the throes of planning murder is the antithesis of speech protected under *Brandenburg*.”<sup>72</sup>

This is classic question begging. That is, to state that the relevant test is whether the speaker provided “assistance to those . . . in the throes of planning murder” does not state something different in kind than a test for imminence, it merely rephrases it.<sup>73</sup> Calling back to the metaphors that Justice Holmes and Judge Hand used, the purported “throes” test is simply another way of stating that one is not allowed to speak a set of words into a context that, metaphorically, is the equivalent of tossing a lighted match into a barrel of gasoline.<sup>74</sup> The reformulation the *Rice* court engages in does not actually compel the result it reaches—it simply finds a synonym for the word (imminence) that it finds troublesome. It solves the problem no more than, say, if I were asked, “What temperature is *hot enough* for baking pizza?” And I responded, “Make sure the temperature is *sufficiently warm!*”

Thus, application of the test in *Rice*, just like application of the unadorned *Brandenburg/Hess* test, does not compel any different result in *Fullmer*<sup>75</sup> (on virtually the same facts)—though it is worth noting that the *Fullmer* court *did* find imminent lawless action in other parts of the speaker’s speech.<sup>76</sup> The speech in *Fullmer* relevant to our purposes is the posting of a set of “Top Twenty Terror Tactics” on the internet, which the government linked to later lawless conduct, the “earliest of which occurred . . . three weeks” after the posting.<sup>77</sup> This gap of three weeks is, of course, far, far shorter than the ten years between the publication of

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70. 128 F.3d at 245 (citing *United States v. Kelley*, 769 F.2d 215, 217 (4th Cir. 1985)).

71. *Id.* at 246 (emphasis added) (citing U.S. DEP’T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO THE UNITED STATES CONSTITUTION 37 (1997), <http://www.cs.cmu.edu/~dst/raisethefist/archive/abi.htm>).

72. *Id.* at 249. For the question of whether these older cases should be understood to apply, compare *Dennis v. United States*, 341 U.S. 494, 581 (1950) (“The freedom to speak is not absolute; the teaching of methods of terror . . . should be beyond the pale . . .”), with *Fullmer*, 584 F.3d at 155 (“[T]he publication of the ‘Top Twenty Terror Tactics,’ without more, is also protected, because although it lists illegal conduct, there is no suggestion that SHAC planned to imminently implement these tactics.”).

73. *Rice*, 128 F.3d at 249.

74. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y. 1917), *rev’d*, 246 F. 24 (2d Cir. 1917).

75. 584 F.3d at 156.

76. *Id.* at 156–58.

77. *Id.* at 155 n.10.

*Hit Man* in 1983 and the murders it inspired on March 3, 1993.<sup>78</sup> Yet, similar to *Rice*, the government in *Fullmer* was able to present strong evidence that the defendants “actually *intended* to provide assistance to murderers and would-be murderers which would be used by them ‘upon receipt.’”<sup>79</sup> The website displayed “a series of links dedicated to educating activists on how to evade investigators” including—as an example—detailed instructions on how to ensure data security and advice to use particular applications to do so.<sup>80</sup>

Similarly (if for perhaps much more pragmatic reasons) courts show no hesitation in holding that advocacy or incitement of tax evasion (where it included how-to-type instructions) is absolutely incitement of *imminent* lawless activity, regardless of time frame.<sup>81</sup> That is, if the speech at issue is directed at inciting tax fraud—as opposed to, say, murder—courts do not seem to take into account the temporal relationship between the speech and the lawless activity at all. Perhaps it is this *completely* atemporal approach when it comes to tax revenue that most clearly shows that courts do not *really* mean spatiotemporal imminence.<sup>82</sup>

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78. *Rice*, 128 F.3d at 241 n.2; *see also* *People v. Rubin*, 158 Cal. Rptr. 488, 493 (Cal. Ct. App. 1979) (“We think solicitation of murder in connection with a public event of this notoriety, even though five weeks away, can qualify as incitement to imminent lawless action.”).

79. *Rice*, 128 F.3d at 241.

80. *Compare Fullmer*, 584 F.3d at 140–41 (quoting Joint Appendix at 1512, 3095–99, *Fullmer*, 584 F.3d 132 (Nos. 06-4211, -4296, -4339, -4436, -4437, -4438, -4447) (“In these sections of the website, SHAC advised its protesters to . . . ‘[b]urn anything with sensitive information on it . . . Visit [www.pgp.com](http://www.pgp.com) and download an email encryption program to protect your email conversations.’ ‘PGP’ stands for ‘pretty good privacy,’ and that encryption device was generally effective at protecting e-mail conversations from outside monitoring. PGP is also used to erase data from hard drives. The software was found on eight of the nine computers at SHAC’s de facto headquarters where three Defendants also lived.”)), *with Rice*, 128 F.3d at 240 (“*Hit Man* instructs in ‘explicit detail’ (replete with photographs) how to construct, ‘without the need of special engineering ability or machine shop tools,’ a homemade, ‘whisper-quiet’ silencer from material available in any hardware store. James Perry constructed such a homemade silencer and used it on the night that he murdered Mildred and Trevor Horn and Janice Saunders.”).

81. *See, e.g.*, *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990); *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985).

82. *See Rubin*, 158 Cal. Rptr. at 979 (citing CAL. PENAL CODE § 799 (West 2008)) (“[T]he nature of the lawless action solicited, bears some relationship to its imminence. Generally speaking, the more serious the crime the greater its time span. Murder, the most serious crime of all, carries the longest time span of any crime, as shown by the lack of any time limitation on its prosecution and a threat of murder can be imminent at a time when a threat of trespass is not.”). This kind of “sliding scale” imminence test is another possible solution to the incoherence in this area of law, but strikes me as begging for inconsistent and politically problematic application. I mention this here to highlight the fact that courts are finding ways out of a strict application spatiotemporal imminence all the time.



## II. EXAMINING THE COMMON LAW MODEL

In more recent years, *Brandenburg* jurisprudence has started to take on the two critical features of a judicial moment susceptible to common law innovation: (1) the old regime is no longer workable and (2) though the courts are ostensibly applying the old rule, they are in reality, slowly gravitating towards a new rule.<sup>83</sup> These qualities are apparent in the current, spatiotemporal imminence jurisprudence.<sup>84</sup>

A. *MacPherson and the Common Law Model of Innovation*

Professor David Strauss describes Judge Benjamin Cardozo's decision in *MacPherson v. Buick Motor Co.*<sup>85</sup> as a "classic in the common law canon . . . reflecting common law reasoning in its most sophisticated form."<sup>86</sup> The *MacPherson* case found Judge Cardozo, in essence, throwing out a rule requiring contractual privity for recovery in torts involving defective products, unless the product was "inherently dangerous."<sup>87</sup> By the time *MacPherson* came before Judge Cardozo,

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83. See David Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 855–56 (2007); see also THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 5–6 (4th ed. 1962). Kuhn's theory of scientific change neatly and powerfully mirrors Strauss's theory. Kuhn posits a structural distinction within science between "normal science" that involves research within an existing paradigm and "revolutionary science" where a crisis emerges after enough anomalies accumulate in the application of normal science, and scientists must explore alternatives to what seem like bedrock assumptions. KUHN, *supra*. When and if a paradigm ultimately shifts, scientific history is often recast as presenting an inevitable process leading to the new paradigm. I owe Kate Walling an intellectual debt for drawing my attention to this parallel.

84. See Marc Rohr, *Grand Illusion? The Brandenburg Test and Speech that Encourages or Facilitates Criminal Acts*, 38 WILMETTE L. REV. 1, 3 (2002) ("The test was unnecessary to the resolution of the *Brandenburg* case itself, is laced with ambiguity despite its veneer of clarity, and has received little clarification in the few subsequent Supreme Court cases that might have shed additional light on its meaning. Lower courts, meanwhile, have, to a very considerable extent, applied and interpreted it very narrowly.").

85. 111 N.E. 1050, 1050 (1916).

86. Strauss, *supra* note 83, at 852; see also RONALD DWORKIN, *A MATTER OF PRINCIPLE* 161–64 (1985); EDWARD H. LEVI, *AN INTRODUCTION TO LEGAL REASONING* 9–27 (1949); Karl Llewellyn, *What is the Doctrine of Judicial Precedent*, 14 U. CIN. L. REV. 207, 209 (1940); Max Radin, *Case Law and Stare Decisis: Concerning Pradjudizienrecht in Amerika*, 33 COLUM. L. REV. 199, 205 (1933).

87. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916). In a quirk of this history that is highly convenient for present purposes, some courts used the formulation "imminently dangerous" acts of negligence, referring to the manufacture of the object, in the place of "inherently dangerous" object. *Statler v. George A. Ray Mfg. Co.*, 88 N.E. 1063, 1064 (N.Y. 1909). This is "imminence" in an obviously causal sense; the danger posed by a defective product placed into the market is neither by necessity temporally or physically proximate at the time of its manufacture. Instead, injury is "imminent" in the sense that the only remaining causal link between the object and the danger it poses is its normal use. *Id.* ("[A] manufacturer may become liable [to third parties having no contractual relation] for a negli-

however, the state of the law was a mess. New York appellate courts had found that poison (when sold as a bottle of medicine),<sup>88</sup> a defective building,<sup>89</sup> an elevator,<sup>90</sup> a rope supplied to lift heavy goods,<sup>91</sup> a small bottle of “aerated water,”<sup>92</sup> and a large “coffee urn”<sup>93</sup> were all inherently dangerous products, but a flywheel in a machine, a wagon axle, a carriage wheel,<sup>94</sup> and an exploding steam boiler<sup>95</sup> were not. Generally speaking, looking to the cases would suggest that predicting whether a product would be found to be “inherently dangerous” was more a matter of luck than application of legal rules.

On its face, *MacPherson* itself would have seemed comfortably governed by precedent: if a carriage wheel is not inherently dangerous,<sup>96</sup> surely neither is the wooden wheel of a Buick Runabout as at issue in *MacPherson*.<sup>97</sup> Since the plaintiff only had privity of contract with Buick, and the wheel was made by a third party—like with wagon wheels and axles—the wheel manufacturer should have been immune to liability.<sup>98</sup> Instead, Judge Cardozo used the opportunity that such a supposedly obvious case presented to make clear that there was, in fact, a new rule that courts were gravitating to over time:

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequence to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then,

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gent construction which, when added to the inherent character of the appliance, makes it imminently dangerous . . .”).

88. *Thomas v. Winchester*, 6 N.Y. 397, 410–11 (1852).

89. *See Burke v. Ireland*, 50 N.Y.S. 369, 372 (App. Div. 1898).

90. *See Kahner v. Otis Elevator Co.*, 89 N.Y.S. 185, 189 (App. Div. 1904), *aff’d*, 76 N.E. 1097 (N.Y. 1905).

91. *See Davies v. Pelham Hod Elevating Co.*, 20 N.Y.S. 523, 525 (App. Div. 1892), *aff’d mem.*, 41 N.E. 88 (N.Y. 1895).

92. *Torgesen v. Schultz*, 192 N.Y. 156, 157, 161 (1908).

93. *See Statler*, 88 N.E. at 1064–65. As a personal aside, I was recently at my parents’ house where they hosted a post-wedding brunch for my sibling and their now-spouse (congratulations again, Ru & Ben!), and I was shocked—shocked—to find them using inherently dangerous objects to make coffee! *See CASABLANCA* (Warner Bros. 1942).

94. *See Loop v. Litchfield*, 42 N.Y. 351, 359 (1870).

95. *See Losee v. Clute*, 51 N.Y. 494, 495–97 (1873).

96. *Loop*, 42 N.Y. at 359 (“If the article is abused by too long use, or by applying too much weight or speed, an injury may occur, as it may from an ordinary carriage wheel, a wagon axle, or the common chair in which we sit. . . . That an injury actually occurred by the breaking of a carriage axle, the failure of the carriage body, the falling to pieces of a chair or sofa, or the bursting of a fly wheel, does not in the least alter its character [as an object that is not inherently dangerous].”).

97. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

98. *See id.*

irrespective of contract, *the manufacturer of this thing of danger is under a duty to make it carefully.*<sup>99</sup>

Put otherwise, Judge Cardozo's ruling recognized "both [(1)] that the privity regime with its 'inherently dangerous' exception was not workable and [(2)] that courts, perhaps without being fully aware of what they were doing, were in fact, although not in name, moving to a simple foreseeability requirement."<sup>100</sup>

Strauss, having made something of a one-man cottage industry of common law constitutional analysis, provides a far better explanation than I could craft, so I will offer his words to explain:

The combination of explicitly normative reasoning with a reliance on the lessons of the past, along with a recognition that both are indispensable, is what makes *MacPherson* a common law exemplar. [Judge] Cardozo did not claim that his views about the privity requirement were irrelevant; that would have been disingenuous. But he also did not claim the authority simply to turn those views into law. Before he could do that, he had to show that his views were consistent with what other judges had done. The conclusion that the privity regime was unworkable and should be replaced by foreseeability was not just [Judge] Cardozo's alone; it was a conclusion that many judges had reached, over several decades, even though those judges were not fully aware that they were reaching that conclusion. [Judge] Cardozo's innovation consisted of making that conclusion, which had been reached inexplicitly in fits and starts, fully explicit.<sup>101</sup>

Thus, per Strauss, in proposing a causal theory of imminence, I will begin by "show[ing] that [my] conclusion about the need for change is based not just on [my] abstract principles but on how the old regime worked—specifically, how it was already being disregarded, and the new regime brought into play."<sup>102</sup>

*B. The Spatiotemporal Imminence Regime is Unworkable, and the Courts are Already Gravitating Toward Applying a Causal Rule*

Strauss's model of common law constitutional decision making provides two criteria for identifying an area ripe with common law innovation: (1) unworkability and (2) gravitation towards an alternate rule.<sup>103</sup> These go hand in hand, to some extent. When a regime is unworkable, the ostensible rule does not explain or predict cases with any

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99. *Id.* at 1053 (emphasis added).

100. Strauss, *supra* note 83, at 856.

101. *Id.* at 857.

102. *Id.* at 859.

103. *See id.* at 857.

real reliability, and one might see judges disregarding or avoiding the rule entirely. Similarly, when there is gravitation towards an alternate rule, one can predict and explain the cases better with the alternate rule than with the ostensible rule. Though, obviously, one must allow that some cases *do* in fact reach the wrong result—for example, the injury caused by an exploding steam boiler, for which the plaintiff could not recover under the privity rule,<sup>104</sup> would certainly be compensable under the *MacPherson* foreseeability rule.<sup>105</sup>

As I laid out earlier,<sup>106</sup> the current state of imminence law is a mess.<sup>107</sup> Courts find lawless activity to be spatiotemporally imminent or not in ways where no clear guiding principle can predict results in any particular case.<sup>108</sup> Additionally, there are rare courts that appear to already be engaged in something like the kind of causal analysis I propose, without realizing they are applying the “wrong” kind of imminence.<sup>109</sup> Where courts are not explicitly engaging in a struggle with imminence, however, they create odd and somewhat confusing exceptions—for instance, take the *Rice* court’s insistence that providing “assistance” to someone in the “throes” of lawless action is somehow different than incitement to imminent lawless action.<sup>110</sup> Most relevant to

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104. *Losee v. Clute*, 51 N.Y. 494, 495–97 (1873).

105. *MacPherson v. Buick Motor Co.*, 111 N.E.1050, 1053 (1916). At the risk of stating the obvious: if (1) people occasionally stand near boilers, (2) a negligently constructed boiler can explode, and (3) those explosions can be big enough to damage significant portions of a house and kill people, it is foreseeable that a negligently constructed boiler would cause serious injury to people and property. *See Losee*, 51 N.Y. at 496 (“[D]efendants knew at the time that it was to be used in the immediate vicinity of and adjacent to dwelling-houses and stores in a village, so that, in case of an explosion while in use, it would be likely to be destructive to human life and adjacent property, and that, in consequence of the negligence of the said defendants in the improper construction of the boiler, the explosion that took place occurred[,] . . . damag[ing] the . . . property [and killing two people].”).

106. *See* discussion *supra* Section I.B.

107. *See generally* Michael J. Sherman, *Brandenburg v. Twitter*, 28 GEO. MASON U. CIV. RTS. L.J. 127 (2018) (reviewing various approaches to *Brandenburg*, as well as the calls to change its rule based on unequal applications by courts).

108. *See* cases cited *infra* Appendix I.

109. *See, e.g., Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1199 n.8 (9th Cir. 1989) (“At best, the scientific evidence concerning the causal relationship between pornographic materials and violent actions is ambiguous and unvalidated. Such equivocal evidence is insufficient to establish the ‘clear and present danger’ required in order for any of the exceptions to general [F]irst [A]mendment principles to apply.”); *see also* *State v. Holland*, No. CR-95-53, 1995 Mont. Dist. LEXIS 930, at \*16 (D. Mont. Nov. 8, 1995) (“Immediacy in time of result cannot be the entire test. . . . ‘Imminent’ harm means a result that is highly predictable.”).

110. *See Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 249 (4th Cir. 1997); *see also* Thomas A. Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 660–61 (2009) (arguing that courts are backing away from *Brandenburg* while still claiming to adhere to it);

glean from these odd exceptions is that we can see that Strauss's second criteria—the gravitational pull of a new rule—is satisfied by courts contorting to avoid the spatiotemporal rule.<sup>111</sup>

Thus, I propose that the best (and most consistent with the underlying justifications for the First Amendment) way of synthesizing precedent and applying *Brandenburg* going forward is to use a rule that turns on causal imminence, rather than spatiotemporal imminence.

### III. TOWARD A CAUSAL THEORY

Legal scholar Elizabeth Joh and radio host Roman Mars have perhaps taken the best approach to the modern constitutional era in “tak[ing] the actions and tweets of the chief executive of the United States and channel[ing] that into learning our Constitution like we never have before.”<sup>112</sup> This maxim is no less applicable to the First Amendment than any other. Thus, while plenty of white supremacists and their ilk have previously engaged in plenty of speech online, never before have we had the kind of data about the effects of such speech than we do now with our current Republican President.<sup>113</sup> A recent study found a robust correlation between the consumption and reach of the 45th President's Islamophobic tweets and increases in anti-Muslim hate crimes, and suggested the connection cannot be easily explained without causation.<sup>114</sup> The point of all this, of course, is that we now know that certain speech online *in fact* results in lawless activity.<sup>115</sup> Courts already have tacitly recognized this in cases like *Rice*.<sup>116</sup> What is left is the question of what an alternative would look like.

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Sherman, *supra* note 107, at 135 (“[O]ne option for the government in addressing online terrorist recruitment is simply to hope that courts will continue to be less than faithful to *Brandenburg*.”).

111. See Strauss, *supra* note 83, at 856.

112. *The Spending Clause*, WHAT TRUMP CAN TEACH US ABOUT CON LAW (June 29, 2017), <https://trumpconlaw.com> (00:1:15–00:01:30).

113. See generally Müller & Schwarz, *supra* note 3 (suggesting a correlation between President Trump's tweets and increased hate-crimes using multiple figures and correlations).

114. See *id.* at 14 (“[T]he Muslim tweets explain between 13.5 and around 16% of the weekly variation in anti-Muslim attacks in counties with high Twitter usage, depending on whether we use the median, top quartile, or top decile in the Twitter user to population ratio. The tweets only explain between 0 and 10% where fewer people use Twitter. Taken at face value, this further points to a potential role for social media in enabling hate crimes against Muslims in the United States.”).

115. See *United States v. Fullmer*, 584 F.3d 132, 155 & n.10 (3d Cir. 2009) (finding that although lawless activity was not imminent, lawless activity was result of internet communications).

116. See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 266–67 (suggesting that the jury could find material in a book providing detailed instructions on how to carry out a crime could lead to the carrying out of the crime).

First, I argue that that the underlying theory and justification for the First Amendment better fits my causal theory than it does with the spatiotemporal regime. Second, I provide two potential models here, based on two other places where causation shows up in American jurisprudence: causation as applied in tort law and a particular difficult question posed by entrapment law.<sup>117</sup> Finally, I discuss some developments in the world that clearly fall within the scope of my theory.

*A. The Underlying First Amendment Theory and Justification*

Few metaphors loom as large in American jurisprudence as the so-called “marketplace of ideas” (the “Marketplace”) does in free-speech.<sup>118</sup> Coined by Justice Holmes (joined by Justice Louis Brandeis), and having intellectual roots in the work of John Stuart Mill,<sup>119</sup> the Marketplace theory of speech basically provides that, like superior products in a perfect market for goods, given enough time, better ideas and truth will win out over bad ideas and lies because they represent a better value for consumers.<sup>120</sup> As Justice Brandeis put it, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, *the remedy to be applied is more speech*, not

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117. Obviously, these are not the only potentially fruitful areas of law to borrow from, and there are any number of other areas I considered. One idea in particular that I found interesting, but ultimately decided would raise too many complications, was using the inchoate crime tools available in criminal law (i.e., attempt and conspiracy).

118. See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 824–25 (2008) (“Free speech, in Justice Holmes’s framework, is worthy of constitutional protection precisely because—like the free flow of goods and services—it creates a competitive environment in which good ideas flourish and bad ideas fail. This theory provided the first justification for a broad freedom of expression commensurate with the sweeping language of the First Amendment itself. Never before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law.”); see also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 73 (Oxford Univ. Press 1965) (“[T]here is undeniably a genuine, though partial, validity in the dictum that ‘the best test of truth is the power of the thought to get itself accepted in the competition of the market.’ . . . [T]hat test of truth is not merely the ‘best’ test. There is no other.”); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995) (“In Speech Clause jurisprudence, for example, the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.”).

119. See Blocher, *supra* note 118, at 823–24 (citing *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting)); Beth A. Fagan, Note, *Rice v. Paladin Enterprises: Why Hit Man Is beyond the Pale*, 76 CHI.-KENT L. REV. 603, 620 n.137 (2000) (“[Justice] Holmes’s theory is grounded in the works of John Stuart Mill, who had written that limiting expression was tantamount to ‘robbing the human race.’”) (citing JOHN STUART MILL, *ON LIBERTY* 24 (Oxford Univ. Press 1960) (1859)).

120. See *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting); see also Blocher, *supra* note 118, at 823.

enforced silence.”<sup>121</sup> While there are many philosophical justifications for free speech protections, it seems uncontroversial to assert that preservation of some version of the Marketplace is inevitably part of that calculus.<sup>122</sup> So, the question becomes: does a causal theory impermissibly disrupt the functioning of the Marketplace?

Let us begin with this: why is *Brandenburg* permitted to disrupt the Marketplace at all? Carrying Justice Brandeis’s conception in *Whitney v. California* forward (in general, the solution to speech-based evils is more speech), the reasoning for allowing *Brandenburg*-type interventions in the Marketplace is because in certain cases there is not “time to expose through discussion the falsehood and fallacies.”<sup>123</sup> But “time” as Justice Brandeis uses it here is a heuristic—it stands in for the times when there is market failure.

Just like in an economic market, the Marketplace for ideas is subject to market failure.<sup>124</sup> In economic markets, there are a number of solutions for this kind of failure; to achieve efficient outcomes,<sup>125</sup> “one must . . . explore non-market alternatives.”<sup>126</sup> That is, in adopting the metaphor of a market, for speech, the Justice Brandeis view simultaneously

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121. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring) (emphasis added). See generally NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP (2018) (discussing the difficulties in drafting effective hate-speech legislation and alternative approaches to censorship).

122. Of course, some scholars state things less equivocally than I am comfortable. See, e.g., Fagan, *supra* note 119, at 620 (“The major rationales for protecting free speech are the (1) marketplace of ideas, (2) self-governance, (3) tolerance, (4) social stability and interest accommodation, and (5) self-realization theories. *Hit Man* lacks First Amendment value because none of the justifications underlying the freedom of speech encompass such a manual.”).

123. 274 U.S. at 377.

124. See John O. Ledyard, *Market Failure*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS 303 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008) (“Market failure, the inefficient allocation of resources with markets, can occur if there are too few markets, non-competitive behavior, or non-existence problems. Many suggested solutions for market failure, such as tax-subsidy schemes, property rights assignments, and special pricing arrangements, are simply devices for the creation of more markets. If this can be done in a way that avoids non-convexities and ensures depth of participation, then the remedy can be beneficial[,] and the new allocation should be efficient. On the other hand, if the addition of markets creates either non-convexities or shallow participation, then attempts to cure market failure from too few markets will simply lead to market failure from monopolistic behavior. Market failure in this latter situation is fundamental. Examples are natural monopolies, external diseconomies, public goods, and informational monopolies. If one wants to achieve efficient allocations of resources in the presence of such fundamental failures one must accept self-interested behavior and explore non-market alternatives.”).

125. Markets are generally favored for their ability to produce efficient outcomes essentially automatically (e.g., by operation of the “invisible hand”). If a market for ideas fails to produce *efficient* outcomes, it is not of value qua being a market.

126. Ledyard, *supra* note 124, at 303.

acknowledges the possibility of market failure in the Marketplace implicitly. In economic terms, then, certain speech—in particular, Nazi and White Supremacist speech<sup>127</sup>—functions metaphorically as anti-competitive behavior and should be treated as such.

Indeed, philosopher Karl Popper, though speaking in non-economic terms, identified one such market inefficiency as the “paradox of tolerance.”<sup>128</sup> That paradox runs as follows:

Unlimited tolerance must lead to the disappearance of tolerance. If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them.—In this formulation, I do not imply, for instance, that we should always suppress the utterance of intolerant philosophies; as long as we can counter them by rational argument and keep them in check by public opinion, suppression would certainly be most unwise. But we should claim the *right* to suppress them, if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational argument because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant. We should claim that any movement preaching intolerance places itself outside the law, *and we should consider incitement to intolerance and persecution as criminal*, in the same way as we should consider incitement to murder, or to kidnapping; or to the revival of the slave trade, as criminal.<sup>129</sup>

Popper recognizes the monopolistic tendency of certain ideas in the Marketplace. Much like monopolistic behavior, while perhaps innocuous when engaged in on a small scale, if permitted with any significant market share, it will—over time—destroy the very existence of a market and any concomitant benefits.<sup>130</sup>

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127. A full treatment of this subject would be fascinating and—I think—very effective, but I fear this Article is already risking losing your attention, dear reader. Thus, I will save questions about something like a Sherman Act for free speech for another day. *See generally* Andre L. Smith, *Race, Law, and the Free Market: A Critical Law and Economics Conception of Racism as Asymmetrical Market Failure*, 4 GEO L.J. & MOD. CRIT. RACE PERSP. 39 (2012) (exploring conceptualizing racism itself as a kind of market failure in actual economic markets).

128. *See* KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 546 (1950); *see also* Julia Serano, *Free Speech and the Paradox of Tolerance*, MEDIUM (Feb. 6, 2017), <https://medium.com/@juliaserano/free-speech-and-the-paradox-of-tolerance-e0547aefe538>.

129. POPPER, *supra* note 128, at 546 (second emphasis added).

130. *See* Roger Congleton et al., *Forty Years of Research on Rent Seeking: An Overview*, RESEARCHGATE 33 (Jan. 2008), [https://www.researchgate.net/publication/242084700\\_Forty\\_Years\\_of\\_Research\\_on\\_Rent\\_Seeking\\_An\\_Overview](https://www.researchgate.net/publication/242084700_Forty_Years_of_Research_on_Rent_Seeking_An_Overview). *See generally*



We might, similarly, regard any of the harms that white supremacist speech and incitement causes as rents sought or monopoly profits extracted. Further, the analogy between how a monopolist erects barriers to entry in a market<sup>131</sup> and how neo-nazis harass minorities and those who disagree with them on the internet is striking. By way of illustrative example, take the so-called “GamerGate” mob that attacked video game developer Zoë Quinn.<sup>132</sup> In short, after breaking up with a man she dubs “The Ex,” he posted a “Manifesto” in which he “bragged about how he designed the Manifesto to exploit the key things that make online content go viral . . . .”<sup>133</sup> Quinn’s harassment persists to this day, beginning with—in Quinn’s words—

[t]housands of people . . . latching on to me as a stand-in for any number of things they hated. The places where I sold my games, talked with friends, or even just looked at cute cat videos were suddenly awash in pictures of mutilated bodies, images of horrible violence, and threats to do these things and worse to me. My home address and phone number were discovered and distributed, leading to 5 a.m. phone calls from strangers detailing the ways they planned to rape me and people bragging about leaving dead animals in my mailbox. Nude photos of me were dug up, printed out, jizzed on by strangers, and mailed to colleagues, friends, and family.<sup>134</sup>

The purpose of these actions, of course, was to silence and eliminate dissenting views. Per Quinn, “As my ex’s manifesto went viral, it became obvious that my attackers’ *dream* was to get me to stop ‘feeding the trolls’

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Keith Cowling and Dennis C. Mueller, *The Social Costs of Monopoly Power*, 88 *ECON. J.* 727 (1978) (arguing based on data that the social costs of monopolistic profit extraction by firms in economic markets in the United States and United Kingdom are extremely high).

131. See R. Preston McAfee et al., *What is a Barrier to Entry?*, 94 *AM. ECON. REV.* 461, 461 (2004) (collecting definitions of entry barriers for antitrust purposes).

132. See generally ZOË QUINN, *CRASH OVERRIDE: HOW GAMERGATE (NEARLY) DESTROYED MY LIFE, AND HOW WE CAN WIN THE FIGHT AGAINST ONLINE HATE* (2017) (recounting Quinn’s entire experience, as well as her career of activism that grew out of the experience, and the various advocacy campaigns she has been involved with).

133. *Id.* at 51.

134. *Id.* at 2–3. I also want to note that, by discussing what happened to Quinn herself, I am guilty of much the same sin many media outlets committed in covering GamerGate—per Quinn, “[E]ven in interviews in which I specifically mentioned the people of color and trans women who had been targeted, those parts of the interview often ended up on the cutting-room floor. Piece after piece glossed over the other forms of bigotry that were manifested in the attacks, along with the [name GamerGate’s] roots in domestic violence.” *Id.* at 73. I chose to discuss Quinn’s story as she has published it and has become a public figure on the issue, but I do not want to simply gloss over the insight Quinn offers on the coinciding systems of oppression often at work in internet incitement and harassment. *But see id.* (emphasis added) (“Even when conversations give a nod to intersecting identities, the topic is still relegated to the sidelines and footnotes.”).

and shut up. They didn't want to tease me; they wanted me gone."<sup>135</sup> Even those who might theoretically speak in support of—or even stay silent about—Quinn were implicitly threatened: “Anyone to whom I had public ties began to receive nude photos of me and pressure to publicly denounce me or become their next target.”<sup>136</sup>

By publishing Quinn's address, name, telephone number, and other details, those engaged in purportedly protected speech<sup>137</sup> in fact forced Quinn out of the Marketplace altogether. In short, as Karl Popper suggests, certain forms of “incitement” in fact undercut the good functioning of the Marketplace in the first instance.<sup>138</sup> Thus, the Marketplace-based rationale for protecting speech does not work here; if this were an ordinary economic market, such monopolistic behavior would not be permitted.<sup>139</sup>

### *B. Proximate and Imminent Causation in Tort Law*

Tort law analysis of proximate cause provides one model for how causal imminence might be analyzed. While, of course, tort causation can itself be fraught and controversial,<sup>140</sup> that causation is part of the prima

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135. QUINN, *supra* note 132, at 51.

136. *Id.*

137. After Quinn “obtained an abuse prevention order against her ex-boyfriend” that included “a provision restricting [the ex]’s ability to post information about Quinn online,” the ex appealed, and because the appeal was “in fact exacerbating” ongoing harassment, Quinn sought vacatur of the abuse prevention order in its entirety. *Quinn v. Gjoni*, 50 N.E.3d 448, 449–50 (2016). Despite this, the ex continued to press First Amendment issues on the appeal, arguing that the order “not to post any further information about Quinn or her personal life online or to encourage ‘hate mobs’” violated his “First Amendment right to comment about her,” and that the court should reach the issues despite his already having all the relief he could ask for “because they present issues that are ‘of public importance, capable of repetition, yet evading review.’” *Id.* at 449, 449 n.2, 452 (quoting *Superintendent of Worcester State Hosp. v. Hagberg*, 372 N.E.2d 242, 245 (Mass. 1978)).

138. POPPER, *supra* note 128, at 546.

139. Recognizing the monopolistic nature of such behavior also serves to clarify the flaw in what might be called “reverse discrimination” or “reverse hate speech” cases. Where power over the Marketplace has not and does not historically exist, just as finding a Sherman Act violation by a small, historically marginal firm would be extremely difficult, the market failure rationale for restricting speech does not apply. *See, e.g.,* Nico Lang, *French Hate Crime Ruling Sets a Dangerous Precedent for LGBT People: It’s Now Illegal to Call Someone a “Homophobe” in France*, SALON (Nov. 7, 2016), <https://www.salon.com/2016/11/07/french-hate-crime-ruling-sets-a-dangerous-precedent-for-lgbt-people-it-is-now-illegal-to-call-someone-a-homophobe-in-france/>.

140. *See, e.g.,* Note, *Rethinking Actual Causation in Tort Law*, 130 HARV. L. REV. 2163, 2164–65 (2017) (“[I]nquiries into the nature of proximate causation are difficult, in part because of the thorny moral issues they raise and the byzantine exercises in line drawing they require. . . . [T]his Note seeks to depart from mainstream acceptance of but-for causation and to explore possible alternatives.”); *see also Exxon Co. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996) (“It is true that commentators have often lamented the degree of disagreement regarding the

facie case for nearly all torts, and courts seem plenty well able to go about deciding tort cases suggesting that causal analysis in torts is functional. Stated concisely, the test for proximate cause is two-part: “An act is a proximate cause of an injury if [(1)] it was a substantial factor in bringing about that injury, and if [(2)] the injury was a reasonably foreseeable consequence of the defendant’s act.”<sup>141</sup>

We are not just limited to importing the general causal test; in a serendipitous quirk, many of the New York tort cases discussed *supra* in Part II.A (the line of cases leading to *MacPherson*) actually apply an “imminence” test in discussing causal relationships.<sup>142</sup> Recall that these cases are drawn out of the evolution of tort law from requiring privity of contract in cases alleging negligent construction of a product to requiring injuries be foreseeable.<sup>143</sup> In New York, these cases often, instead of discussing the inherent dangerousness of a particular article, discussed imminence of a danger to human life.<sup>144</sup> Thus, as in the paradigm case of *Thomas v. Winchester*, where negligent replacement of an apothecary’s dandelion extract with highly poisonous belladonna was found to create imminent danger, if a plaintiff could prove danger to life was “imminent” in the causal sense, then she was entitled to an exception to the general privity regime.<sup>145</sup> Similarly, imminence was found when “death or great bodily harm of some person was the natural and almost inevitable consequence of” the negligent action—for instance, “the sale of

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principles of proximate causation and confusion in the doctrine’s application . . . .”); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (“What we do mean by the word ‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.”); Ned Hall, *The Intrinsic Character of Causation*, in 1 OXFORD STUDIES IN METAPHYSICS 255 (Dean W. Zimmerman ed., 2004) (discussing causation from a physical perspective).

141. 5 MODERN FED. JURY INSTRUCTIONS-CIV. P. 87.03 (2018). For application of the two-part proximate cause test, see *Jensen v. City of Oxnard*, 145 F.3d 1078, 1082–83 (9th Cir. 1998) (holding that the complaint stated a cause of action where it alleged a city’s deliberate indifference to maintenance, training, and control of its SWAT teams was the proximate cause of injury caused by violation of SWAT team member’s constitutional rights).

142. See *Devlin v. Smith*, 89 N.Y. 470, 477 (1882) (finding harm is imminent as to construction workers where defendant negligently constructed a ninety-foot scaffold); *Kahner v. Otis Elevator Co.*, 89 N.Y.S. 185, 187 (App. Div. 1904), *aff’d*, 76 N.E. 1097 (N.Y. 1905) (finding harm is imminent where a large, heavy wheel in an elevator shaft is constructed so that it falls when someone pulls on a rope that would be pulled on in the ordinary course of maintenance).

143. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916); *Statler v. George A. Ray Mfg. Co.*, 88 N.E. 1063, 1064–65 (N.Y. 1909); *Devlin*, 89 N.Y. at 477; *Kahner*, 89 N.Y.S. at 187–88.

144. *E.g.*, *Devlin*, 89 N.Y. at 477; *Thomas v. Winchester*, 6 N.Y. 397, 409–10 (1852); *Kahner*, 89 N.Y.S. at 189.

145. See *Thomas*, 6 N.Y. at 405, 409–10.

[poisonous] belladonna by means of the false label.”<sup>146</sup> In the case of belladonna, even if there were an enormous gap in time and space between a doctor’s purchase of what he thought was dandelion extract (a mild medicine) and his administration of belladonna (a deadly poison) in its place, the entire time, the mislabeled canister was simply waiting to cause its harm.

Similarly, then, it should not matter that *Hit Man* had sat apparently harmless on a shelf for ten years after its publication (likely spatially far away from where it was initially written) before it provided the blueprint to a gruesome triple murder in 1993, because the harm was imminent in the nature of the book.<sup>147</sup> Taking as a model these early twentieth century tort cases, courts could easily apply a test for whether a particular instance of online speech created an imminent—that is, inherent to the speech—risk of lawless activity. While there is obviously some case-by-case work to be done here, the general principle seems sound. In cases where a speaker has a large platform and speaks to an audience likely to act on particular information, the speaker should not have a First Amendment defense if those acts are likely to be unlawful unless counterspeech can effectively protect potential victims. By contrast, if the speaker is, say, telling jokes on forum where jokes are well-understood as such, the speaker should have a First Amendment defense to harm caused by a listener who takes a joke out of context. In practice, I believe this test would be applied functionally like the concepts discussed below in Section III.C.

### C. Judge Posner’s Entrapment Machine

Thanks in part to his talent for farfetched hypotheticals and flare for

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146. *Id.* at 409.

147. I, of course, should note that my approach *does* protect less speech than a rigorously applied spatiotemporal imminence rule. However, it is clear that courts are profoundly uncomfortable with applying a rigorous spatiotemporal rule (and are not, in fact, applying one). See *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 267 (4th Cir. 1997). Thus, I think the fair comparison is not whether my approach protects less speech than a rigorously applied spatiotemporal rule, but whether it protects less speech than an arbitrary, ad hoc semi-spatiotemporal rule. Moreover, as I argue *infra* Section III.A, I believe my approach squares well with the underlying philosophical and normative justifications for the First Amendment.

In short, I think there is room in my causal approach to make any particular policy choice a question of drawing lines than one of principle without losing sight of the fact that a causal test also does a better job of capturing the intuitions and concerns actually at work in the cases. In the interest of being clear and putting my cards on the table, however, I should note my own policy intuition is that—in particular for “revenge porn,” doxing, white supremacist and racist rhetoric, and a variety of other toxic internet speech—our current jurisprudence (to the extent it is consistent at all) is generally too speech protective.

dramatic, compelling writing, former U.S. Court of Appeals for the Seventh Circuit Judge Richard Posner's opinions provide a rich source of material testing the limits and internal logic of a variety of areas of law. A causal test for imminence might look a lot like the limit to entrapment suggested by a hypothetical in an entrapment case, where Judge Posner fictionalizes a machine that left only the act of pushing a button for the defendant to have committed a crime:

Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, "Sure, but I don't know anything about counterfeiting." Suppose the government then bought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that *all he had to do was press a button to print the money*; and then offered him \$10,000 for some quantity of counterfeit bills. The government's lawyer acknowledged that the counterfeiter would have a strong case that he had been entrapped, even though he was perfectly willing to commit the crime once the government planted the suggestion and showed him how and the government neither threatened him nor offered him an overwhelming inducement.

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... It is different when the defendant is *not in a position without the government's help* to become involved in illegal activity. "The government may not provoke or create a crime, and then punish the criminal, its creature."<sup>148</sup>

Judge Posner's hypothetical is largely getting at the fact that, in some entrapment cases, the government is the real reason any criminal activity takes place.<sup>149</sup> Without the government acting, there is no reason to believe the idea of counterfeiting would have occurred to the defendant.<sup>150</sup> Thus, from a consequentialist standpoint, it is difficult to assign the blame to the actor as opposed to the government.<sup>151</sup> Indeed, if such an entrapment machine were set up, say, at a farmer's market with an agent offering the \$10,000 for anyone who pushed the button and handed him the counterfeit bills, one imagines they would find a near endless supply of willing "counterfeiters."<sup>152</sup>

Understood that way, Judge Posner's entrapment machine looks

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148. *United States v. Hollingsworth*, 27 F.3d 1196, 1199–200 (7th Cir. 1994) (en banc) (emphasis added) (quoting *Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting)).

149. *See id.*

150. *See id.* at 1199.

151. *See id.* at 1201–02.

152. *See id.* at 1199.

very similar to how the internet functions in the cases where personal information and justifications for violence are posted to forums online. The speaker (the person posting the information) makes it relatively simple for any passing user to participate in a campaign of violence and harassment, and by doing so, creates lawless action where it would not otherwise exist. For example, in *Planned Parenthood of the Columbia/Williamette, Inc. v. American Coalition of Life Activists*, where the speaker created “wanted” posters online that identified individual doctors and indicated which doctors had already been killed (encouraging violence against the others), without the action of the Nuremberg Files website, no one would be “in a position” to identify and attempt to murder the doctors listed.<sup>153</sup> Thus, where the speaker’s speech is the very thing that creates the *ability* to engage in the relevant lawless act, the natural effects of that speech should be understood as causally imminent to it: the speaker has effectively created a “lawless action” machine (to use *Brandenburg*’s language).<sup>154</sup>

The internet is, in effect, a lawless action machine. There are places on the internet where one need only enter a name and a few personal details and press “post” in order to set a real-life chain of events in motion that leads to constant harassment and people showing up at a person’s door or demanding extortion payments for years. In one case detailed by Professor Danielle Citron in her seminal book *Hate Crimes in Cyber Space*, a woman’s ex-boyfriend pressed the button on the lawless action machine, as it were, by posting “her full name, e-mail address, screen shots of her Facebook page, and links to her web bio, which included her work address” online alongside nude pictures of her that he had obtained during their relationship.<sup>155</sup> From there, “countless anonymous emails” began pouring in, “claim[ing] that her pictures and videos aroused [the senders] and that they could not wait to have sex with her.”<sup>156</sup> Her work colleagues began to receive anonymous “tips,” including a phone call to the university where she taught accusing her of “masturbating for her students and putting it online.”<sup>157</sup> This harassment continued through name and email changes, and was in full force years after the original posts.<sup>158</sup> Nothing at all could have happened, however, if the ex-boyfriend

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153. See 290 F.3d 1058, 1065 (9th Cir. 2002), *aff’d in part, rev’d in part, vacated*, 422 F.3d 949 (9th Cir. 2005).

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

155. DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 45 (2014)

156. *Id.*

157. *Id.* at 46.

158. See *id.* at 45–50.

did not press the button.<sup>159</sup> It is therefore at that point—when the ex-boyfriend’s finger is hanging over the button—that the lawless activity should be considered “imminent.”<sup>160</sup> In understanding this unique quality of cyberspace, we can perhaps draw on something like internet folk wisdom.<sup>161</sup> “Rule 34” of the internet “states that pornography or sexually related material exists for any conceivable subject.”<sup>162</sup> Its corollary, called either “Rule 34b” or “Rule 35,” provides that if no pornography exists, it will be made.<sup>163</sup> Thus, together, the rules

suggest that if you can think of a pornographic scenario, theme, or style—no matter how esoteric or unlikely it may seem—then such porn will already have been made, and it will be available online. If this is not the case, then it is only a matter of time before such porn is made.<sup>164</sup>

The applicability of these rules here is a little tamer, but is driven by the same force—what one might call the “infinite monkey” quality of the internet.<sup>165</sup> That is, while not infinite in some real sense, the raw human-power of the internet makes it so that, if the only causal step left is equivalent to pressing a button, *someone* is inevitably going to press that button.<sup>166</sup> So, for example, during the so-called “GamerGate,” various fora were used to publish personal details of women who played and

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159. See, e.g., *United States v. Hollingsworth*, 27 F.3d 1196, 1199–200 (7th Cir. 1994) (en banc) (“Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, ‘Sure, but I don’t know anything about counterfeiting.’ Suppose the government then bought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that all he had to do was press a button to print the money; and then offered him \$10,000 for some quantity of counterfeit bills. . . . [T]he counterfeiter would have a strong case that he had been entrapped, even though he was perfectly willing to commit the crime once the government planted the suggestion and showed him how . . .”).

160. *Imminent* (adj.), *supra* note 14. Recall, the meaning of *minēre* draws upon words meaning “mountain,” and archaically it means “overhanging.” See *id.*

161. Admittedly, “folk wisdom” is a generous characterization.

162. Nukeitall, *Rule 34*, URBAN DICTIONARY (Mar. 30, 2006), <https://www.urbandictionary.com/define.php?term=Rule%2034>; see also OGI OGAS & SAI GADDAM, *A BILLION WICKED THOUGHTS* 7 (2011) (“Today, Rule 34 thrives as sacred lore on blogs, YouTube videos, Twitter feeds and social networking sites. It’s frequently used as a verb, as in ‘I Rule 34’ed Paula Abdul and Simon Cowell on the judging table.”).

163. Durking, *Rule 34*, URBAN DICTIONARY (July 6, 2008), <https://www.urbandictionary.com/define.php?term=Rule%2034>.

164. SUSANNA PAASONEN, *CARNAL RESONANCE: AFFECT AND ONLINE PORNOGRAPHY* 1 (2011).

165. See JORGE LUIS BORGES, *THE TOTAL LIBRARY* 214–16 (Eliot Weiberger ed., Esther Allen et al. trans., 2017) (collecting various versions of the infinite monkey concept). “Strictly speaking, one immortal monkey would suffice.” *Id.* at 215 n.2

166. See, e.g., *Obama Makes It Through Another Day of Resisting Urge to Launch All U.S. Nuclear Weapons at Once*, ONION (May 11, 2011, 8:00 AM), <https://politics.theonion.com/obama-makes-it-through-another-day-of-resisting-urge-to-1819572627>.

critiqued videogames.<sup>167</sup> This practice, known as “doxing,” involves placing enough information online that an angered mob can terrorize an individual.<sup>168</sup> Doxing is effective as a mode of terror because it can be particularly difficult to attribute the aggregate effect of the various anonymous actors on the internet to any one person.<sup>169</sup>

What makes doxing effective in this way is its ability to leverage the infinite monkey-like qualities of the internet. That is, the person whose intent, malice, and access to personal information makes accomplishing terror possible has a relatively easy time setting the machine in motion. While my causal test is far from solving the myriad problems presented by doxing and revenge porn,<sup>170</sup> it removes a particularly high hurdle—the First Amendment—that scholars in the area have (to mix sports metaphors) wrestled with. A causal understanding of First Amendment imminence allows a court to look at the person pressing the button that sets the activity in motion, no matter how far removed that person is in space and time. Thus, the “causal machine” test might be stated as where the speech at issue provides enough that the ultimate actor (the person in fact doing the “lawless” action that is made imminent) would otherwise “*not [be] in a position without the [speaker]’s help* to become involved in [lawless] activity”<sup>171</sup>—that lawless activity is best understood as being causally imminent in relation to the speech. As applied to the revenge

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167. Julia M. MacAllister, Note, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 *FORDHAM L. REV.* 2451, 2459 (2017) (discussing Gamergate, and further addressing the First Amendment implications of threat doctrine, rather than imminence, for doxing).

168. Sometimes referred to as “doxxing,” “dox,” short for “documents” or “docs,” is used as a verb meaning to publish someone’s personal identity documents or information online without that person’s permission or consent. See *dox*, MERRIAM-WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/dox>.

169. See MacAllister, *supra* note 167 (“The subjects of Gamergate harassment, like Brianna Wu endured a constant barrage of harassment that affected their ability to work, socialize, and sleep. Writer and developer Zoë Quinn fled her home after people online made rape and death threats toward her and bragged about putting dead animals through her mailbox. Feminist cultural critic Anita Sarkeesian canceled a talk at Utah State University after the university administration received an email that a shooting massacre would be carried out at the event.”). It is also important to note the counter-First Amendment values that such attacks have: “[T]he [Gamergate] actors doxed them with the intent to intimidate, harass, silence, and threaten them.” *Id.*

170. Mary Anne Franks provides a deeper analysis of the First Amendment and revenge porn. See Mary Anne Franks, “*Revenge Porn*” Reform: *A View from the Front Lines*, 69 *FLA. L. REV.* 1251, 1312–13 (2017) (“It is not implausible that a court could treat nonconsensual pornography as belonging to an existing and explicit category of exception to full First Amendment protection. Even if it does not however, nonconsensual pornography could still be considered a category of speech that is an implicit exception to the First Amendment, or as a new category of exception.”).

171. *United States v. Hollingsworth*, 27 F.3d 1196, 2000 (7th Cir. 1994) (en banc) (emphasis added).



porn and doxing examples, the spatiotemporal approach presents difficulty in that the true harm—the “countless anonymous emails,” the “anonymous tips,” and the real-world violence—is not the harm that happens in a short temporal time frame. Thus, while there may be some short-term dignitary harm<sup>172</sup> to the initial posting, some of the truly bad conduct is never captured by the spatiotemporal test. By contrast, the causal test easily includes all subsequent conduct that makes use of the “revenge porn” or dox posting; if not for the initial post, no subsequent harms would emerge.

#### D. Applying Causal Theory to Modern Problems

On June 28, 2018, a shooter<sup>173</sup> armed with a shotgun and smoke grenades attacked the newsroom of Maryland’s Capital News Gazette, killing five reporters.<sup>174</sup> Just two days before the shooting, neo-fascist tabloid writer Milo Yiannopoulos sent two different journalists messages saying, “I can’t wait for the vigilante squads to start gunning journalists down on sight.”<sup>175</sup> He then reposted these messages publicly on his Instagram account, captioning the message “where is the lie[?]”<sup>176</sup> The post received over 7,000 “likes” before Yiannopoulos took it down.<sup>177</sup>

172. *But see generally* J. Remy Green, *A (Nude) Picture Is Worth a Thousand Words—But How Many Dollars?: Using Copyright as a Metric for Harm in “Revenge Porn” Cases*, 45 RUTGERS L. REC. 171 (2018) (arguing that a better conception of the harm in “revenge porn” cases is in terms of copyright harm). If the harm of “revenge porn” is seen as a copyright-type harm, rather than a dignitary kind of harm, the very publication of the thing might more readily be seen as causally encompassing any and all subsequent causal links.

173. Name omitted on principle. I will note, however, his gender (male), his race (white), that he had a history of domestic violence, and that he was arrested alive.

174. *See* Sabrina Tavernise et al., *5 People Dead in Shooting at Maryland’s Capital Gazette Newsroom*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/capital-gazette-annapolis-shooting.html>.

175. Davis Richardson, *How the Upper East Side’s Beach Café Became a Watering Hole for Trump Titans*, OBSERVER (June 28, 2018, 2:39 PM), <https://observer.com/2018/06/beach-cafe-trump-titans-watering-hole/> (“Following [President] Trump’s presidential upset, former members of the president’s inner-circle . . . flocked to the Beach [Café] to flex their political capital and hash out resentments from the campaign trail. . . . [The café also drew the] occasional fringe grifters like Alex Jones and Milo Yiannopoulos—the latter of whom told Observer ‘I can’t wait for the vigilante squads to start gunning journalists down on sight’ when asked about his favorite item on the menu . . . .”); Will Sommer, *Far-Right YouTube Star Plans Takeover of UKIP*, DAILY BEAST (June 26, 2018, 5:06 AM), <https://www.thedailybeast.com/far-right-youtube-stars-plan-takeover-of-ukip> (“Asked about his decision to join the party, Yiannopoulos wrote in an email that he ‘can’t wait for the vigilante squads to start gunning journalists down on sight!’”).

176. Davis Richardson, *Milo Yiannopoulos Encourages Vigilantes to Start ‘Gunning Journalists Down’*, OBSERVER (June 26, 2018, 12:32 PM), <https://observer.com/2018/06/milo-yiannopoulos-encourages-vigilantes-start-gunning-journalists-down/>.

177. Joe Bernstein (@Bernstein), TWITTER (June 27, 2018, 9:58 AM), <https://twitter.com/bernstein/status/1011987091658543104?lang=en> (“A reader tells me he reported

Almost immediately after the news broke, Yiannopoulos posted a several paragraph rant on Facebook, which notably began, “You’re about to see a raft of news stories claiming that I am responsible for inspiring the deaths of journalists.”<sup>178</sup> President Donald Trump, too, has consistently made comments that seem to encourage violence against journalists.<sup>179</sup> He has called them “sick people” who are “trying to take away our history and our heritage,” and has said, “I really think [journalists do not] like our country.”<sup>180</sup> He also—in Stalinesque fashion—frequently calls the media “the enemy of the people.”<sup>181</sup> In the aftermath of the shooting,

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Milo’s @instagram post threatening journalists with gun violence, and the company found it did not violate their community guidelines.”)

178. Milo posted his “You’re about to see” post at 4:05 p.m., less than two hours after the shooting took place, and at most, no more than an hour after fatalities were reported. Milo Yiannopoulos, FACEBOOK (June 28, 2018, 4:05 PM), <https://www.facebook.com/myian-nopoulos/posts/youre-about-to-see-a-raft-of-news-stories-claiming-that-i-am-responsible-for-ins/1194490660688827/>. This timing indicates that he knew, immediately, that his prior public comments could be read to have encouraged the shooting. The shooter entered the room around 2:30 p.m., and the newspaper staff tweeted asking for help at 2:43 p.m. Anthony Messenger (@amesscapgaz), TWITTER (June 28, 2018, 2:43 PM), <https://twitter.com/amesscapgaz/status/1012406073704239105>. At 3:45 p.m., reporter Phil Davis reported, “A single shooter, shot multiple people at my office, some of whom are dead.” Phil Davis (@PhilDavis\_CG), TWITTER (June 28, 2018, 3:45 PM), [https://twitter.com/phildavis\\_cg/status/1012421008597364742?lang=en](https://twitter.com/phildavis_cg/status/1012421008597364742?lang=en).

179. See President Donald Trump (@realDonaldTrump), TWITTER, (July 2, 2017, 8:21 AM), <https://twitter.com/realDonaldTrump/status/881503147168071680> (featuring a video of President Trump’s appearance on WWE, body-slammng a wrestler with a face that has been edited and replaced to show a CNN logo instead); see also President Donald Trump (@realDonaldTrump), TWITTER (July 19, 2018, 8:24 AM), <https://twitter.com/realDonaldTrump/status/1019936133147516929> [hereinafter Trump Tweet July 19] (emphasis added) (“The Summit with Russia was a great success, except with the *real enemy of the people*, the Fake News Media. I look forward to our second meeting so that we can start implementing some of the many things discussed, including stopping terrorism, security for Israel, nuclearFalse . . . [sic.]”); President Donald Trump (@realDonaldTrump), TWITTER (June 13, 2018, 8:30 AM), <https://twitter.com/realdonaldtrump/status/1006891643985854464> [hereinafter Trump Tweet June 13] (emphasis added) (“*Our Country’s biggest enemy is the Fake News* so easily promulgated by fools!”).

180. Daniel Victor, *Trump, Calling Journalists ‘Sick People,’ Puts Media on Edge*, N.Y. TIMES (Aug. 23, 2017), <https://www.nytimes.com/2017/08/23/business/media/trump-rally-media-attack.html>.

181. See President Donald Trump (@realDonaldTrump), TWITTER (July 29, 2018, 5:30 AM), <https://twitter.com/realdonaldtrump/status/1023546197129224192> (emphasis added) (“Had a very good and interesting meeting at the White House with A.G. Sulzberger, Publisher of the New York Times. Spent much time talking about the vast amounts of Fake News being put out by the media & *how that Fake News has morphed into phrase, ‘Enemy of the People.’ Sad!*”) (note that there is no reason to believe Sulzberger agreed with any of this); see also Trump Tweet July 19, *supra* note 179; President Donald Trump (@realDonaldTrump), TWITTER (July 15, 2018, 9:18 AM), <https://twitter.com/realdonaldtrump/status/1018530173006692352> (“Unfortunately, no matter how well I do at the Summit, if I was given the great city of Moscow as retribution for all of the sins and evils committed by Russia . . . .”); President Donald Trump (@realDonaldTrump), TWITTER (June 17, 2018, 7:25

though he seemed to express sympathy for the victims of the shooting, President Trump refused to lower American flags in Maryland (before ultimately bowing to media pressure).<sup>182</sup>

For their own part, the *Gazette's* public letter on the shooting suggests attributing at least some of the shooter's motivation to the rhetoric President Trump and Yiannopoulos use:

Here's what else we won't forget: Death threats and emails from people we don't know celebrating our loss, or the people who called for one of our reporters to get fired because she got angry and cursed on national television after witnessing her friends getting shot.

We won't forget being called an enemy of the people.

No, we won't forget that. Because exposing evil, shining light on wrongs and fighting injustice is what we do.<sup>183</sup>

But without a further connection, the link seems tenuous at best—far too tenuous to override the First Amendment interests in play.<sup>184</sup>

However, what if it emerged that the shooter had been retweeting President Trump's "enemy of the people" rhetoric? If he had liked Yiannopoulos's Instagram post? If he had screamed epithets about the "fake news media" as he shot reporters? I think causal imminence (as between President Trump/Yiannopoulos and the harm to reporters) exists in these hypotheticals. As I discussed in Section III.C, once a particular environment begins to exist, certain speech can be the equivalent of

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PM), <https://twitter.com/realdonaldtrump/status/1008506045373845504> (emphasis added) ("Why was the FBI giving so much information to the Fake News Media. They are not supposed to be doing that, and *knowing the enemy of the people Fake News*, they put their own spin on it—truth doesn't matter to them!"); Trump Tweet June 13, *supra* note 179; President Donald Trump (@realDonaldTrump), TWITTER (May 28, 2018, 7:45 AM), <https://twitter.com/realdonaldtrump/status/868810404335673344> (emphasis added) ("[I]t is very possible that those sources don't exist but are made up by *fake news writers*. #FakeNews is the enemy!"); President Donald Trump (@realDonaldTrump), TWITTER (February 17, 2017, 3:48 PM), <https://twitter.com/realdonaldtrump/status/832708293516632065> (emphasis added) ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, *it is the enemy of the American People!*").

182. Maya Oppenheim, *Donald Trump Declines Request to Lower Flags for Capital Gazette Shooting Victims, Says Annapolis Mayor*, INDEPENDENT (July 3, 2018, 1:21 PM), <https://www.independent.co.uk/news/world/americas/donald-trump-lower-flags-capital-gazette-shooting-victims-maryland-a8428611.html>.

183. Rick Hutzell et al., *Our Say: Thank You. We Will Not Forget*, CAP. GAZETTE (July 1, 2018, 6:00 AM), [http://www.capitalgazette.com/opinion/our\\_say/ac-ce-our-say-20180630-story.html#](http://www.capitalgazette.com/opinion/our_say/ac-ce-our-say-20180630-story.html#).

184. Of course, this misses that incitement often exists in the absence of lawless activity. Many cases, like *Rice*, only treat incitement as a way of analyzing a First Amendment defense to criminal conduct in an *ex post* posture. This is the kind of analysis I am imagining here. A separate, interesting question exists regarding when, in the absence of lawless activity, the government can restrict speech *ex ante*, but that question is beyond the scope of this Article.

pressing a big, red “lawless action” button.<sup>185</sup> The connection between the speaker and the lawless activity exists all the more when the speaker (like President Trump) plays a key role in creating such an environment.

And, of course, these stories are obviously not the only ones that skirt this line.<sup>186</sup> Much conduct on the internet raises complicated questions about context—and that context might differ dramatically from the moment a speaker speaks to the moment the listener “hears” and acts upon the speech. But this problem is not new, it just crystallizes and more regularly presents the difficulty represented by separating speaker from speech in space and time. *Brandenburg* was not conceived with this possibility in mind, and therefore, must now be looked at in light of how speech exists in the digital world.<sup>187</sup> Given that even when courts were only dealing with books, they were already drifting towards applying causal—as opposed to spatiotemporal—imminence as the proper standard, the prudent course is now to make that recognition explicit.

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185. See QUINN, *supra* note 132, at 51–52 (“My ex bragged publicly about how he designed the Manifesto to exploit the key things that make online content go viral . . . . It was a communal witch hunt, and he took his manifesto to the groups that had a personal interest in seeing me burn—places that were prone to witch hunts, especially ones frequented by people who were against women working in games.”).

186. See, e.g., Declan McCullagh, *To Spy on a Cheating Spouse*, REASON.COM (May 31, 2018, 12:00 AM), <https://reason.com/archives/2018/05/31/to-spy-on-a-cheating-spouse> (spelling out, in detail, a number of ways to use technology to spy on one’s spouse). For instance, McCullagh details how to track vehicles: “GPS trackers are tiny magnetic transmitters, typically battery powered, that you can buy for as little as [thirty dollars] plus a monthly fee. From an app or web browser, the user then monitors the vehicle’s movements. To optimize for legality, be the sole owner of the target vehicle. Joint ownership is second best. If the only name on the title is your spouse’s, don’t say we didn’t warn you.” *Id.*; see also, e.g., *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (citing *United States v. Holecek*, 739 F.2d 331, 335 (8th Cir. 1984)) (finding no speech protection where defendant gave detailed instructions in how to prepare tax returns that ultimately violated tax return law). It is also notable that much of this sort of line-toeing can be illegal on grounds that the speaker does not foresee at all. For example, while the conduct urged in McCullagh’s article above may not violate the laws they analyze, at least some of it almost certainly violates the Computer Fraud and Abuse Act, various state laws on behavior designed to cause emotional distress, and any number of others. *Cf.* Green, *supra* note 172, at 191 (noting that the FBI mistakenly turned away a revenge porn victim, citing the fact that the conduct did not violate laws about age of consent).

187. See generally *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (applying *Brandenburg* to a lawsuit against a publishing company for publishing instructions on how to kill, but not discussing how *Brandenburg* might apply to online publishing).

APPENDIX I  
IMMINENCE CASES AS DECIDED

Lawless Activity Is Imminent Where the Speaker. . .	Lawless Activity Is Not Imminent Where the Speaker(s). . .
<ul style="list-style-type: none"> <li>• sent an email encouraging “electronic civil disobedience” on a specified date;<sup>1</sup></li> <li>• published a book with detailed instructions on how to become a “hit man”;<sup>2</sup></li> <li>• counseled and directly assisted preparing false tax returns;<sup>3</sup></li> <li>• held up a sign on television at a school event proclaiming “BONG HiTS 4 JESUS”;<sup>4</sup></li> </ul> <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> <li>• offered a reward to anyone “who kills, maims, or seriously injures a member of the American Nazi Party” at an event five weeks away.<sup>5</sup></li> </ul>	<ul style="list-style-type: none"> <li>• led a KKK rally where members were wielding fire arms, burning a cross, and chanting “bury the niggers” and promising “revengeance”;<sup>6</sup></li> <li>• posted a list of “Top Twenty Terror Tactics” online;<sup>7</sup></li> <li>• created violent video games and pornography that purportedly inspired violence in the real world;<sup>8</sup></li> <li>• were fundamentalist preachers who preached that the Bible commands that Christians must violate truancy laws;<sup>9</sup></li> <li>• published an article painting autoerotic asphyxiation in glowing terms;<sup>10</sup></li> <li>• created digitally synthesized child pornography;<sup>11</sup></li> <li>• created posters celebrating the</li> </ul>

1. *United States v. Fullmer*, 584 F.3d 132, 141 (3d Cir. 2009).
2. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 266–67 (4th Cir. 1997).
3. *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985); *see also* *United States v. Rowlee*, 899 F.2d 1275, 1280 (2d Cir. 1990).
4. *Morse v. Frederick*, 551 U.S. 393, 397, 410 (2007).
5. *People v. Rubin*, 158 Cal. Rptr. 488, 488 (Cal. Ct. App. 1979) The court found that “solicitation of murder in connection with a public event of this notoriety, even though five weeks away, [could] qualify as incitement to imminent lawless action.” *Id.* at 493.
6. *Brandenburg v. Ohio*, 395 U.S. 444, 446 n.1, 448–49 (1969) (per curiam).
7. *United States v. Fullmer*, 584 F.3d 132, 155–56, 155 n.10 (3d Cir. 2009).
8. *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002); *see also* *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).
9. *Bangor Baptist Church v. Maine*, 576 F. Supp. 1299, 1334 (D. Me. 1983).
10. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1022–23 (5th Cir. 1987).
11. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002), *superseded by statute*, Pro-secutorial Remedies and Other Tools to end the Exploitation of Children Today Act, Pub. L. No. 108-21, § 502(a)(1), (a)(3), 117 Stat. 650, 680 (2003).

	<p>killing of abortion doctors and identifying doctors who had not yet been killed;<sup>12</sup></p> <ul style="list-style-type: none"> <li>• posted personal information combined with racist and homophobic rhetoric on white supremacist forums;<sup>13</sup></li> <li>• recorded and released the song “Suicide Solution” advocating suicide;<sup>14</sup></li> <li>• called for a strike in a newspaper advertisement in violation of a court order;<sup>15</sup></li> <li>• sold books and magazines whose “primary purpose encouragement of illegal drug use” at self-identified “head shops”;<sup>16</sup></li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>• urged killing a judge on a public blog.<sup>17</sup></li> </ul>
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12. *Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1090–92, 1092 n.5 (9th Cir. 2002) (Kozinski, J., dissenting), *aff’d in part, rev’d in part, vacated*, 422 F.3d 949 (9th Cir. 2005). Note that the majority here analyzes the question in pure “threat” terms and does not address the *Brandenburg* argument. I am sympathetic to the dissent’s argument that the majority opinion somewhat distorts “true threat” doctrine here, but believe the dissent misses the mark otherwise. The real problem is that the square peg of the facts in the case would not fit in the round hole of *Brandenburg*’s spatiotemporal test and had nothing to do with threat doctrine.

13. *United States v. Henry (In re White)*, No. 2:07cv342, 2013 U.S. Dist. LEXIS 133148, at \*222 (E.D. Va. Sept. 13, 2013).

14. *Waller v. Osbourne*, 763 F. Supp. 1144, 1145, 1151 (M.D. Ga. 1991), *aff’d*, 958 F.2d 1084 (11th Cir. 1992).

15. *Glen v. Hongisto*, 438 F. Supp. 10, 12–13, 12 n.2 (N.D. Cal. 1977).

16. *High Ol’ Times, Inc. v. Busbee*, 449 F. Supp. 364, 366, 369–70 (N.D. Ga. 1978), *rev’d*, 621 F.2d 135, 141 (5th Cir. 1980).

17. *United States v. Turner*, No. 09-00650, 2009 U.S. Dist. LEXIS 131244, at \*6–7 (E.D.N.Y. Oct. 5, 2009), *aff’d*, 720 F.3d 411, 429 (2d Cir. 2013).

APPENDIX II  
IMMINENCE CASES SORTED BY PROPOSED CAUSAL RESULT

Lawless Activity Is Causally Imminent Where the Speaker(s) . . .	Lawless Activity Is Not Causally Imminent Where the Speaker . . .
<ul style="list-style-type: none"> <li>• sent an email encouraging “electronic civil disobedience” on a specified date;<sup>1</sup></li> <li>• created posters celebrating the killing of abortion doctors and identifying doctors who had not yet been killed;<sup>2</sup></li> <li>• published a book with detailed instructions on how to become a “hit man”;<sup>3</sup></li> <li>• counseled and directly assisted preparing false tax returns;<sup>4</sup></li> <li>• offered a reward to anyone “who kills, maims, or seriously injures a member of the American Nazi Party” at an event five weeks away;<sup>5</sup></li> </ul>	<ul style="list-style-type: none"> <li>• created violent video games and pornography that purportedly inspired violence in the real world;<sup>11</sup></li> <li>• published an article painting autoerotic asphyxiation in glowing terms;<sup>12</sup></li> <li>• created digitally synthesized child pornography;<sup>13</sup></li> <li>• recorded and released the song “Suicide Solution” advocating suicide;<sup>14</sup></li> <li>• called for a strike in a newspaper advertisement in violation of a court order;<sup>15</sup></li> <li>• held up a sign on television at a school event proclaiming “BONG HITS 4 JESUS”;<sup>16</sup></li> </ul> <p style="text-align: center;">AND</p> <ul style="list-style-type: none"> <li>• sold books and magazines</li> </ul>

1. United States v. Fullmer, 584 F.3d 132, 141 (3d Cir. 2009).

2. Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1092 n.5 (9th Cir. 2002) (Kozinski, J., dissenting), *aff’d in part, rev’d in part, vacated*, 422 F.3d 949 (9th Cir. 2005).

3. Rice v. Paladin Enters., Inc., 128 F.3d 233, 266–67 (4th Cir. 1997).

4. United States v. Freeman, 761 F.2d 549, 552 (9th Cir. 1985); *see also* United States v. Rowlee, 899 F.2d 1275, 1280 (2d Cir. 1990).

5. People v. Rubin, 158 Cal. Rptr. 488, 488 (Cal. Ct. App. 1979). The court found that “solicitation of murder in connection with a public event of this notoriety, even though five weeks away, [could] qualify as incitement to imminent lawless action.” *Id.* at 493.

11. James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002); *see also* Sanders v. Acclaim Entm’t, Inc., 188 F. Supp. 2d 1264, 1281 (D. Colo. 2002).

12. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1022–23 (5th Cir. 1987).

13. Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002), *superseded by statute*, Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act, Pub. L. No. 108-21, § 502(a)(1), (a)(3), 117 Stat. 650, 680 (2003).

14. Waller v. Osbourne, 763 F. Supp. 1144, 1151 (M.D. Ga. 1991), *aff’d*, 958 F.2d 1084 (11th Cir. 1992).

15. Glen v. Hongisto, 438 F. Supp. 10, 12–13, 12 n.2 (N.D. Cal. 1977).

16. Morse v. Frederick, 551 U.S. 393, 397, 410 (2007).

<ul style="list-style-type: none"> <li>• led a KKK rally where members were wielding fire arms, burning a cross, and chanting “bury the niggers” and promising “revenge”;<sup>6</sup></li> <li>• posted a list of “Top Twenty Terror Tactics” online;<sup>7</sup></li> <li>• were fundamentalist preachers who preached that the Bible commands that Christians must violate truancy laws;<sup>8</sup></li> <li>• posted personal information combined with racist and homophobic rhetoric on white supremacist forums;<sup>9</sup></li> </ul> <p>AND</p> <ul style="list-style-type: none"> <li>• urged killing a judge on a public blog.<sup>10</sup></li> </ul>	<p>whose “primary purpose encouragement of illegal drug use” at self-identified “head shops.”<sup>17</sup></p>
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To address what I see as a prime objection to my sorting, I acknowledge that one might perhaps set a different threshold for a finding of causal imminence—in tort terms, a different degree of proximate causality—but this is a question of placing a line on a relatively well-defined spectrum, rather than one of sorting fact patterns willy-nilly into two discrete buckets. As was the case in *MacPherson*, the old rule—spatiotemporal imminence or privity of contract—has a certain binary quality,<sup>18</sup> while causal imminence (and foreseeability) are both better

6. *Brandenburg v. Ohio*, 395 U.S. 444, 446 n.1, 468–69 (1969) (per curiam).

7. *United States v. Fullmer*, 584 F.3d 132, 155–56, 155 n.10 (3d Cir. 2009).

8. *Bangor Baptist Church v. Maine*, 576 F. Supp. 1299, 1334 (D. Me. 1983).

9. *United States v. Henry (In re White)*, No. 2:07cv342, 2013 U.S. Dist. LEXIS 133148, at \*222 (E.D. Va. Sept. 13, 2013).

10. *See United States v. Turner*, No. 09-00650, 2009 U.S. Dist. LEXIS 131244, at \*6–7 (E.D.N.Y. Oct. 5, 2009), *aff’d*, 720 F.3d 411, 429 (2d Cir. 2013).

17. *High Ol’ Times, Inc. v. Busbee*, 449 F. Supp. 364, 366, 369–70 (N.D. Ga. 1978), *rev’d*, 621 F.2d 135 (5th Cir. 1980).

18. With spatiotemporal imminence, something is either going to happen in the next few minutes within a certain physical range or it is not; someone is either in contractual privity or they are not. *See MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).



seen as questions about points along a spectrum.<sup>19</sup> Application of an imminence test, given the time frames in which courts operate, would actually be quite simple.<sup>20</sup> By the time a court was looking at any question of imminence, the court would be well able to tell whether lawless activity had taken place within the maximum time frame.<sup>21</sup>

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19. Something has a particular degree of foreseeability, or something has a particular degree of causal relation and/or separation. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

20. *See, e.g.,* *United States v. Fullmer*, 584 F.3d 132, 155 n.10 (3d Cir. 2009) (“The government attempts to connect the posting of the ‘Top Twenty Terror Tactics,’ which occurred on March 6, 2001, to later unlawful conduct, the earliest of which occurred on March 31, 2001. These events occurred a minimum of three weeks apart, which does not meet the ‘imminence’ required by the *Brandenburg* standard.”).

21. I am not the only person to make this observation as to causation and the First Amendment. *See generally* Kenneth J. Brown, *Assessing the Legitimacy of Governmental Regulation of Modern Speech Aimed at Social Reform: The Importance of Hindsight and Causation*, 10 WM. & MARY BILL RTS. J. 459 (2002) (demonstrating the connection between government regulation conducted in the benefit of hindsight).