ESSAY

Terrorist Speech on Social Media

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The presence of terrorist speech on the internet tests the limits of the First Amendment. Widely available cyber terrorist sermons, instructional videos, blogs, and interactive websites raise complex expressive concerns. On the one hand, statements that support nefarious and even violent movements are constitutionally protected against totalitarian-like repressions of civil liberties. The Supreme Court has erected a bulwark of associational and communicative protections to curtail government from stifling debate through overbroad regulations. On the other hand, the protection of free speech has never been an absolute bar against the regulation of low value expressions, such as calls to violence and destruction.

Terrorist advocacy on the internet raises special problems because it contains elements of political declaration and self-expression, which are typically protected by the First Amendment. However, terrorist organizations couple these legitimate forms of communication with instigation, recruitment, and indoctrination. Incitement readily available on social media is sometimes immediate or, more often, calibrated to influence and rationalize future dangerous behaviors. This is the first Essay to analyze all the Supreme Court's free speech doctrines that are relevant to the enactment of a constitutionally justifiable anti-terrorism statute. Such a law must grant the federal government authority to restrict dangerous terrorist messages on the internet, while preserving core First Amendment liberties. Legislators should develop policies and judges should formulate holdings on the bases of the imminent threat of harm, true threats, and material support doctrines. These

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three frameworks provide the government with the necessary constitutional latitude to prosecute dangerous terrorist speech that is disseminated over social media and, thereby, to secure public safety, without encroaching on speakers' right to free expression.

INTRODUCTION

The First Amendment is often understood in the context of individuals expressing views about democracy, partaking in debates, engaging in self-expressive conversations, creating artistic works, and contributing to discussions.[1] That broadly theoretical framework is historically derived from the Framers' arguments against taxation without representation and the establishment of deliberative government.[2] The broad conception of speech also contemporaneously informs pressing debates about police cameras,[3] internet blogs,[4]

1. Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1018–42.

2. 1 GEORGE BROWN TINDALL, AMERICA: A NARRATIVE HISTORY 176, 193 (1984) (discussing protestations against British taxation through the slogan of "no taxation without representation").

3. Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) ("[W]e conclude there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment.").

corporate financing of political campaigns,[5] and protests near abortion clinics.[6]

Support for terrorism on the internet and legislative efforts to shut it down pose challenges to traditional political speech doctrines because they raise conflicting liberty and security concerns. Supporters of terrorism communicate to advance violent political ideologies, which are typically protected by the First Amendment, but also sometimes incite, threaten, and conspire to commit violence, which are expressions that enjoy no such constitutional protection.

Arguably the most pressing question in the free speech area today is whether and to what extent terrorist speech is protected by the First Amendment. One of the most intriguing policy questions concerns terrorists' uses of the internet as an instrument of indoctrination and recruitment. The U.N. Office on Drugs and Crime cogently stated the importance of enacting a U.S. internet anti-terrorist statute, imploring that "[i]t would be extremely helpful to other countries if the United States could find a solution to its limited ability to furnish judicial cooperation concerning foreign incitement offenses resulting from its jurisprudence concerning freedom of speech and expression."[7] This Essay develops a framework for passing such a law without offending the principles of free speech doctrine.

The matter is not straightforward, however. Under ordinary circumstances, the First Amendment protects offensive and obnoxious speech; therefore, even membership in violent and autocratic organizations is privileged against adverse state actions, except in very specific circumstances, such as when it advocates imminently dangerous activities.[8] However, recruitment, indoctrination, and training create more difficult problems for First Amendment theory, particularly when these communicative activities are done in coordination with terrorist organizations. The First Amendment dilemma arises because classic doctrines prohibit the state from repressing offensive expressions but permit restrictions on incitement.

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4. Doninger v. Niehoff, 527 F.3d 41, 50 (2d Cir. 2008) (holding that a student's blog post was actionable because it "foreseeably create[d] a risk of substantial disruption within the school environment").

5. Citizens United v. FEC, 558 U.S. 310, 347 (2010) ("[T]he First Amendment does not allow political speech restrictions based on a speaker's corporate identity.").

6. *See* McCullen v. Coakley, 134 S. Ct. 2518, 2535, 2537 (2014) (holding certain restrictions on speech at an abortion clinic to be overly broad); *see also* Hill v. Colorado, 530 U.S. 703, 734–35 (2000) (upholding a picketing restriction in the vicinity of abortion clinics).

7. U.N. OFFICE ON DRUGS & CRIME, DIGEST OF TERRORIST CASES 118 (2010).

8. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (finding that even violent-sounding statements that are uttered without the immediate threat of their being carried out are protected by the First Amendment).

Terrorist communications on the internet often contain both elements, challenging the scope and applicability of traditional incitement jurisprudence.

The troubling nature of this subject is brought home by concrete examples of terrorist recruitment. Numerous terrorists—such as Omar Mateen, whose attack of the Pulse nightclub in Miami left forty-nine dead and fifty-three injured—were at least partly radicalized through materials circulated on the internet.[9] The broad reach of the internet has made it easier than ever to establish terrorist contacts; groups that were formerly so geographically dispersed that communications between them were either impractical or impossible now have the means to collaborate, share membership lists, recruit new members, and advise each other. This Essay considers the extent to which terrorist speech can be combatted without running afoul of free speech norms in the United States. I argue that the Free Speech Clause of the First Amendment is not a bar against the limitation of intentionally inciting, truly threatening, and coordinated terrorist advocacy. Part I sets out the proliferating problem of terrorist digital content on social media. Part II turns to U.S. free speech doctrine and offers preliminary thoughts about the types of terror communications that might be curtailed without running afoul of the First Amendment. Part III provides international context by analyzing treaties and conventions as well as a variety of anti-terror statutes from foreign democracies. Part IV suggests how best to advance legislation for combatting terrorist incitement, threats, and material support. Part V concludes with a critique of scholars who regard efforts to restrict terrorist advocacy on the internet to be unconstitutional.

I. INCITEMENT TO TERRORISM ON THE INTERNET

The internet is awash with calls for terrorism. Besides violent rhetoric, there are forums seeking recruits and even children's websites to entice young disciples. Addressing the internet's global reach is one of the greatest challenges regulators face in fashioning narrowly tailored policies that preserve political expression, while casting a net to ensnare terrorist incitement before it turns into violent action. Over the last decade, the internet has become the mainstage for terrorist incitements. The World Wide Web has

9. Ed Pilkington, *FBI and Obama Confirm Omar Mateen Was Radicalized on the Internet*, GUARDIAN (June 14, 2016), http://www.theguardian.com/us-news/2016/jun/13/pulse-nightclub-attack-shooter-radicalized-internet-orlando [https://perma.cc/45F7-R6HA].

revolutionized communications.[10] It is a neutral medium. On the one hand, the internet is an important launching pad for human rights efforts;[11] on the other, the internet has developed into an indispensable medium for terrorist planning, organization, and incitement.[12] Before addressing the constitutional issues of regulating terrorist incitement and propaganda, this Part surveys the many uses to which terrorists put the internet.

Technically adept terrorist organizations and their devotees exploit social networking sites to spread ideologies, disseminate instructional videos, consolidate power, and threaten enemies. Terrorist organizations, which are ideologically committed to using tactical violence to achieve political objectives, use both publicly available and encrypted channels to organize, plan, and foment singular and mass acts of terror.[13] This Essay deals only with the regulation of publicly available sources. Terrorists use these tools for recruitment, propaganda, fund raising, indoctrination, data mining, and for sharing strategies for attacking and destroying targets.[14] For example, ISIS has multiple Twitter accounts for the rapid dissemination of propaganda.[15] Some national security analysts predict that terrorist organizations will one day use Twitter to send real-time messages to coordinate ongoing attacks.[16] Twitter is already an active forum for a variety of terror organizations—groups such as al-Qaeda, Hezbollah, and Minbar al-Tawhid wal-Jihad—each manipulating the internet to its own purposes.[17] YouTube is likewise a hub for radical videos available for viewing throughout the world.[18] Facebook too is a source for hate propaganda; although, the company has a policy against violent threats being posted, civil rights

10. *See* BRUCE HOFFMAN, INSIDE TERRORISM 201 (2006).

11. *Internet Freedom: Promoting Human Rights in the Digital Age—a Panel Discussion*, U.S. STATE DEP'T (Mar. 4, 2011), http://www.state.gov/j/drl/rls/rm/2011/162490.htm [https://perma.cc/AY23-4W5E].

12. *Internet Terror Recruitment and Tradecraft: Hearing Before the Subcomm. on the Intelligence, Information Sharing, and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 111th Cong. 12 (2010) (statement of Bruce Hoffman).

13. *See* U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, COUNTERING THE USE OF THE INTERNET FOR TERRORIST PURPOSES—LEGAL AND TECHNICAL ASPECTS 31–32 (May 2011), http://www.un.org/en/terrorism/ctitf/pdfs/ctitf_interagency_wg_compendium_legal_technical_aspects_web.pdf [https://perma.cc/L6U9-RCWV].

14. *Id.* at 32.

15. J.M. Berger, *The Evolution of Terrorist Propaganda: The Paris Attack and Social Media*, BROOKINGS (Jan. 25, 2015), http://www.brookings.edu/research/testimony/2015/01/27-terrorist-propaganda-social-media-berger [https://perma.cc/X9P2-VQDB].

16. GABRIEL WEIMANN, TERRORISM IN CYBERSPACE: THE NEXT GENERATION 139 (2015).

17. *Id.*

18. *Id.* at 141–46.

organizations who report the violative content have sometimes found Facebook staff to be intransigent.[19] Terrorists have utilized a variety of other social media to threaten, enlist, defame, and call for brutal actions.

To give some idea of the incendiary content, Facebook has refused requests from various watchdog organizations to follow its written community decency standard to "remove graphic images when they are shared . . . to celebrate or glorify violence."[20] In the past, despite repeated external requests, Facebook has refused to take down a community page called, "Stab Israelis."[21] It depicted a Palestinian flag in the background and an image of a man menacingly holding a large knife in his hand.[22] On a different Facebook page, a graphically depicted young man walks down the street with a long butcher knife in one hand toward two Jews in Chasidic clothes, who are standing at a bus stop.[23] Another Facebook page contained a victim's photograph with a knife blade almost completely imbedded in his head and the following message: "Stabbing operation. The free men of Al-Aqsa. The Intifada has started. The [West] Bank is carrying out resistance. There is nothing greater than a knife penetrating the heads of the Jews."[24] This came during a period of terrorist stabbings in Israel. At the same time Twitter hosted a slew of messages with hashtags rejoicing and supporting the attacks.[25] In response, in 2015, twenty thousand Israelis filed a class action law suit against Facebook for "allowing Palestinian terrorists to incite violent attacks against Israeli citizens on its internet platform."[26] The Fatah Facebook page depicted

19. Complaint at 1–2, Lakin v. Facebook, Inc., No. 12831/15 (N.Y. Sup. Ct. Oct. 26, 2015) (filing suit for Facebook's alleged facilitation of terrorist and hate speech).

20. *Violence and Graphic Content*, FACEBOOK (2016), https://www.facebook.com/communitystandards# [https://perma.cc/AB9P-WVJH].

21. Yitzhak Benhorin, *20,000 Israelis Sue Facebook*, YNETNEWS.COM (Oct. 27, 2015), http://www.ynetnews.com/articles/0,7340,L-4716980,00.html [https://perma.cc/4VHW-BXWC]. Facebook at first refused to take down the "Stab Israelis" page and only did so after an Israeli newspaper published an article about it. JNS.Org, *Facebook Removes 'Stab Israelis' Page Following Article in Hebrew Press*, ALGEMEINER (Oct. 14, 2015), http://www.algemeiner.com/2015/10/14/facebook-removes-stab-israelis-page-following-article-in-hebrew-press/ [https://perma.cc/EXM9-P9CY].

22. Adva Cohen, *Class Action Against Facebook Seeks to 'Dislike' Incitement*, YNETNEWS.COM (Oct. 15, 2015), http://www.ynetnews.com/articles/0,7340,L-4711718,00.html [https://perma.cc/RBU8-VT6T].

23. *Social Media as a Platform for Palestinian Incitement—Praise for Stabbing Attackers, Threats of Further Attacks*, MEMRI (Oct. 15, 2015), http://cjlab.memri.org/lab-projects/tracking-jihadi-terrorist-use-of-social-media/social-media-as-a-platform-for-palestinian-incitement-praise-for-stabbing-attackers-threats-of-further-attacks/ [https://perma.cc/8F6K-PD8A].

24. *Id.*

25. *Id.*

26. Benhorin, *supra* note 21 (providing the first page of the complaint).

Al-Aqsa mosque atop a rising mound of dirt with rats trying to climb up and infiltrate it, all of the rodents with Jewish stars on their backs.[27] Yet a different Facebook page is dedicated to purported Jewish ritual murder of Christian children,[28] a group defamation that has often incited violence against Jews.

The effect of this contact can best be gathered from information gleaned about the social media influence on domestic terrorists. The path to Tashfeen Malik and Syed Farook's terrorist attacks in San Bernardino readily exemplifies how incitement is spread on the internet and later acted upon by devotees. The shooters, a husband and wife, listened to hours of terror imam Anwar al-Awlaki's lectures and "por[ed] over directions on making explosives" in *Inspire*, the al-Qaeda magazine created by al-Awlaki and Samir Kahn.[29] Al-Awlaki's lectures are easily available through a basic search on YouTube; indeed, a search under his name yields more than 69,900 results. His inciteful lectures have been repeatedly connected to persons who perpetrated terrorist attacks, including the *Charlie Hebdo* shooting, the Boston Marathon bombing, the assassination attempt on MP Stephen Timms, and others.[30] Without adequate government initiative, civil rights activists have found it difficult to convince these websites to take down online terrorist support.[31] To be fair, some internet service providers have made an earnest effort at combatting terrorism on their websites,[32] but the elusive nature of terror organizations and the commercial interests intrinsic to corporate-mindedness requires adequate government oversight to add elements of punishment and deterrence in cases of recalcitrance.

Terrorist incitement is not new, but social networks have vastly increased the span of its influence. Prior to the broad

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27. Isr. Ministry of Foreign Affairs, *Recent Examples of Palestinian Incitement to Terror* (Nov. 18, 2014), http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Pages/Examples-of-Palestinian-incitement-to-terror-18-Nov-2014.aspx [https://perma.cc/TU9A-JMPD].

28. *Jewish Ritual Murder*, FACEBOOK, https://www.facebook.com/truthaboutjews (last visited Jan. 9, 2017) [https://perma.cc/KRL6-3CMU].

29. Scott Shane, *Internet Firms Urged to Limit Work of Anwar al-Awlaki*, N.Y. TIMES (Dec. 18, 2015), http://www.nytimes.com/2015/12/19/us/politics/internet-firms-urged-to-limit-work-of-anwar-al-awlaki.html [https://perma.cc/4774-M3J3].

30. *Woman Jailed for Life for Attack on MP Stephen Timms*, BBC (Nov. 3, 2010), http://www.bbc.com/news/uk-england-london-11682732 [https://perma.cc/8V4H-FV76].

31. *See* Shane, *supra* note 29.

32. One of the recent positive efforts by internet service providers had been the creation of a joint database—shared by Twitter, Microsoft, Facebook, and YouTube—that created " 'hashes' (unique digital 'fingerprints') for violent terrorist imagery or terrorist recruitment videos or images that have been removed from their services." *Partnering to Help Curb Spread of Online Terrorist Content*, FACEBOOK NEWSROOM (Dec. 5, 2016), http://newsroom.fb.com/news/2016/12/partnering-to-help-curb-spread-of-online-terrorist-content/ [https://perma.cc/PT2X-YNBT].

availability of the internet, terrorist operatives and recruits faced far greater hurdles to meeting and coordinating attacks. With the exponential growth of the internet in the last two decades, communications between terrorist organizations and their operatives have been fundamentally transformed.[33] For example, individuals can upload videos, articles, and emails from internet cafes, home computers, or portable devices that can later be accessed anywhere in the world.[34] Furthermore, networks, editors, disseminators, promoters, and services empower persons to pass the information onto new cyber forums.[35]

The internet poses legal puzzles for pluralistic countries.[36] The World Wide Web provides terrorist organizations with a host of ways to disseminate inciting messages through social media, real time chat rooms, text messages, Twitter accounts, and a host of email applications. The cross-border nature of cyber communications has far-reaching consequences at great distances from the country where the messages were sent. Those messages can impact persons across borders through electromagnetic transmissions, creating potential international conflicts. Materials might be downloaded in one country but stored on servers abroad.

The internet has empowered terrorists' recruitment and publicity efforts. Unlike old media sources such as newspapers, terrorist organizations now control the production, direction, editing, and dissemination of their messages to worldwide audiences.[37] Moreover, the internet emboldens terrorists by providing them with the tools to post anonymously and inexpensively.[38] Terrorists spend a significant amount of resources and time on their web presentations.[39] Their leaders are deeply aware of the importance communications

33. *See* HOFFMAN, *supra* note 10, at 197–202 (discussing terrorist organizations' reliance on computers, CDs, emails, and web services).

34. *See, e.g.*, Barbara Mantel, *Terrorism and the Internet: Should Web Sites that Promote Terrorism Be Shut Down?*, 3 C.Q. GLOBAL RESEARCHER, Nov. 2009, at 285, 287.

35. *See* Transcript of Record at 886, U.S. v. Ali Hamza Suliman al Bahlul (Military Comm'n Convening Order No. 07-01, 07-05), http://www.mc.mil/Portals/0/pdfs/alBahlul/Bahlul%20Transcript.pdf [https://perma.cc/2KQM-2XZE].

36. *See* Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 521–31 (2009).

37. *See* HOFFMAN, *supra* note 10, at 197 (asserting that "the art of terrorist communication has evolved to a point at which the terrorists themselves can now control the entire production process").

38. *Id.* at 201–02.

39. Mantel, *supra* note 34, at 285–89.

play in terrorizing populations, indoctrinating recruits, consolidating power, and spreading propaganda.[40]

Interactive forums on Twitter, Facebook, Google+, and Tumblr host discussions, membership drives, threats, and calls to arms of terrorist organizations such as ISIS.[41] Among the messages readily available on these sites are advocacy of mobilization, calls for people to travel to the Levant and join in the fight, coverage of life in the caliphate, and warnings to those unwilling to join in the ideological and religious mission.[42] ISIS's accounts also provide information about newly formed networks to use in case law enforcement agents begin to monitor existing ones or social media sites remove some accounts.[43] ISIS is not an isolated example, as many other organizations that the U.S. State Department has designated as terrorists have made similar use of the new media. Among these, the Continuity Irish Republican Army makes regular use of the internet to disseminate and propagate their political goals and violent tactics as well as to establish support networks.[44] Similarly, Hamas regularly uses chat rooms to plan and organize its activities; exploits emails to coordinate between operatives in Gaza, the West Bank, and Lebannon; publishes instructions for creating bombs, toxic gases, and poisons; and operates children's sites containing photos of youths wearing military regalia and carrying weapons, features on "martyrs" who killed Jews, and catchy phrases calling for martyrs to be covered in blood.[45] A significant number of other terror organizations have websites, including Boko Haram, Hezbollah, Liberation Tigers of Tamil Eelam, Revolutionary Armed Forces of Colombia, and many others.[46] While

40. The awareness of the impact of new media is evident in a letter Ayman al-Zawahiri, who is currently the leader of al-Qaeda, wrote to Abu Musab al-Zarqawi, the founder of al-Qaeda in Iraq, to stress the importance of communications: "We are in a battle, and more than half of this battle is taking place in the battlefield of the media." Gordon Corera, *Traditional Media: Impact on Proterrorism Propaganda and Counterterrorism Policies*, *in* COMBATING TRANSNATIONAL TERRORISM 123 (Steve Tsang ed., 2009).

41. LORENZO VIDINO & SEAMUS HUGHES, ISIS IN AMERICA: FROM RETWEETS TO RAQQA 21 (2015).

42. *Id.* at 23.

43. *Id.* at 24.

44. *See* Lorraine Bowman-Grieve, *Irish Republicanism and the Internet: Support for New Wave Dissidents*, 4 PERSP. ON TERRORISM, May 2010, at 22.

45. John Arquilla et al., *Networks, Netwar, and Information-Age Terrorism*, *in* IAN O. LESSER ET AL., COUNTERING THE NEW TERRORISM 65 (1999); *see* STEVEN EMERSON, JIHAD INCORPORATED: A GUIDE TO MILITANT ISLAM IN THE US 478 (2006); Gabriel Weimann, *www.terror.net: How Modern Terrorism Uses the Internet*, U.S. INST. PEACE 9 (Mar. 13, 2004), http://www.usip.org/sites/default/files/sr116.pdf [https://perma.cc/V5K3-8TXA].

46. Paul Piper, *Terrorist Activity on the Internet*, INFO. TODAY, INC. (Dec. 2008), http://www.infotoday.com/searcher/nov08/Piper.shtml [https://perma.cc/Q4GV-5MYJ] (listing a variety of terrorist websites).

the actual number of terrorist sites is constantly in flux, some idea of magnitude may be gleaned from the Canadian Centre of Intelligence and Security Studies's finding that in 2006 there were about five thousand operational terrorist websites.[47]

Among the most recent examples of how terrorist websites influence and indoctrinate followers were the cases of Dzhokhar and Tamerlan Tsarnaev, who set off bombs at the April 15, 2013, Boston Marathon.[48] A variety of clues provided investigators with information about the criminal motivation behind the attack.[49] Investigators also sought to determine whether the brothers were acting under the direction of a larger terrorist organization.[50] A search of surviving brother Dzhokhar's computer revealed several radical tracts by a renowned terrorist preacher with a broad internet following, Anwar al-Awlaki.[51] The same al-Awlaki had provided email counsel to Major Nidal Hasan before the latter went on a terrorist shooting rampage in Fort Hood, Texas.[52] After the murders, al-Awlaki bragged that Hasan was his student and defended the murder spree as "a heroic act" and "a wonderful operation."[53] In the same interview, which first ran on an al-Qaeda sponsored website, al-Awlaki went on to exhort others to commit acts of violence:

> I support what he did, and I call upon anyone who calls himself a Muslim, and serves in the U.S. Army, to follow in the footsteps of Nidal Hasan. Good deeds erase bad ones. In

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47. Lorenzo Vidino et al., *Terrorist Chatter: Understanding What Terrorists Talk About* 19 (Norman Paterson Sch. of Int'l Affairs, Carleton Univ., Working Paper No. 03, 2015).

48. Dianatha Parker & Jess Bidgood, *Boston Marathon Bombing: What We Know*, N.Y. TIMES (Jan. 1, 2015), http://www.nytimes.com/2015/01/02/us/boston-marathon-bombings-trial-what-you-need-to-know.html?_r=0 [https://perma.cc/2NU7-4ZHA].

49. When the younger brother was captured he had used his own blood to write messages clearly indicating the motivation behind his actions. Those messages included: "The U.S. Government is killing our innocent civilians"; "Can't stand to see such evil go unpunished"; "We Muslims are one body, you hurt one you hurt us all"; "Stop killing our innocent people and we will stop." Michael Scherer, *5 New Revelations from the Boston Bomber Indictment*, TIME (June 27, 2013), http://swampland.time.com/2013/06/27/5-new-revelations-from-the-boston-bomber-indictment/ [https://perma.cc/5JDQ-A4HF].

50. Richard A. Serrano et al., *Boston Suspect Says No Outside Role in Blasts*, L.A. TIMES, Apr. 24, 2013, at A1.

51. Peter Bergen & David Sterman, *The Man Who Inspired the Boston Bombings*, CNN (Apr. 11, 2014), http://www.cnn.com/2014/04/11/opinion/bergen-boston-bombing-awlaki-jihadists/ [https://perma.cc/U6LQ-94B9].

52. *Lessons from Fort Hood: Improving Our Ability to Connect the Dots: Hearing Before the Subcomm. on Oversight, Investigations & Mgmt. of the H. Comm. on Homeland Sec.*, 112th Cong. 11–12 (2012) (statement of Douglas E. Winter, Deputy Chair, The William H. Webster Commission on the Federal Bureau of Investigation, Counterterrorism Intelligence, and the Events at Fort Hood, Texas, on November 5, 2009), http://homeland.house.gov/sites/homeland.house.gov/files/Testimony-Winter.pdf [https://perma.cc/NZ8C-C86B].

53. Jacob Sullum, Commentary, *With Terrorists, Obama's 'Trust Me' Is Not Enough*, CHI. SUN TIMES, Oct. 5, 2011, at 34.

> addition, I call upon [all] Muslims to follow in his footsteps, and to wage Jihad by speech or by action.[54]

Until his death in a U.S. drone strike, al-Awlaki was a powerful voice on the internet terrorist community with his own Facebook page, blog, and cadre of followers.[55] He was an example of how a charismatic leader can effectively exploit social media to recruit and threaten. His website openly supported violent conflict, religious bigotry, and violent advocacy through speeches, articles, and publications, such as his *44 Ways to Support Jihad*.[56] A variety of terrorists openly spoke of his influence on their plots. For example, his work inspired three of five men who planned to attack Fort Dix, New Jersey; a group of eighteen men who planned to blow up the Toronto Stock Exchange listened to al-Awlaki sermons and were influenced by his text, *Constants on the Path of Jihad*; and, the men who carried out the July 7, 2005, terror attack in London were mesmerized by al-Awlaki's exaltation of *shaheeds* (martyrs).[57]

Calls for YouTube to voluntarily take down al-Awlaki's videos have achieved limited success.[58] Pressure on the company mounted after an investigation of Roshonara Choudhry, who attempted to assassinate a member of the British Parliament.[59] Police discovered that Choudhry had downloaded "the full set of Awlaki's lectures" and had become radicalized through his sermons.[60] After the attempted assassination, British Minister of State for Security and Counter

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54. *Yemeni-American Jihadi Cleric Anwar Al-Awlaki in First Interview with Al-Qaeda Media Calls on Muslim U.S. Servicemen to Kill Fellow Soldiers and Says: "My Message to the Muslims . . . Is that We Should Participate in this Jihad Against America . . . ,"* MEMRI (May 23, 2010), http://www.memri.org/report/en/0/0/0/0/0/0/4202.htm [https://perma.cc/M85U-A6PZ].

55. *Anwar Al-Awlaki's Messages Still Resonate on Facebook*, ANTI-DEFAMATION LEAGUE: EXTREMISM & TERRORISM (Feb. 6, 2014), http://blog.adl.org/extremism/generation-awlaki-facebook-terrorism-messages-still-resonate [https://perma.cc/2TW3-HJDU].

56. Katherine Zimmerman, *Militant Islam's Global Preacher: The Radicalizing Effect of Sheikh Anwar al Awlaki*, AEI CRITICAL THREATS (Mar. 12, 2010), http://www.criticalthreats.org/yemen/militant-islams-global-preacher-radicalizing-effect-sheikh-anwar-al-awlaki [https://perma.cc/9HTW-6HQ5].

57. Steve Swann, *A Truly Dangerous Meeting of the Minds*, BBC NEWS (Apr. 3, 2015), http://www.bbc.com/news/magazine-32065132 [https://perma.cc/WH8P-EEWT]; Zimmerman, *supra* note 56.

58. *See* James Gordon Meek & Kenneth R. Bazinet, *YouTube's Got to Gag Mouthpiece: Weiner*, N.Y. DAILY NEWS (Oct. 24, 2010), http://www.nydailynews.com/news/national/youtube-gag-jihad-mouthpiece-anwar-al-awlaki-rep-anthony-weiner-article-1.187619 [https://perma.cc/KJA3-KHJY].

59. John F. Burns & Miguel Helft, *YouTube Withdraws Cleric's Videos*, N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/04/world/04britain.html [https://perma.cc/YPW6-8BHN].

60. Vikram Dodd, *Roshonara Choudhry: I Wanted To Die . . . I Wanted To Be a Martyr*, GUARDIAN (Nov. 3, 2010), http://www.theguardian.com/uk/2010/nov/04/stephen-timms-attack-roshonara-choudhry [https://perma.cc/MRK7-9FKC]. Choudhry confessed to have listened to more than "100 hours" of al-Awlaki's sermons. *Id*.

Terrorism, Baroness Pauline Neville-Jones, requested of the United States to eliminate and block al-Awlaki's videos from servers hosted in the United States. The videos, as Neville-Jones asserted, "incite cold-blooded murder" and would "categorically not be allowed in the U.K."[61] While the United States rejected the request, YouTube voluntarily took down several of the videos found to be in violation of its Terms of Service.[62] But, rather than completing the removal, YouTube has continued to allow a large collection of al-Awlaki videos to be searchable, viewable, and audible on its website. The availability of al-Awlaki's ideologically driven sermons and threats of violence are representative of a large trend that remains unaddressed by U.S. law. The next part of this Essay surveys relevant First Amendment doctrines that must be the starting point for a U.S. law prohibiting incitement, true threats, and material support of terror on social media.

II. THE FIRST AMENDMENT AND TERRORIST SPEECH

Free speech is a quintessential constitutional right because it is essential to politics, research, and self-assertion. The First Amendment establishes a substantive injunction against indiscriminate government regulation of speech. At its philosophical core, the Free Speech Clause protects each individual's right to participate in deliberative democracy, express ideas, engage in politics, and generally contribute to the common good of open society.[63] As a general rule, courts regard limits on speech with suspicion unless such regulations are narrowly defined within the context of American precedential history.[64]

The Supreme Court has developed a variety of helpful doctrines for lower courts to distinguish abstract statements in support of terror and those that intentionally intimidate or are likely to cause imminent threats of harm. Moreover, there is no First Amendment right to cooperate with a terrorist organization in advancing its political agenda; however, government cannot impair

61. Burns & Helft, *supra* note 59 ("Pauline Neville-Jones, a former high-ranking diplomat who is security minister in the Cameron government, said of the videos that Britain would 'take them down' if it was purely a British issue, but that the implications were 'global' and required action by the United States.").

62. *Id.*

63. *See* Tsesis, *supra* note 1, at 1042–43 (expostulating the role of the common good in free speech theory).

64. United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

the right to be a peaceful member of an organization or even to advocate its nefarious purposes.

The core distinction here is in the free speech value of advocacy as opposed to the unprotected, albeit communicative, contribution to the perpetration of violence. Identifying doctrines for distinguishing between these modes of communication is essential to avoid repeating grave errors of an era in the early- to mid-twentieth century, when the Supreme Court countenanced the suppression of subversive but nonviolent speech.[65] At the heart of the Red Scare, which has left such an indelible imprint on the heightened scrutiny of U.S. free speech jurisprudence,[66] was the McCarthy Era witch hunt of innocent persons associated with the Communist movement and even those suspected of being engaged in it.[67]

The difference between agitating for change, even when expressed obnoxiously or favoring anti-democratic institutions, and inciting violence can be ascertained by examining *Dennis v. United States*, where the Court upheld the convictions of U.S. Communist Party leaders for allegedly "knowingly and willfully" engaging in advocacy "intended to overthrow the Government of the United States as speedily as the circumstances would permit."[68] In hindsight, while the evidence against the defendants in *Dennis* was remarkably weak—consisting of the presumption that they supported violent overthrow of sovereignty because of their commitment to Marxist-Leninist ideology[69]—recognition of the government's authority to prohibit purposeful instigation for violent overthrow has not faltered.

The premise in *Dennis* discredits an earlier decision in *Whitney v. California*, where a defendant's conviction had been based solely on her membership in the Communist Party, with no indication she planned to incite others to revolutionary violence.[70] Hence the Court eventually overturned *Whitney* and probably should have overturned the convictions of the defendants in *Dennis*, or at least more closely scrutinized statutory application to the defendants. Nevertheless, the

65. Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 845.

66. *See, e.g.*, Jason Paul Saccuzzo, *Bankrupting the First Amendment: Using Tort Litigation to Silence Hate Groups*, 37 CAL. W. L. REV. 395, 408 (2001) (discussing the Warren Court's liberal reaction to the First Amendment jurisprudence of the Red Scare period).

67. *See* Richard Delgado, *Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey*, 146 U. PA. L. REV. 865, 874 (1998).

68. 341 U.S. 494, 515, 516 (1951).

69. *Id.* at 497–98; United States v. Foster, 9 F.R.D. 367, 374–76 (S.D.N.Y. 1949) (containing grand jury indictment).

70. 274 U.S. 357 (1927).

State need not sit idly by "until the putsch is about to be executed."[71] Justice Brandeis, in his concurrence to *Whitney*, provided a crucial caveat that there is a "wide difference between advocacy and incitement."[72] The Supreme Court itself has recognized the distinction between these two cases in *Brandenburg v. Ohio*, explaining that advocacy can only be prohibited when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[73] In later years, as we will see in this Part of the Essay, the Court further qualified free speech doctrine to not protect true threats and material support to terrorists.

The First Amendment right to engage like-minded people, to express one's views, and to disseminate information, even in statements supportive of violent political action, does not extend to conduct that advances violent terrorist activities.[74] That balance between speech and the social interest in security is predicated on nuanced judicial frameworks, requiring careful analysis of how to rigorously protect deliberative democracy while prohibiting narrow categories of destructive messages incompatible with public safety.

In this Part of the Essay, I aim to identify First Amendment jurisprudence that offers viable legislative approaches for restricting terrorist incitement or propaganda. It first parses the incitement doctrine, then turns to true threats, and concludes with the material support for terror. This discussion of Supreme Court jurisprudence provides the groundwork for Part IV's elaboration on the scope of a constitutionally sound statutory initiative for curtailing dangerous terrorist speech on the internet.

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71. *Dennis*, 341 U.S. at 509. Researchers have found that the Court's pronouncement in *Dennis* "led to the arrest and prosecution of dozens of additional CPUSA [Communist Party of the United States] members." Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N.U. L. REV. 261, 273 (2015). In the current categorical rules era of First Amendment jurisprudence, it is unlikely that *Dennis*'s balancing test would withstand constitutional muster. James E. Fleming, *Securing Deliberative Democracy*, 72 FORDHAM L. REV. 1435, 1458 n.149 (2004). While it is Justice Frankfurter's concurrence in *Dennis* that is typically referred to as balancing congressional and speech interests, *see Dennis*, 341 U.S. at 524–26, 542–46 (Frankfurter, J., concurring), the plurality likewise used a version of that method. *Id.* at 510 (plurality opinion) (quoting United States v. Dennis, 183 F.2d 201, 215 (2d Cir. 1950) (Hand, J.) (adopting the "gravity of the evil" test for identifying whether the existing danger justified government imposed restrictions on speech)).

72. *Whitney*, 274 U.S. at 376 (1927) (Brandeis, J., concurring).

73. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

74. Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 617–18 (2014) (defining the peaceful right of association).

A. Incitement Doctrine

Justice Oliver Wendell Holmes first announced the clear and present danger test for incitement in *Schenck v. United States*.[75] The case upheld convictions under the Espionage Act of 1917 against two defendants who had distributed leaflets urging readers to refuse conscription into the military.[76] That World War I era statute criminalized "willfully mak[ing] or convey[ing] false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or . . . promot[ing] the success of its enemies."[77] In his majority opinion, Justice Holmes set out a seminal adjudicative test: "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."[78] This test recognizes the federal government's authority to ensure public safety, especially "[w]hen [the] nation is at war."[79]

With time, the test for incitement and Holmes's thinking on it became refined to distinguish it from merely offensive communications. In his dissent to *Abrams v. United States*, which became one of the most influential statements of First Amendment norms, he wrote eloquently against suppressing the free expression of innocuous political opinions, even those that were averse to government policies.[80] In that case, the majority upheld the convictions of five anarchists for writing and publishing a pamphlet in opposition to the United States' intervention in the Soviet Civil War between the White Armies and the Bolsheviks.[81] Those five were sentenced to jail, despite making general political statements without threatening anyone. Holmes, in dissent, wrote that the expression of controversial speech should not be restricted unless it posed "the present danger of immediate evil or an intent to bring it about."[82] Rather than seeking to suppress offensive ideas, Holmes

75. 249 U.S. 47, 52 (1919).

76. *Id.* at 47–53.

77. Espionage Act of 1917, Pub. L. No. 65-24, ch. 30, tit. I, § 3, 40 Stat. 217, 219 (1917).

78. *Schenck*, 249 U.S. at 52 (emphasis added). Justice Holmes elaborated that the "clear and present danger" question is one of "proximity and degree." *Id.*

79. *Id.*

80. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

81. *See* Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 845 (2008) (explaining the anarchist defendants' political protest).

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

remonstrated, "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[83]

Holmes's principled statement establishes that the First Amendment safeguards the expression of views, even those challenging government operations. Likewise, persons can associate with anti-governmental groups. However, as Justice Brandeis pointed out in a concurrence to a separate case, "[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute" but can be restrained when a conspiracy or incitement poses a clear and present danger of "destruction or . . . serious injury, political, economic or moral."[84] However, as we saw in Part I, much of terrorist communications on the internet are not simple exchanges of ideas but indoctrinations intended to recruit listeners to commit violent offenses.

Fifty years after deciding *Schenck*, the Supreme Court established the current standard for incitement in *Brandenburg v. Ohio*.[85] The Court held the First Amendment protects "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."[86] For clarification, the Court added that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[87]

Scholars have written of *Brandenburg* in its broader context but are often silent about the limitation of its applicability. For instance, Professor Geoffrey Stone praises the case as a bulwark built "to withstand the undue pressure to stifle dissent in wartime."[88] Professor Nadine Strossen likewise reads the case broadly as a general prohibition against statutes that punish "generalized advocacy" that "was neither intended nor likely to cause immediate violent or unlawful conduct."[89] As a general matter, both of these statements are correct; however, neither author adequately accounts

83. *Id.* at 630.

84. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

85. 395 U.S. 444, 447 (1969) (per curiam); *see* Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1159 (2013). While the First Amendment protects debate just as much during peace as it does during periods of war, the persistent uses of the internet by terrorist organizations increases government's interest in placing adequate limits on its dissemination.

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

87. *Id.* (quoting Noto v. United States, 378 U.S. 290, 297–98 (1961)).

88. Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131, 1151 (2004).

89. Nadine Strossen, *Incitement to Hatred: Should There Be a Limit?*, 25 S. ILL. U. L.J. 243, 251 (2001).

for the context of the facts under which the case arose. *Brandenburg* was decided in a very particular circumstance: The only people present at the rally were Ku Klux Klan members and a camera crew, whom the Klan invited. Participants did not intend to intimidate the outsiders nor did anyone direct any fighting words at them.[90] As the Klan's guests, the reporter and cameraman had nothing to fear. Given the speculative nature of the violent threats (for example, "it's possible that there *might* have to be *some* revengeance taken")[91] it is no wonder that the Court overturned Brandenburg's conviction for the State's lack of proof that the comment was an intentional threat or that the rally posed any imminent threat of harm. Under different circumstances, where a fight is likely to imminently break out or specific threats are issued, the judicial analysis will be quite different.

The incitement doctrine applies only to imminently dangerous statements and is hence of limited value to combat internet terrorist incitement. A statute containing such a component could be effective against immediate calls for violence through applications such as Instagram or Snapchat. But the bulk of internet terrorist speech seeks long-term indoctrination, mentoring, recruitment, and so on; hence, policymakers need additional doctrinal guidelines.

B. True Threats

The diffuse nature of the World Wide Web and the typical lack of immediacy of the posts limit the applicability of the *Brandenburg* incitement standard to terrorist content on the internet. The true threats doctrine, which does not contain an imminence component,[92] applies to larger sets of online terrorist postings than was envisioned in the 1960s, when *Brandenburg* was decided. This Section contains a discussion of the three true threats cases most relevant to

90. *Brandenburg*, 395 U.S. at 445–46:

> The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events.

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

92. *See* United States v. Dillard, 795 F.3d 1191, 1200 (10th Cir. 2015) ("Imminence may contribute to a finding that a communication constitutes a true threat, but it is not a required element."); United States v. Fullmer, 584 F.3d 132, 156 (3d Cir. 2009) (asserting that true threats are outside First Amendment protection and can involve instilling "fear in future targets").

adjudication and policy construction: *Watts v. United States*,[93] *Virginia v. Black*,[94] and *Elonis v. United States*.[95]

Watts, which was decided the same year as *Brandenburg*, contains the building blocks for the "true threats" category of unprotected speech.[96] The case arose from a speech that Watts made at an anti–Vietnam War rally. "If they ever make me carry a rifle," he had asserted, "the first man I want to get in my sights is L.B.J."[97] The defendant was subsequently convicted for knowingly and willfully threatening the president.[98] Unlike the defendant in *Brandenburg*, Watts made his statements in a very public, political forum. Upon appeal, the Supreme Court reversed the conviction, holding the statement was not a true threat but protected "political hyperbole."[99] As the Court recognized, the language of politics is often "vituperative, abusive, and inexact."[100] Although the defendant's statements were "crudely offensive," he was not criminally liable because in the context of the anti-war rally his statements could not be construed as threatening.[101]

The *Watts* holding left ambiguity that led to a lower court split as to whether the prosecution needed to prove up that a speaker reasonably foresaw the words' effects on the audience or that a reasonable recipient would understand the statements to be threatening.[102] The Court's most recent definition of the constitutional standard adopted neither of those diverging readings: it held, in *Virginia v. Black*, that the prosecution at a criminal trial is required to

93. 394 U.S. 705 (1969).

94. 538 U.S. 343 (2003).

95. 135 S. Ct. 2001 (2015).

96. *Watts*, 394 U.S. at 705–08.

97. *Id.* at 706 (referring to then President Lyndon Baines Johnson).

98. *Id.*

99. *Id.* at 707–08.

100. *Id.* at 708.

101. *Id.*

102. *See* Doe v. Pulaski Cty. Special Sch. Dist., 306 F.3d 616, 622 (8th Cir. 2002) (explaining how the Ninth and Second Circuits' interpretative standards on true threats differed); *see also* Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1074 (9th Cir. 2002) (relying on an objective test, not containing an immediacy element, about "whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault" (quoting United States v. Orozco–Santillan, 903 F.2d 1262, 1265 (9th Cir. 1990))); United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976) (interpreting *Watts* as a recognition of true threats only in circumstances of "unequivocal, unconditional, immediate and specific" personal threats).

prove the intent of the defendant charged with making true threats.[103] There is no need to demonstrate whether a reasonable person would have understood the statements to be intimidating nor to provide evidence of audience response, but only the intent to threaten.[104] The Court defined true threats to be: "Those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[105] This type of expression is reflective of many forms of terrorist speech on the internet, which we saw in Part I often takes the form of intentional intimidation, motivation, recruitment, and training of others.[106]

The Court's most recent true threats case, *Elonis v. United States*, focused on statutory interpretation but did not seem to alter the constitutional standard in *Black*.[107] *Elonis* overturned the conviction of a defendant charged under a federal law that criminalized interstate and international threatening communications.[108] In his majority opinion, Chief Justice Roberts rejected the interpretation of those circuit courts that had previously found the prosecution needed only to prove that a reasonable person would foresee his words to be threatening to the audience.[109] While the

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103. 538 U.S. 343, 359 (2003) (" 'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.").

104. *Id.* at 359–60 ("The speaker need not actually intend to carry out the threat.").

105. *Id.* at 359.

106. *See* ANTHONY RICHARDS, CONCEPTUALIZING TERRORISM 104 (2015); CATHERINE A. THEOHARY & JOHN ROLLIS, CONG. RESEARCH SERV., R41674, TERRORIST USE OF THE INTERNET: INFORMATION OPERATIONS IN CYBERSPACE 3 (2011).

107. Elonis v. United States, 135 S. Ct. 2001, 2012 (2015); *id.* at 2016 (Alito, J., concurring in part and dissenting in part) ("It is settled that the Constitution does not protect true threats.").

108. 18 U.S.C. § 875(c) (2016).

109. *Elonis*, 135 S. Ct. at 2012:

> In light of the foregoing, Elonis's conviction cannot stand. The jury was instructed that the Government need prove only that a reasonable person would regard Elonis's communications as threats, and that was error. Federal criminal liability generally does not turn solely on the results of an act without considering the defendant's mental state;

see also United States v. White, 670 F.3d 498, 510–11 (4th Cir. 2012) (holding that *Black* did not create a "specific-intent-to-threaten requirement" for cases involving true threats); United States v. Mabie, 663 F.3d 322, 333 (8th Cir. 2011) ("The government need not prove that Mabie had a subjective intent to intimidate or threaten in order to establish that his communications constituted true threats."). *But see* United States v. Sutcliffe, 505 F.3d 944, 953, 960–61 (9th Cir. 2007) (finding that the true threats statute requires proof of specific intent to threaten).

statute had no explicit mens rea provision, the Court found that "wrongdoing must be conscious to be criminal."[110]

The Chief Justice did not revisit *Black*'s definition of true threats.[111] Dicta from Justice Alito's separate opinion in *Elonis*, nevertheless, may supply additional clarity into the doctrine's meaning. He intimated that true threats are unprotected by the First Amendment because they "inflict great harm and have little if any social value."[112] This statement conceives true threats to be low value expressions that have traditionally and historically been unprotected by the First Amendment.[113] True threats are not only dangerous because they may incite others to violent confrontation, but also that they "may cause serious emotional stress for the person threatened."[114] Moreover, Justice Alito asserted that, although the threatening statement may be made in a communication containing other nonthreatening words, this does not require the State to excuse the threatening part of the message.[115]

The true threats doctrine along with the incitement doctrine reviewed in Part II.B provide two pieces of the constitutional puzzle lawmakers will need to put together in constructing a statute prohibiting terrorist threats on social media. It is suited for prosecuting the intentional expression of threats against individuals or groups via social media. Yet, where the terrorist communication is neither immanently dangerous nor intentionally threatening, an additional doctrine fills out the range of initiatives that Congress can pursue.

C. Material Support for Terrorism

As with the true threats doctrine, mens rea is a required element for finding a party culpable under the material support for terrorism statute. In *Holder v. Humanitarian Law Project*, the Supreme Court upheld the constitutionality of a federal statute prohibiting anyone from providing "material support or resources" to organizations that the Secretary of State has designated to be foreign

110. *Elonis*, 135 S. Ct. at 2009 (quoting Morissette v. United States, 342 U.S. 246, 252 (1952)).

111. Virginia v. Black, 538 U.S. 343, 358–59 (2003).

112. *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

113. United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012).

114. *Elonis*, 135 S. Ct. at 2016 (Alito, J., concurring in part and dissenting in part).

115. *Id.*

terrorists.[116] The statute contained a mental component, applying only to anyone who lent support with the "knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts."[117]

Several U.S. nonprofit organizations, including Humanitarian Law Project, brought facial First Amendment challenges to the statute because it criminalized providing "communications equipment" and "expert advice or assistance" to the designated terrorist organizations. Plaintiff sought to provide training in international law, political involvement, and negotiation strategies to the Kurdish Workers' Party and the Liberation Tigers of Tamil Eelam, both groups on the State Department's designated terrorist organization list. Humanitarian Law Project's conduct certainly posed no immediate danger and therefore was protected under *Brandenburg*, and the organization had made no threats and therefore differed from the intentional threat of *Black*. Instead, the Court determined that the federal government had authority to prohibit groups from working with terrorist organizations even when their violent operations were interlinked with more benign functions, such as charity work.[118]

The statute's prohibition against counseling terrorists in the use of scientific, technical, or other specialized knowledge[119] raised concerns about content-based discrimination. The law clearly distinguished between persons disseminating technical and specialized information about negotiations to terrorist organizations and communicating the same to benign entities or parties. Indeed, the statute reached only material support that was coordinated or directed by a foreign terrorist organization, but not independent propaganda on behalf of the group.[120] The matter at bar was, therefore, different than content-based discrimination of simply obnoxious or disfavored communications.[121]

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116. 561 U.S. 1, 40 (2010). The formal title of the statute at bar is Providing Material Support or Resources to Designated Foreign Terrorist Organizations. 18 U.S.C. § 2339B(a) (2006).

117. *Humanitarian Law Project*, 561 U.S. at 12.

118. *See id.* at 29 (deferring to Congress's finding that foreign terrorist organization are so thoroughly saturated with criminal activities that any contributions to them will advance their illegal schemes).

119. 18 U.S.C. § 2339A(b)(3) (2006).

120. *Humanitarian Law Project*, 561 U.S. at 31–32; 18 U.S.C. § 2339B(h).

121. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 789, 805 (2011) (striking down a state statute prohibiting the sale or rental to minors of violent video games "patently offensive to prevailing standards in the community"); Snyder v. Phelps, 562 U.S. 443, 459 (2011) (holding that the First Amendment protects speech even when some audience members find it hurtful and obnoxious); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 574

Under ordinary circumstances, the Court reviews content-based restrictions through the prism of strict scrutiny analysis, examining whether the government has a compelling interest for enforcing the restriction and whether it is narrowly tailored to the policy aim.[122] Indeed, some commentators immediately asserted that the Court decided *Humanitarian Law Project* on the basis of strict scrutiny analysis.[123] The dissent, however, recognized this not to be the case, even criticizing the majority for not demanding the government to prove up the matter under this most rigorous constitutional standard.[124] Presumably because of the grave danger involving terrorist organizations, the Court was more deferential than it might have been under ordinary circumstances. The majority was only willing to identify its analysis to be "more rigorous scrutiny" than the intermediate scrutiny test, unfortunately not providing any clearer alternative standard of review.[125] In what appears to be a lawyerly sleight of hand maneuver, in his later opinion to *William-Yulee*, Chief Justice Roberts reworked the *Humanitarian Law Project* standard of review and in passing cited the case as an example of a strict scrutiny case.[126]

(1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.").

122. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2222 (2015) ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."); Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1673 (2015) (relying on strict scrutiny analysis to uphold a content-based limitation on judicial candidate speech).

123. Eugene Volokh, for instance, asserts that *Humanitarian Law Project* is the "only non-overruled majority opinion upholding a content-based speech restriction under strict scrutiny." Eugene Volokh, Humanitarian Law Project *and Strict Scrutiny*, VOLOKH CONSPIRACY (June 21, 2010, 1:28 PM), http://volokh.com/2010/06/21/humanitarian-law-project-and-strict-scrutiny [https://perma.cc/H9ML-BYS5].

124. *Humanitarian Law Project*, 561 U.S. at 45 (Breyer, J., dissenting) ("[W]here, as here, a statute applies criminal penalties and at least arguably does so on the basis of content-based distinctions, I should think we would scrutinize the statute and justifications 'strictly'—to determine whether the prohibition is justified by a 'compelling' need that cannot be 'less restrictively' accommodated.").

125. *Id.* at 28 (majority opinion).

126. *Williams-Yulee*, 135 S. Ct. at 1665–66 ("The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee's First Amendment challenge. We have emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise." (citing *Humanitarian Law Project*, 561 U.S. at 25–39; McConnell v. FEC, 540 U.S. 93, 314 (2003), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995); Burson v. Freeman, 504 U.S. 191, 211 (1992))).

This was not the first time the Chief modified a holding in a string cite, without explanation or analysis. In *McCutcheon v. Federal Election Commission*, Roberts cited to a 1977 case, *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977), for the proposition that the First Amendment protects "Nazi parades." 134 S. Ct. 1434, 1441 (2014). That claim, however,

Indeed, it is likely that the outcome of the case would have been the same even if the Court engaged in strict scrutiny review because the government was pursuing one of its core, compelling functions, defined by the Preamble to the Constitution, to provide for the nation's common defense.[127] It would have seemed logical, therefore, for the Court to find that prohibiting individuals and groups from advancing the causes of terrorists is compelling. Furthermore, the majority in *Humanitarian Law Project* found that in this case criminal liability was attached to "a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations."[128]

Under ordinary circumstances communication with a group, especially about political topics such as participation in international forums, would be protected free speech. This would even be the case if the subject of the conversation were to be the abstract praise or even support for revolution, overthrow, or violence. Indeed, the Court noted that the statute did not prohibit "independent advocacy," defense, or espousal of ideology, but only knowingly proving support.[129] However, context matters, as it did under the different circumstances in

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grossly distorted the holding in *National Socialist Party of America*, which ordered a remand of a case on the purely procedural grounds that judicial review of lower court injunctions implicating the First Amendment could not be delayed, but must provide for "immediate appellate review." 432 U.S. at 43–44.

The Chief Justice in fact appears to be a master of distorting past holdings to meet the contingency of his ideological conclusions, acting more like an advocate than judge. Another poignant example of his skill appears in recent voting rights cases: his presentation of state equality in *Northwest Austin Municipal Utility District Number One v. Holder* relied on an earlier voting rights decision, *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966), for the proposition that the doctrine of state "equal sovereignty" has precedential basis. *Northwest Austin*, 557 U.S. 193, 203 (2009). But the quote in *Northwest Austin* from *Katzenbach* Roberts introduced—"Distinctions can be justified in some cases. 'The doctrine of the equality of States . . . does not bar . . . remedies for local evils which have subsequently appeared.' *Katzenbach*"—skillfully used an ellipsis to obfuscate a key portion of the statement in *Katzenbach*, which limited the concept of equal state sovereignty to admission to the Union. 383 U.S. at 328–29 ("The doctrine of the equality of States, invoked by South Carolina, does not bar this approach, for that doctrine applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."). Later, in *Shelby County*, the Chief actually quoted the entire passage from *Katzenbach*, (including those parts he excluded in *Northwest Austin*), but not letting the limiting language ("applies only to the terms upon which States are admitted to the Union") stop his internal drive to create a firm foundation for equal state sovereignty, he actually cited his own distortion in *Northwest Austin* for "the fundamental principle of equal sovereignty." Shelby Cty. v. Holder, 133 S. Ct. 2612, 2624 (2013). About the Chief's sleight of hand, Justice Ginsburg remarked, "[T]he Court ratchets up what was pure dictum in *Northwest Austin*, attributing breadth to the equal sovereignty principle in flat contradiction of *Katzenbach*." *Id.* at 2649 (Ginsburg, J., dissenting).

127. *Humanitarian Law Project*, 561 U.S. at 40.

128. *Id.* at 26.

129. *Id.* at 16, 23.

Brandenburg, and when those statements are made in concert with an organization or individual committed to political violence, content that is protected in other circumstances can be regulated to protect the public from terrorism. In the case of the material support statute, however, government interest is not the suppression of some political message. Rather, it is to impede terrorist organizations from using the power of propaganda to advance violent wings of the organization.[130] The Court accepted the government's argument that the "fungible" nature of resources Humanitarian Law Project sought to provide terrorists would help them gain "legitimacy" in international forums, empower their recruitment efforts, and help "raise funds."[131] Therefore, the majority in *Humanitarian Law Project* found that terrorist organizations typically lack the "firewalls" to prevent material support from sympathetic charitable organizations from being funneled into their maleficent activities.[132]

Given that the government has no means of exploring the financial or organizational records of all foreign terrorist organizations, a complete ban on material support is a narrowly tailored means of providing for national security. In *Humanitarian Law Project*, the majority should have been more systematic in explaining whether or the extent to which the government's fundamental responsibility for national security did not require as close a tailoring as might have been expected in ordinary content restriction cases involving no similarly grave constitutional charge.[133] The closest the Court came to explaining that deference was to mention that the Preamble to the Constitution establishes national security to be a foremost national obligation.[134] Therefore, the government could have argued that it has a proportionately compelling reason to enforce a limited restriction on individuals from teaching terrorist organizations that have not renounced political violence how to exploit international legal channels and

130. In 2016, litigants filed a federal lawsuit against Facebook for claiming it "knowingly provided material support and resources to Hamas . . . facilitat(ing) this terrorist group's ability to communicate, recruit members, plan and carry out attacks, and strike fear in its enemies." Dan Williams, *Relatives of Palestinian Attack Victims Sue Facebook for $1 Billion in U.S.*, REUTERS (July 11, 2016), http://www.reuters.com/article/us-israel-palestinians-facebook-idUSKCN0ZR1G0 [https://perma.cc/6PQM-GRTJ].

131. *Humanitarian Law Project*, 561 U.S. at 30–32.

132. *Id.* at 30–31.

133. *See* Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 489 (2013) (discussing the greater deference the Court gives to congressional initiatives in matters of national security).

134. *Humanitarian Law Project*, 561 U.S. at 40.

instruments.[135] Each incremental aid for terrorists to strengthen their standing and influence increases the ability of the leadership to simultaneously carry out destructive missions.[136] Moreover, as the majority recognized, the advice Humanitarian Law Project proposed to provide terrorists was likely to strengthen their hands at the negotiation table because "material support of a terrorist group's lawful activities facilitates the group's ability to attract 'funds,' 'financing,' and 'goods' that will further its terrorist acts."[137]

The Court's rationale and ruling in *Humanitarian Law Project* provides valuable guidance for drafting a federal criminal statute against sponsoring, propagandizing, or recruiting in cooperation with terrorists and their organizations. It indicates why there is a compelling interest to act against social media postings that seek to cooperate, legitimate, recruit, coordinate, or indoctrinate on behalf of groups listed on the State Department's list of designated terrorist organizations. Part IV develops the framework of such a statute without offending First Amendment principles. It likewise explains the compellingly important reasons for restricting imminently dangerous and directly threatening terrorist speech on social media. Part V then reflects on several academic criticisms to the use of material support for terror as a basis of content-based restrictions. Before turning to those discussions, it is enlightening to gain further insight from international efforts against hate speech in general and against destructive messages disseminated over the internet in particular.

III. INTERNATIONAL AND FOREIGN LAWS AGAINST INCITEMENT AND TERROR

As is the case in the United States, representative democracies and international entities throughout the world treat freedom of speech as a fundamental right. At the international level, the Universal Declaration of Human Rights ("UDHR"), adopted by the U.N. General Assembly in 1948, proclaimed that "everyone has the

135. Vicki Jackson makes the interesting point that rather than a categorical prohibition against material support of terrorism, the Court could have provided greater clarity and justification for its holding in *Humanitarian Law Project* by relying on proportionality analysis to identify why narrow tailoring analysis may be altered or modified "in some class of national security cases." Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3139–40 (2015).

136. *See* Boim v. Holy Land Fund for Relief & Dev., 549 F.3d 685, 698 (7th Cir. 2008).

137. *Humanitarian Law Project*, 561 U.S. at 32 n.6.

right to freedom of opinion and expression."[138] Furthermore, since the adoption of UDHR, freedom of speech provisions have been "included in all international human rights treaties."[139] Unlike the United States, however, the international community is less tolerant of terrorist propaganda and less hesitant about criminalizing its dissemination.[140] There is a broad consensus in the international community—manifested by treaties, conventions, and protocols—that virulent group defamation has instigated the perpetration of a variety of crimes against humanity, including the Holocaust and Rwandan genocide.

The U.N. Office on Drugs and Crime has identified various terrorist propaganda on the internet, including the sharing of extremist ideas; "recruitment, radicalization, and incitement to terrorism"; procuring financial support; disseminating misinformation; and spreading alarm and fear in the population.[141] The increasing use of internet technology by international terrorists has ignited a global debate over the legitimacy of regulating terrorist incitements. Domestic initiative and international cooperation is essential to address international terrorism, which is composed of non-state actors who coordinate, plan, and incite attacks in an effort to affect the outcomes of politics. Therefore, it is useful to examine how the international community and foreign countries, especially those with a strong tradition of protecting free expression, address the dissemination of terrorism on the internet.

A. United Nations Efforts Against International Incitement

The roots of international efforts against terrorism lie in long-standing norms against hateful incitement directed at groups. The enormous scale of the Holocaust and the effectiveness of Nazi propaganda in recruiting followers to commit crimes against humanity

138. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."); *see* ALEXANDER TSESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR DESTRUCTIVE SOCIAL MOVEMENTS 180–81 (2002); Tsesis, *supra* note 36, at 501.

139. WIBKE K. TIMMERMANN, INCITEMENT IN INTERNATIONAL LAW 54 (2014).

140. *See* Eric De Brabandere, *The Regulation of Incitement to Terrorism in International Law*, *in* BALANCING LIBERTY AND SECURITY: THE HUMAN RIGHTS PENDULUM 219 (Ludovic Hennebel & Helene Tigroudja eds., 2011).

141. *The Use of the Internet for Terrorist Purposes*, U.N. OFF. DRUGS & CRIME 4–5 (Sept. 2012), http://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf [https://perma.cc/6BGV-E82G].

catalyzed early international efforts to address the dangers of incitement.[142] After World War II, the international community recognized a pressing need to establish collaborative norms for limiting the dissemination of hatred. The United Nations took the first step in this process in 1948, when the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide. Among the signatories obligations is to punish "[d]irect and public incitement to commit genocide."[143] Two decades later, U.N. members passed the International Covenant for Civil and Political Rights ("ICCPR"), which recognized incitement to be a threat to international peace and security.[144] Article 20(2) of the ICCPR requires states to prohibit "incitement to hatred."[145] It reads, in relevant part: "Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."[146] Article 20(2) is read in conjunction with the protection on free expression located in Article 19(2).[147]

In addition to the broader conventions against hatred, genocide, and violence, U.N. Security Council Resolution 1624 specifically calls for signatories to prevent and prohibit terrorist incitements.[148] The collective goal of Resolution 1624, which was passed in the aftermath of the London terrorist attack of July 7, 2005, is for states to "adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to . . . [p]rohibit by law incitement to commit a terrorist act or acts."[149] Danish Prime Minister Anders Rasmussen captured the essence of Resolution 1624: "Freedom of speech and expression is the very foundation of any modern democratic society,

142. TSESIS, *supra* note 138, at 180–81.

143. Convention on the Prevention and Punishment of the Crime of Genocide art. 3(c), Dec. 9, 1948, 78 U.N.T.S. 277.

144. De Brabandere, *supra* note 140, at 221–22.

145. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

146. *Id.*

147. *Id.* art. 19:

> (1) Everyone shall have the right to hold opinions without interference. (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary . . . .

148. S.C. Res. 1624, ¶ 1 (Sept. 14, 2005).

149. *Id.*

but that must never be an excuse for inciting terrorism and fostering hatred."[150] Despite the call upon the international community to criminalize terrorist incitement, Resolution 1624 lacks a clear roadmap for country-by-country enactment.

Three years after its adoption, the U.N. Secretary-General offered a definition for the incitement to terrorism: "Incitement can be understood as a direct call to engage in terrorism, with the intention that this will promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring."[151] Several provisions of the resolution call on member states to prohibit incitement, recruitment, and training of terrorism, "when committed intentionally" through the use of internet technology or by other means.[152] Like the material support statute in the United States, Resolution 1624 is drafted to allow for the criminalization of aiding and abetting terrorists by incitement, recruitment, and coordination.

B. European Convention on the Prevention of Terrorism

While Resolution 1624 was a call for the international community to enact domestic laws proscribing direct incitement to terrorism, the Council of Europe took a more practical step to advancing the Resolution's terms by passing the European Convention on the Prevention of Terrorism.[153] The Council—which represents forty-seven countries, twenty-eight of them members of the European Union—seeks to advance human rights through international conventions. Its initiative to prevent terrorism is part of a cooperative effort to prosecute the growing incidents of terrorism without negatively impacting the freedoms of expression and association.[154] The Convention includes a provision, Article 5, requiring each member state to criminalize the "public provocation to commit a terrorist offence."[155] The Convention defines "public provocation" as the "distribution, or otherwise making available, of a message to the

150. Quoted in De Brabandere, *supra* note 140, at 226.

151. U.N. Secretary-General, *The Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 61, U.N. Doc. A/63/337 (Aug. 28, 2008).

152. Council Framework Decision 2008/919/JHA of 28 November 2008 Amending Framework Decision 2002/475/JHA on Combating Terrorism, 2008 O.J. (L 330) 8–11.

153. *Council of Europe Convention on the Prevention of Terrorism*, COUNCIL EUR. (May 16, 2005), http://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008371c [https://perma.cc/48F3-GXJR].

154. *Id.* at pmbl. ("Recognising that this Convention is not intended to affect established principles relating to freedom of expression and freedom of association.").

155. *Id.* art. 5.

public, with the intent to incite the commission of a terrorist offense, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offenses may be committed."[156] As with the U.S. true threats and material support doctrines, Article 5 applies only when the speaker has specific intent and when the utterance is directed at the public.

Where Article 5 differs from U.S. law is in the provision that prohibits not only direct advocacy but also "indirect incitement," including "*apologie*" for terrorism.[157] Laws that criminalize the *apologie* of terrorism, also known as "glorification of terrorism," proscribe speech that publicly praises, supports, or justifies terrorism or terrorist acts.[158] The regulation of *apologie* to terrorism is significantly more controversial than traditional incitement statutes,[159] and anything comparable in the United States would likely be found unconstitutional. On the other hand, Article 5 appears to be in keeping with precedents of the European Court of Human Rights.

The broad European understanding of public harm against which the state can act is reflected in the holding of the European Court of Human Rights ("ECHR") in the *Leroy v. France* decision.[160] In *Leroy*, a French cartoonist published a cartoon on September 13, 2001, depicting the Twin Towers attack and the caption: "We have all dreamt of it . . . Hamas did it."[161] The cartoonist was convicted and fined €1,500 for condoning and glorifying terrorism. The European Court of Human Rights later upheld his conviction because, in addition to being political commentary about perceived American imperialism, the cartoon glorified terrorism and attacked the dignity of its many victims.[162] Moreover, the ECHR found the drawings were capable of stirring up violence.[163] For a U.S. appellate court to uphold

156. *Id.*

157. De Brabandere, *supra* note 140, at 232–34.

158. *Id.* (citing the Council of Europe Committee of Experts on Terrorism definition of *apologie*).

159. For background on the differing methods states have used to combat indirect incitement, see Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT'L SEC. J. 1, 5–19 (2011).

160. *Leroy v. France*, App. No. 36109/03, Eur. Ct. H.R. (Oct. 2, 2008), http://hudoc.echr.coe.int/eng?i=002-1888#{"itemid":["002-1888"]} [https://perma.cc/2HLM-592W].

161. Dirk Voorhoof, *European Court of Human Rights Case of* Leroy v. France, IRIS LEGAL OBSERVATIONS OF THE EUROPEAN AUDIOVISUAL COMMUNITY, IRIS 2009-2:2/1, http://merlin.obs.coe.int/iris/2009/2/article1.en.html [https://perma.cc/EXF7-YFF5].

162. *Id.*

163. Press Release, Registrar of the European Court of Human Rights, Chamber Judgment: Leroy v. France (Feb. 10, 2008), http://www.legislationline.org/documents/id/18026 [https://perma.cc/XEW8-V72D].

such a conviction, the likelihood of violence would have to be imminent, of which there was no indication. Moreover, the cartoonist was neither threatening anyone nor cooperating with a terrorist organization. Therefore, this parody would have almost certainly been protected by the First Amendment in the United States.

In a more recent French case, the French comedian Dieudonne M'Bala M'Bala was arrested for terrorism *apologie* made after the attack on the satirical magazine *Charlie Hebdo*.[164] Immediately following the attack, the phrase "*Je suis Charlie*," meaning "I am *Charlie*," became a popular French expression of solidarity with the victims and the right of self-expression and political affirmation. Playing on this statement, Dieudonne tweeted, "*Je suis Charlie Coulibaly*," translated "I am Charlie Coulibaly."[165] The tweet referred to Amedy Coulibaly, who was one of the four gunmen connected with the Charlie Hebdo shooting.[166] Dieudonne was among fifty-four persons arrested by French authorities for the *apologie* of terrorism.[167] A Parisian court later convicted Dieudonne for supporting terrorism on the internet and sentenced him to a two month suspended sentence for a Facebook post sympathizing with terrorist gunmen.[168] As crude and sympathetic to terrorism as Dieudonne's statements were, it is highly unlikely that he would have been similarly convicted in the United States.

C. Democracies' Curbs on Digital Terrorist Propaganda

In an effort to bolster British security following the July 7, 2005, London terror attacks and in keeping with the terms of the

164. Krishnadev Calamur, *Controversial French Comedian Arrested over Facebook Post on Paris Attacks*, NPR (Jan. 14, 2015, 11:46 AM), http://www.npr.org/blogs/thetwo-way/2015/01/14/377201227/controversial-french-comedian-arrested-over-facebook-post-on-paris-attacks [https://perma.cc/S65X-MV6W].

165. *Id.*

166. *Id.*

167. *Id.*

168. Aurelien Breeden, *Comic Is Guilty in Terror-Speech Case in Paris*, INT'L N.Y. TIMES, Mar. 19, 2015, at 4. Adding to Dieudonné's legal troubles, a Belgian court, sitting in the City of Liege, later convicted him on separate charges for inciting hatred. Henry Samuel, *French Comedian Dieudonné Sentenced to Two Months in Prison*, TELEGRAPH (Nov. 25, 2015, 11:39 AM), http://www.telegraph.co.uk/news/worldnews/europe/belgium/12015954/French-comedian-Dieudonné-sentenced-to-two-months-in-prison.html [https://perma.cc/JNT8-3CCV]. The court fined him nine thousand euros for a comedy routine in the City in which he expressed doubt that Jews were killed in gas chambers. *Id.* In a different case altogether, the European Court of Human Rights convicted Dieudonné, reasoning that free speech guarantees do not protect racist and "anti-Semitic comments." Dan Bilefsky, *Court Rules Against French Comedian Dieudonné in Free-Speech Case*, N.Y. TIMES (Nov. 10, 2015), http://www.nytimes.com/2015/11/11/world/europe/dieudonne-mbala-mbala-france-european-rights-court.html [https://perma.cc/46YY-WSYX].

European Convention on the Prevention of Terrorism, the United Kingdom passed the Terrorism Act of 2006.[169] The Act criminalizes the intentional or reckless encouragement of others to commit terrorism,[170] the purposeful distribution of terrorist publications, and the purposeful provision of service "to others that enables them to obtain, read, listen to or look at such a publication, or to acquire it by means of a gift, sale or loan."[171]

Opponents of the Act have warned that the government may abuse its power to intrude on privacy. Those concerns, while authentic, have not been borne out in practice; the United Kingdom has been very judicious in bringing charges under the law. Despite the hesitancy of officials, there have been several notable achievements. In 2011, Mohammed Gul received five years in jail for creating compilation videos depicting terrorist attacks with extremist commentary.[172] In a 2010 case, an East London student, Roshonara Choudhry, whose radicalization was influenced by extremist sermons that she discovered on the internet, was convicted for attempting to murder a member of Parliament.[173] The same year, Shasta Khan began reading, listening to, and studying radical materials found on the internet, such as al-Awlaki sermons and articles in the al-Qaeda magazine *Inspire*.[174] She and her husband were eventually convicted after they began planning an antisemitic terrorist act, engaging in reconnaissance missions to Jewish sites, and gathering bomb-making

169. For a summary of the U.K. Terrorism Act 2006, see Tufyal Choudhury, *The Terrorism Act 2006: Discouraging Terrorism*, *in* EXTREME SPEECH AND DEMOCRACY 463–87 (Ivan Hare & James Weinstein eds., 2009).

170. Terrorism Act 2006, c. 11, § 1 (U.K.).

171. *Id.* § 2.

172. *See Islamic Terrorist Propaganda Student Mohammed Gul Jailed*, BBC NEWS (Feb. 25, 2011), http://www.bbc.com/news/uk-england-london-12576973 [https://perma.cc/4YPZ-NYQG]; *see also Radical Preacher Anjem Choudary Jailed for Five Years*, BBC NEWS (Sept. 6, 2016), http://www.bbc.com/news/uk-37284199 [https://perma.cc/AMC3-JASG] (reporting that an imam, whose "followers carried out attacks in the UK and abroad," was convicted and sentenced to five years for preaching radical doctrine and posting online a statement of allegiance to ISIS).

173. DAVID ANDERSON, THE TERRORISM ACTS IN 2012: REPORT OF THE INDEPENDENT REVIEWER ON THE OPERATION OF TERRORISM ACT 2000 AND PART 1 OF THE TERRORISM ACT 2006 § 2.23 (July 2013), https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/07/Report-on-the-Terrorism-Acts-in-2012-FINAL_WEB1.pdf [https://perma.cc/LP9N-74AY]; Dodd, *supra* note 60; Vikram Dodd, *Roshonara Choudhry: Police Interview Extracts*, GUARDIAN (Nov. 3, 2010), https://www.theguardian.com/uk/2010/nov/03/roshonara-choudhry-police-interview [https://perma.cc/RMA4-X2VF].

174. Shiraz Maher & Alexander Meleagrou-Hitchens, *ICSR Insight—Jihad at Home*, ICSR (July 7, 2012), http://icsr.info/2012/07/icsr-insight-jihad-at-home/ [https://perma.cc/ZX2Q-WJJL]; *Oldham Wife Shasta Khan Guilty of Jewish Jihad Plan*, BBC NEWS (July 19, 2012), http://www.bbc.com/news/uk-england-manchester-18882619 [https://perma.cc/KLP7-9RQS].

materials.[175] In a separate case, three men who promoted terrorism on the internet were sentenced in 2007 to ten years in prison.[176]

As Part I of this Essay demonstrated, terrorists have found the internet to be effective for indoctrination, propagandizing, and recruitment. The U.K.'s Terrorism Act of 2006 is even more focused in its terms for combatting these evils than the U.S. material support statute. Both are national approaches designed to aggressively address threats that impact public safety.

Additionally, the U.K. Data Retention and Investigatory Powers Act 2014 requires public telecommunications operators, such as internet service providers ("ISPs"), to "retain relevant communications data" that the Secretary of State deems necessary to investigate allegations of terrorist activities.[177] In response to this statutory requirement, the United Kingdom's major ISPs—BT, Virgin, Sy, and Talk Talk—now feature a public hyperlink to facilitate the reporting of terrorist materials online to the Counter Terrorism Internet Referral Unit.[178] Placing conditions on ISPs to monitor the content of their digital traffic is controversial because it can be abused to suppress legitimate communications. But the United Kingdom is by no means alone in this effort.

The French government has taken a similarly cooperative approach by entering into agreements that require French ISPs to filter materials containing "child pornography, terrorism, or hate speech."[179] The French Interior minister claimed that ninety percent of people recruited to terrorism are indoctrinated through internet content.[180] France has recently enlisted the support of Apple, Facebook, Google, and Twitter to help the government ward off terrorism.[181] The new regulation, which requires ISPs to delist offending websites from web searches, can lead to rapid responses to

175. Maher & Meleagrou-Hitchens, *supra* note 174.

176. *UK Court Jails Trio Who Incited Terrorism over Web*, REUTERS (July 5, 2007), http://www.reuters.com/article/us-britain-security-internet-idUSL0485000520070705 [https://perma.cc/AP64-K4KR].

177. Data Retention and Investigatory Powers Act 2014, c. 27, § 1 (U.K.), *amended by* Counter-Terrorism and Security Act 2015, ch. 3, § 21 (U.K.).

178. Patrick Wintour, *UK ISPs To Introduce Jihadi and Terror Content Reporting Button*, GUARDIAN (Nov. 13, 2014, 10:17 PM), http://www.theguardian.com/technology/2014/nov/14/uk-isps-to-introduce-jihadi-and-terror-content-reporting-button [https://perma.cc/5TRH-3RFA].

179. Derek E. Bambauer, *Cybersieves*, 59 DUKE L.J. 377, 401 (2009).

180. Frédéric Donck, *EU Issues Overview—14–20 February 2015*, ISOC EUR. REGIONAL BUREAU NEWSL. (Internet Soc'y), Feb. 23 2015, at 3.

181. *Id.*

truly threatening posts and exchanges.[182] The cooperative relationship between government and private actors is not fully voluntary as ISPs, telecommunication services, and web-hosting services must cooperate with French intelligence units.[183] Some civil rights groups have raised understandable concerns about the potential for government overreaching. An appeals process to an administrative court offers persons who are opposed to the order an opportunity to challenge takedown demands, which the French Central Office on the Fight Against Crime is empowered to enforce.[184]

In the Netherlands, General Civil Penal Code Article 147c prohibits anyone from spreading information that encourages others to commit terrorist actions.[185] Another provision of that country's code, Article 147d, prohibits anyone from providing material support to terrorist organizations or recruiting anyone to participate in one.[186] In 2015, Ishaq Ahmed and another man were indicted under Article 147 for pledging to raise money for ISIS to send to fighters in Syria along with other equipment, such as clothes and shoes.[187] Ministers from other European democracies—Austria, Germany, Sweden, Denmark, Italy, Spain, Latvia, Belgium, and Poland—have likewise agreed in principle to work with social media companies to combat terrorists' persistent, regular, and effective uses of cyberspace.[188]

Given the nature of the internet, multi-state cooperation is most likely to significantly stunt the spread of terrorist ideology.

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182. Amar Toor, *France Can Now Block Suspected Terrorism Websites Without a Court Order*, VERGE (Feb. 9, 2015, 7:01 AM), http://www.theverge.com/2015/2/9/8003907/france-terrorist-child-pornography-website-law-censorship [https://perma.cc/454J-JMB7].

183. Bertrand Liard & Alexis Tandeau, *New French Act on Intelligence Services: Impacts on Technical Operators*, WHITE & CASE (Sept. 11, 2015), www.whitecase.com/publications/article/new-french-act-intelligence-services-impacts-technical-operators [https://perma.cc/AQ6D-NKN7].

184. *France Implements Internet Censorship Without Judicial Oversight*, EDRI (Mar. 11, 2015), https://edri.org/france-censorship-without-judicial-oversight/ [https://perma.cc/VM58-LR3Q].

185. Almindelig borgerlig Straffelov 22 mai 1902 §§ 147(a)–162(c). For an English translation, see *The General Civil and Penal Code with Subsequent Amendments, the Latest Made by Act of 21 December 2005 No. 131*, NORWEGIAN MINISTRY OF JUST. LEGIS. DEP'T (2006), http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19020522-010-eng.pdf [https://perma.cc/8L6S-JB8G].

186. *Id.*

187. *Two Men Charged Under Norway Anti-terror Law*, LOCAL (May 11, 2015, 2:09 PM), http://www.thelocal.no/20150511/norway-charges-fourth-man-under-anti-isis-law [https://perma.cc/4523-ZJ6E]. Article 147a establishes factors for determining the gravity of the terrorist offence. Almindelig borgerlig Straffelov 21 desember 2005 § 147(a).

188. Sam Trendall, *Politicians Across Europe Call on ISP 'Partnerships' To Help Fight Terror*, CHANNELNOMICS (Jan. 12, 2015), http://www.channelnomics.eu/channelnomics-eu/news/2389789/politicians-across-europe-call-on-isp-partnerships-to-help-fight-terror [https://perma.cc/NU7R-KC74].

Accordingly, the European Commission created a European Union Internet Referral Unit on July 1, 2015, for tracking terrorist materials online.[189]

In North America, Canada adopted a statute, C-51, which empowers officials to seize and take down terrorist propaganda after obtaining a court order.[190] The statute passed in June 2015; it is, therefore, still too early to know whether, as its critics claim, Canada will exploit the law to abuse police powers. Given the country's historical commitment to human rights and free speech, it is more likely that the Canadian judiciary will place limits on investigators seeking takedown orders to preserve citizens' deliberation and safety. The real challenge will be applying the law fairly without engaging in arbitrary content restrictions. But on its face, C-51 concerns only terrorist propaganda, communications that are outside the realm of Canadian free speech protections, as are material support and true threats.

A consensus understanding already exists around the world about the dangers to public order posed by terrorist uses of the internet. Many democracies have either adopted or are developing legislation that permits greater regulation of internet propaganda and recruitment. The difficulty is the same today as it was a decade ago: governments must develop policies effectively safeguarding public well-being while staying true to the European commitment to preserving online privacy. While the European and Canadian policies balance speech and privacy differently than the United States' approach—with Europe tending to be less libertarian and more driven by privacy concerns than the United States—they share an obligation to safeguard public safety against terrorism.

IV. DRAFTING A UNITED STATES CYBERSPACE TERRORIST STATUTE

This Part of the Essay sets out an urgently needed statutory framework for regulating internet-based terrorist incitement, propaganda, and indoctrination. Self-policing by social networks has proven only partly adequate for identifying and removing such posts, particularly without any criteria of what constitutes incitement and

189. Press Release, European Commission, Implementing the European Agenda on Security—New Measures to Combat Terrorism and Illicit Trafficking of Firearms and Use of Explosives (Dec. 2, 2015), http://europa.eu/rapid/press-release_MEMO-15-6219_en.htm [https://perma.cc/D2GC-FM2J].

190. Anti-terrorism Act, S.C. 2015, c C-51 (Can.); Laura Payton, *Anti-terrorism Powers: What's in the Legislation?*, CBC NEWS (Jan. 30, 2015, 1:25 PM), http://www.cbc.ca/news/politics/anti-terrorism-powers-what-s-in-the-legislation-1.2937964 [https://perma.cc/ZRA7-ANW4].

where the line is between merely "loathsome" speech and true threats.[191] While companies like Yahoo, Facebook, and Twitter are able to carefully filter advertising content to their users, they choose not to eliminate messages of terrorist organizations using their servers. A national law is needed to prohibit conduct closely tracking the doctrines set out in Part II: a law regulating terrorist communication on the internet should prohibit imminently dangerous, truly threatening, and materially supportive forms of terrorist digital content. However, even political support of heinous terror speech that poses no danger, expresses no intentional menace, nor is coordinated with any designated terrorist organization is protected by First Amendment norms of deliberation, self-expression, and dissemination of information.

The need for a law prohibiting terrorist incitement on the internet is evidenced by the widespread assessment in the national security community—foremost the views of the Republican Chair, Richard Burr, and the Democratic Vice Chair, Dianne Feinstein, of the Senate Select Committee on Intelligence—that, in addition to existing surveillance laws, an additional statute should be passed to prevent terrorist recruitment, distribution of information, and planning through social media.[192] That bill is currently in the re-drafting stage, and this Essay aims to aid in the write-up process.

We need not solely accept the views of politicians. Part I of this Essay provided examples of how persons who attempted or perpetrated acts of terror had earlier been radicalized through postings they accessed online. For example, one of the two San Bernardino terrorists, who together murdered fourteen people, had pledged her support of ISIS on Facebook.[193] Organizations like ISIS

191. *See* Alex Hern, *Google's Eric Schmidt Calls for 'Spell-Checkers for Hate and Harassment,'* GUARDIAN (Dec. 8, 2015, 5:05 PM), http://www.theguardian.com/technology/2015/dec/08/googles-eric-schmidt-spell-checkers-hate-harassment-terrorism [https://perma.cc/T887-RSNZ] ("Chairman says everyone should work together to fight terrorism online and to de-escalate tensions on social media, but does not set out any plans."); Deepa Seetharaman et al., *Social Websites Hunt for Terror Posts*, WALL ST. J. Dec. 7, 2015, at B1 (discussing how such companies must make judgment calls).

192. Press Release, Senator Dianne Feinstein, Bill Would Require Tech Companies to Report Online Terrorist Activity (Dec. 8, 2015), http://www.feinstein.senate.gov/public/index.cfm/2015/12/bill-would-require-tech-companies-to-report-online-terrorist-activity [https://perma.cc/HG72-9M6R].

193. For statements in support of the Combat Terrorist Use of Social Media Bill of 2015, see 161 CONG. REC. H9314–17 (daily ed. Dec. 15, 2015) https://www.congress.gov/congressional-record/2015/12/15/house-section/article/H9314-3.

make consistent uses of social media to shock, threaten, and communicate ideology.[194]

Intelligence agencies, such as the Federal Bureau of Investigation, have identified terrorist groups' "widespread reach through the internet and social media."[195] Expert testimony before congressional committees, such as the Senate Committee on Homeland Security and Government Affairs, shows that military strategy against terrorist groups should coincide with government efforts to undermine their social media communication campaigns.[196] In separate research, Professor Gabriel Weimann has found that terrorists regularly use platforms like Facebook and Twitter to upload and download videos, send messages, recruit, instruct, and train. An example of this nefarious training is the Boston Marathon bombers, the Tsarnaev brothers, who learned how to design the bomb using Al-Qaeda's online publication.[197]

This Essay focuses on the regulation of propaganda to incite terrorism, the intentional dissemination of serious expressions of violence directed at particular individuals or groups, and the solicitation or provision of assistance to designated terrorist organizations.[198] It seeks to resolve the quandary of how to maintain the First Amendment interest in protecting offensive speech, even speech that abstractly extolls acts of terror, while drawing up some narrowly drafted prohibitions. Scholars like Professor Ashutosh Bhagwat are correct to argue that the First Amendment freedom of association does not extend to violent terrorist groups; on the other hand, I think it is mistaken to believe that the Free Speech Clause does not enable government to prohibit violent political advocacy.[199] Speech protection is not absolute, and many speech-protective

194. P.W. Singer & Emerson Brooking, *Terror on Twitter*, POPULAR SCI. (Dec. 11, 2015), http://www.popsci.com/terror-on-twitter-how-isis-is-taking-war-to-social-media [https://perma.cc/V3WR-N56V].

195. *"Threats to the Homeland"*: *Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 2 (2015) (statement of James B. Comey, Director, Federal Bureau of Investigation).

196. *See Jihad 2.0: Social Media in the Next Evolution of Terrorist Recruitment: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 114th Cong. 2 (2015) (statement of Daveed Gartenstein-Ross, Senior Fellow, Foundation for Defense of Democracies) (discussing ISIS's use of social media platforms such as Twitter for terrorist recruitment).

197. Gabriel Weimann, *Terrorism in Cyberspace*, FATHOM (2015), http://fathomjournal.org/terrorism-in-cyberspace/ [https://perma.cc/JUH5-A5PE].

198. *See* discussion *infra* Part IV.

199. *See* Bhagwat, *supra* note 74 (arguing that "purely independent" speech in support of terrorism, without coordination with a terrorist organization, may be protected by the First Amendment).

democracies around the world do not shield the dissemination of terrorist ideologies.[200]

U.S. politicians on both sides of the aisle have proposed solutions to address the proliferation of menacing, indoctrinating, and organizing terrorist posts. Former Secretary of State Hillary Clinton suggested that social media companies—such as Facebook, Snapchat, and Twitter—take down terrorist posts and websites.[201] But exclusively voluntary compliance is unlikely to result in rigorous enough efforts by companies for such sites, which have for years been forums for terrorism, to eliminate the problem.[202] Given the extreme danger to national security of terrorism, voluntary schemes are insufficiently robust. While some social media providers (like Twitter) have made a good beginning by policing their sites,[203] these efforts are predicated on business sensibilities rather than on public policy; therefore, their lists of terror groups might not be identical to the State Department's. Furthermore, the First Amendment applies to government action, not to the private conduct of cyber-businesses, who might therefore target too much or too little speech without incurring liability. Criminal penalties, notice requirements, and injunctive relief are required to combat the quickly growing problem.

At the other end of the political spectrum from Clinton, President Donald Trump has previously suggested that it might be appropriate for the government to shut off the internet to specific geographic locations.[204] Trump's initiative would deploy a dragnet that would sweep up terrorist speech, but it also runs the risk of dredging

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200. For example, in the United States, advocacy directed to producing imminent lawless action, and likely to produce such action, is unprotected incitement. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

201. David E. Sanger, *Hillary Clinton Urges Silicon Valley to 'Disrupt' ISIS*, N.Y. TIMES (Dec. 6, 2015), http://www.nytimes.com/2015/12/07/us/politics/hillary-clinton-islamic-state-saban-forum.html [https://perma.cc/7TVX-WZH7]. In her December 2015 statement, Hillary Clinton presented a cooperative plan with social media companies to prevent terrorist recruitment via "social media, chat rooms, and what's called the 'Dark Web.' " Michael Wilner & Danielle Ziri, *Hillary Clinton Will Target Hamas's 'Virtual Territory,' Campaign Says*, JERUSALEM POST (June 13, 2016), http://www.jpost.com/US-Elections/Hillary-Clinton-will-target-Hamass-virtual-territory-campaign-promises-456589 [https://perma.cc/KK4A-RVA7].

202. Ariel Ben Solomon, *Cyber Jihad Expert: Social Media Companies Are Unlikely to Stem Online Propaganda*, JERUSALEM POST (Dec. 9, 2015), http://www.jpost.com/Middle-East/Cyber-jihad-expert-Social-media-companies-are-unlikely-to-stem-online-propaganda-436743 [https://perma.cc/TF2L-4SYT].

203. *See, e.g.*, Twitter (@twitter), *Combating Violent Extremism*, TWITTER (Feb. 5, 2016, 20:13 UTC), https://blog.twitter.com/2016/combating-violent-extremism [https://perma.cc/5WQ9-WRSW] (detailing Twitter's efforts to shut down ISIS related websites).

204. Ed Mazza, *Donald Trump Wants Bill Gates' Help 'Closing That Internet Up,'* HUFFINGTON POST (Dec. 8, 2015, 11:43 PM), http://www.huffingtonpost.com/entry/donald-trump-closing-that-internet-up_56679803e4b009377b22f001 [https://perma.cc/Q5DH-PQ5D].

up expressions of politics, arts, and many other forms of constitutionally protected speech.

Senators Richard Burr (R-N.C.) and Dianne Feinstein (D-Cal.), respectively the Chair and Vice Chair of the U.S. Senate Intelligence Committee, have introduced an unrefined bill, modeled on child pornography legislation, that would require social media sites and similar businesses to turn over information when they "become aware of terrorist activity such as attack planning, recruitment or distribution of terrorist material."[205] Critics point out, however, that the bipartisan bill does not define what constitutes "terrorist activity" and thus mandates that businesses make content-based judgment calls.

Although the United States' approach to free speech tends to be more libertarian than Europe's and Canada's,[206] the jurisprudence reviewed in Part II (the imminent incitement, true threats, and material support doctrines) suggests that a three-pronged approach to terrorist internet advocacy, recruitment, and agitation can be formulated in conformity with First Amendment doctrines. I recommend passage of either an omnibus three-part statute or three separate statutes criminalizing imminently inciting, truly threatening, and materially supportive terrorist communications.[207] The law should be drafted in conformity with Supreme Court precedents and informed by the European experiences and international initiatives against cyber terrorist posts.

An imminently inciting posting is one that is highly probable to result in terrorist conduct.[208] For example, where a person prods another on social media—such as Snapchat, WhatsApp, or Facebook Chat—to begin without delay a politically motivated attack, the

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205. *Bill Would Require Social Media Companies to Report Terrorist Activity*, NBC NEWS (Dec. 8, 2015, 6:27 PM), http://www.nbcnews.com/tech/security/bill-would-require-social-media-companies-report-terrorist-activity-n476591 [https://perma.cc/G4N3-3QVM]; Damian Paletta, *Congress Eyes Social-Media Companies as Terror Fears Mount; Bipartisan Bill Aims to Require Platforms to Report Online Terrorist Activity*, WALL ST. J. (Dec. 9, 2015, 8:17AM), http://www.wsj.com/articles/congress-eyes-social-media-companies-as-terror-fears-mount-1449667043 [https://perma.cc/M9W5-ZC4S].

206. *See* Alexander Tsesis, *The Right to Erasure: Privacy, Data Brokers, and the Indefinite Retention of Data*, 49 WAKE FOREST L. REV. 433, 473 (2014) (contrasting Europe's dignity-based theory on privacy interests with the United States' libertarian approach).

207. To reiterate, in this Essay I do not address surveillance of private data—that is a subject for another article. Here, I am proposing a modest but urgently needed step to remove the many readily available and searchable terror posts on social media such as YouTube, Twitter, Snapchat, and Facebook.

208. *See* Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (finding that the First Amendment protects abstract violent statements but not those that pose an imminent incitement to engage in violence).

statement can constitutionally, and should as a matter of social policy, be made actionable, if under the circumstances it is likely to incite such action. This would place a narrow limitation on speech without negatively impacting any abstract statements or associational rights.

Likewise, restrictions on truly threatening speech directed at specific persons or groups would affect only utterances that have a low social value, without harming core self-expressive, informative, or political statements.[209] For instance, in the case of a YouTube video calling on people to attack specific others (who may be identified by name—as might be the case with the targeting of political leaders, religious leaders, and so on—or by religious, political, ethnic, racial, sex, or sexual orientation status), the government has a compelling reason to secure public peace by limiting a very narrowly circumscribed set of menacing digital content.

Finally, under materially supportive speech regulations, when it comes to coordination with a group on the Secretary of State's designated terrorist list,[210] a court applying exacting scrutiny should countenance the limited restraint on speech. The material support category applies to persons who aid terrorist groups, post materials on the internet, recruit others, discuss legitimate targets, or forward terrorist materials.[211] Indictments of persons who run terrorist websites, television stations, or recruitment efforts should not be immune from litigation, even when they are not directly involved in the terrorist organization's violent missions.

All three parts of such a law would serve the compelling interest of providing for security while affecting only a narrow group of expressions with the low social value of advancing terrorist causes. The most basic example of a statute compatible with U.S. free speech doctrine would be a provision criminalizing social media posts, especially those uploaded on platforms like Twitter or Facebook with their instant messaging functions, posing an imminent threat of harm. As with any other criminal statute, the prosecution would bear the burden of proving the case beyond a reasonable doubt. The criminal prosecution for a truly threatening cyber post would be more complex. The meaning of the words or symbols cannot be taken for granted; instead, a prosecutor would need to convince the trier of fact that the

209. *See* Virginia v. Black, 538 U.S. 343, 363 (2003) (establishing that intentionally threatening communications, such as cross burnings "carried out with the intent to intimidate," are not protected by the First Amendment).

210. For a discussion of the State Department's designated terrorist list, see *infra* text accompanying notes 268–279.

211. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 17, 24 (2010) (developing the constitutional framework for material support of terror prosecutions).

words or symbols used are associated with terrorist ideology or a terrorist organization. Threats knowingly made against the backdrop of ISIS or Hezbollah flags could be presented as material evidence of the defendant's frame of mind and purpose. As for material support, under U.S. law, simple ideological, abstract, or comedic statements lauding a designated foreign terrorist organization cannot be prosecuted; only statements made in the service of and in coordination with such a group are actionable.[212]

In addition, whether Congress adopts the omnibus or separate statutes, the criminal provision must be narrowly tailored. To avoid chilling core First Amendment expression and political deliberation, the law cannot be vague. Congressional hearings and task forces should be used to create standards that a person of average intelligence can understand.[213] As for the definition of "terrorism," the law could either refer to existing U.S. Codes or, preferably, set forth a unified definition to help agencies identify and combat terrorism.[214]

Additionally, as an initial matter, social media companies should draft and follow their own written policies against terrorist postings. Their terms of usage should conform to regulations that preserve the privacy of non-offenders as well as comply with legislative safeguards for security.[215] Voluntary reporting is one facet of the solution, but regulations should set specific and compelling conditions as to when companies must report offending uses to agencies and when courts may issue warrants requiring companies to take down websites or to identify the unique internet protocol ("IP") addresses of persons posting terrorist digital materials or of persons posting comments planning or threatening to commit acts of terror. Where a social media company is unwilling or unable to comply with an injunction order—as was the case in another context, in a circuit court copyright infringement case involving Napster, a MP3 sharing

212. For example, videos calling for the genocide of Jews in coordination with terrorist groups should be considered actionable. For details about genocidal videos, see Pmwvideos Pmw, *Hamas Spokesmen Calls for Genocide of All Jews*, YOUTUBE (Apr. 12, 2007), https://www.youtube.com/watch?v=YKeAVBYAbn0&index=3&list=PL74076A6F6697D9DC [https://perma.cc/FM3B-5W54]; Sarah levy, *Mahmoud Al Zahar Reveals Hamas' Genocidal Agenda—Shocking!*, YOUTUBE (Nov. 22, 2012), https://www.youtube.com/watch?v=5UT6grrx8do&list=PL74076A6F6697D9DC&index=5 [https://perma.cc/49EF-G6L9].

213. Broadrick v. Oklahoma, 413 U.S. 601, 607–08 (1973) (defining unconstitutional vagueness).

214. *See* Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 J. LEGIS. 249, 272 (2004).

215. This Essay does not deal with social media liability, which is the subject of a separate project.

website[216]—a court should have the authority to order a partial or complete shutdown of the system.

Even when a social media company voluntarily takes down an offending website, it is only a temporary solution. As a cyber expert explains, when one terrorist social media account is removed, terrorists can simply relaunch their operations under a new moniker.[217] The European Commission warns: "[T]errorist groups have demonstrated advanced skills in the use of the Internet and new communication technologies to disseminate propaganda, interact with potential recruits, share knowledge, plan and coordinate operations."[218] Voluntarily reporting the information to a cyber terror unit, as the French and U.K. Commission schemes require,[219] creates a more centralized means of tracking repeat players across a range of servers, social media outlets, and geographic locations. Having a single bureaucratic entity responsible for anti-terrorist efforts on the internet also avoids the problems associated with fragmentation, such as confused chains of authority and balkanized data processing.

Given the magnitude of the problem, government initiative is required. Corporate self-policing is insufficient. Legislative schemes that rely on voluntary compliance in matters of public safety transfer an inordinate amount of public trust into the hands of private actors.[220]

Mine is not a proposal for data detection nor data mining; it requires no breaches and no spying on private discussions (a critique of those approaches is outside the scope of this Essay). Rather, I suggest empowering government agencies to seek warrants, obtain injunctions, and hold criminally accountable the creators, instigators, and facilitators of cyber terror. It is a realistic approach designed to combat terrorist incitement, threats, and material support without violating First Amendment principles.

To better explain the limits of my proposal it may be helpful to provide an example of a social media law that is far outside the bounds of my suggestion.[221] In addition to her proposal in the Senate

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216. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1098 (9th Cir. 2002).

217. Solomon, *supra* note 202.

218. Press Release, European Commission, *supra* note 189.

219. *See supra* text accompanying notes 178–185.

220. *See* Carla Marinucci, *Feinstein Slams Silicon Valley for Lack of Help Against Terrorist 'Monsters*,*'* POLITICO (Nov. 16, 2015, 2:24 PM), http://www.capitalnewyork.com/article/california/2015/11/8583030/feinstein-slams-silicon-valley-lack-help-against-terrorist-monste [https://perma.cc/R4WB-XCQK].

221. An example of a politically oppressive internet security law is the new Chinese internet security regulations. Among other provisions, the Chinese law requires companies to turn over encryption keys and criminalizes eliciting "panic in society," influencing national policy, and

Intelligence Committee,[222] Senator Dianne Feinstein has proposed a bill for the total ban on encrypted or public source communications[223] that, although far less intrusive than a politically repressive internet security law, would likely violate the prior restraint doctrine. While the details of her plan have yet to be worked out, such a ban would prevent the use of important communication tools, which can serve legitimate business and private purposes as well as to obfuscate criminality.[224]

Any law restricting the incitement of terrorist speech online that functions as a prior restraint would be subject to exacting judicial scrutiny.[225] The ordinary presumption against prior restraints can be overcome in some rare circumstances, such as those mentioned by the influential concurrences of *New York Times v. United States*. While in that case two district courts' injunctions against allowing newspapers to publish dated military reports were found to be unconstitutional, a majority of justices agreed that the presumption against prior restraints can be overcome in some narrow circumstances, at least

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subverting the national state—and is totalitarian in its intrusion on private communications and political debate. *See* Ben Blanchard, *China Passes Controversial Counter-Terrorism Law*, REUTERS (Dec. 27, 2015, 3:17 PM), http://uk.reuters.com/article/uk-china-security-idUKKBN0UA07820151227 [https://perma.cc/G5C9-Y2XR]; *Counter-Terrorism Law (Initial Draft)*, CHINA LAW TRANSLATE (Nov. 8, 2014), http://chinalawtranslate.com/ctldraft/?lang=en [https://perma.cc/6EKP-3FFJ]. The Chinese law threatens persons simply seeking to influence national policy through political utterances contrary to the ruling Communist Party. My proposal is based on three Supreme Court doctrines of low value speech that poses a threat to public safety. *See supra* Part II. It is not a bar against the expression of controversial nor subversive ideas. Criminalizing terror incitement, true threats, and material support on social media sites does not interfere with political dissent nor communicative privacy.

222. *See supra* text accompanying notes 192 and 205.

223. Patrick Howell O'Neill, *Top Democratic Senator Will Seek Legislation to 'Pierce' Through Encryption*, DAILY DOT (Dec. 9, 2015, 10:53 AM), http://www.dailydot.com/politics/fbi-encryption-james-comey-tech-companies/ [https://perma.cc/U8YE-N5BH].

224. *See* E. John Park, *Protecting the Core Values of the First Amendment in an Age of New Technologies: Scientific Expression vs. National Security*, 2 VA. J.L. & TECH. 3, 10 (1997) ("[E]ncryption software is used to authorize transactions, authenticate users, verify the accuracy of messages and documents, certify legitimate transactions, as well as protect individual privacy."); R. Michael Waterman, *The Limits of Privacy*, WIS. LAW., June 2000, at 36 (book review) ("[S]ophisticated computer encryption software allows terrorists, organized crime members, and foreign spies to enjoy unfettered communications and operations in this country . . . .").

225. Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 766 (1994) (finding that a state court did not violate the presumption against prior restraint by ordering a thirty-six foot buffer zone around the entrances of an abortion clinic); Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) ("Although there is a 'heavy presumption' against the validity of a prior restraint, the Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally." (citations omitted)); Neb. Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976) (noting that "the barriers to prior restraints remain high").

when Congress has found that the threats to security are substantial or a police action is warranted to prevent a danger that is inevitable, direct, and immediate.[226] In the matter of internet terrorist communication, certain circumstances might pose immediate and inevitable threats, such as if terrorists were to coordinate an ongoing terrorist operation through Twitter, Snapchat, or Facebook Chat. This type of event would likely warrant an emergency injunction for suspension of specific accounts, posts, or, in the direst of circumstances, briefly affecting even access to targeted geographic locations. But those circumstances requiring immediate action will likely be rare; more commonly terrorist speech on the internet is threatening and indoctrinating.

My proposal of a criminal anti-terrorism statute addresses perspicuous terrorist uses of the internet. But it has certain limitations. As discussed in Part I, terrorist recruitment, indoctrination, and operational videos are so easily found on common websites—such as YouTube, Facebook, and Twitter—that besides removing the immediately dangerous, threatening, or materially supportive data, law enforcement agents will sometimes be unable to track down recruiters and conspirators, unless in limited circumstances social media servers and ISPs are enjoined to disclose posters' and interactive users' identifying information. In addition to U.S. domestic law, international agreements will also help law enforcement because of the cross-border nature of terrorism; however, new treaties or executive agreements are beyond the scope of this Essay.

Whatever legislative scheme lawmakers adopt to restrain terrorist expression that is not imminently dangerous, the key to withstanding constitutional challenges will be the inclusion of provisions limiting culpability to intentional threats and the conduct of persons or associations that provide material support to violent terrorist organizations. In the United States, drafting constitutional public safety laws against terrorist utterances on the internet will

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226. N.Y. Times Co. v. United States, 403 U.S. 713, 726–27 (1971) (Brennan, J., concurring) ("[O]nly governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."); *id.* at 730 (Stewart, J., joined by White, J., concurring) (finding that the government had failed to show that any of the documents newspapers sought to publish posed "direct, immediate, and irreparable damage to our Nation or its people"); *id.* at 732 (White, J., joined by Stewart, J., concurring) (discussing the value of congressional findings of a substantial threat); *id.* at 742–47 (Marshall, J., concurring) (discussing the problem with courts granting injunctions for prior restraint without clear congressional mandate); *id.* at 758 (Harlan, J., joined by Burger, C.J. & Blackmun, J., dissenting); *id.* at 763 (Blackmun, J., dissenting).

require Congress to rely on parameters of free speech doctrines. While true threats and material support statutes will likely be the most effective means of restricting terrorist expressions on the internet, in some limited circumstances the *Brandenburg* imminent threat of harm test could also be applicable.

Most terrorist activities on the internet do not create a clear and present danger. However, where advocacy to terror is likely to immediately influence violent behavior, its social value is so low as to be outside the purview of the First Amendment.[227] The Court has explicitly stated that incitement is low value speech not subject to First Amendment protection.[228] There is reason to believe that in cases where there is a grave danger to national security, the prosecution will be able to meet the imminent threat of harm test.[229] At a minimum, the federal government should operate emergency courts to deal with matters like coordinated terrorist activities. This would empower law enforcement agents to identify sources of imminent terrorist attacks asserted on Tweets or Snapchat posts, and immediately, albeit only temporarily, cut off internet services to the pinpoint location of an ongoing terrorist attack or immediate incitement. These sorts of emergency shut downs should be very brief (between twenty-four and forty-eight hours) to preserve the right to speech but provide law enforcement adequate time to request an injunction or file criminal charges. Moreover, an injunction to shut down communications should only be granted in extremely rare circumstances where the prosecution proves that there is an ongoing attack that is currently using social media to coordinate violence. And even if that danger exists or is imminent, a court must balance the government's interest of shutting down digital channels of communication against the foreseeable need of innocent parties trapped at the point of attack to make contact through social media. Furthermore, the area where a digital signal is shut off should be limited to the precise point of attack, with ongoing emergent monitoring to track whether the location expands or shifts.

More commonly, there will be no ongoing or imminent threat but, rather, the dissemination of true threat, indoctrination, recruitment, and material support. In those circumstances, criminal

227. *See* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 113–14 (2006).

228. United States v. Alvarez, 132 S. Ct. 2537, 2543–44 (2012).

229. Scales v. United States, 367 U.S. 203, 251 (1961) (restating doctrine that government can restrict both immediate and future calls for the violent overthrow of government); Dennis v. United States, 341 U.S. 494, 497–98, 510 (1951) (upholding the conviction of Communist Party members who allegedly advocated the violent overthrow of government).

liability would only arise when the disseminators of terrorist content intentionally post true threats from themselves or engage in coordinated efforts with a terrorist group for recruitment and other purposes. To demonstrate a compelling reason for enacting narrowly tailored federal law against credible threats and material support, congressional committees should elicit expert testimony in order to identify the general characteristics of terrorist propaganda that is intentionally uttered to endanger national security, specific individuals, or groups. Such a record could be helpful in later litigation.[230] True threats and communicative material support for terror constitute low value forms of speech, unprotected by the First Amendment.[231] Where national security is pitted against the dissemination of highly dangerous menacing dogmas or radical propaganda, government should secure public safety—which is clearly recognized as a preeminent obligation of federal government by the Preamble to the Constitution[232]—rather than succumbing to an absolutist view of free speech.

This Essay's suggestion for a uniform national policy runs counter to those scholars who advocate for a more state-oriented approach of monitoring and deterring terrorist activities.[233] Because terrorism poses a substantial threat to national security, it would be a mistake to solely rely on private companies to police themselves. So too state-by-state approaches are likely to be insufficient to meet the challenges of establishing interstate exchanges of police information necessary to track a webpage that can be accessed anywhere in the United States. A national statutory scheme is crucial for establishing uniform standards to monitor terrorist interactions. The cross-border nature of the internet requires national enforcement. Alexander Hamilton long ago asserted, "The principle purposes to be answered by Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions

230. I base this argument on an indirect analogy from Commerce Clause jurisprudence, where the Court has said that congressional hearings and formal findings are helpful, although not mandatory, for a judge deciding whether Congress overstepped its legislative authority. *See* United States v. Lopez, 514 U.S. 549, 563 (1995).

231. True threats and "speech presenting some grave and imminent threat" are unprotected by the First Amendment. *Alvarez*, 132 S. Ct. at 2544.

232. Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010).

233. *See* Samuel J. Rascoff, *Counterterrorism and New Deterrence*, 89 N.Y.U. L. REV. 830, 830 (2014); Benjamin S. Mishkin, Note, *Filling the Oversight Gap: The Case for Local Intelligence Oversight*, 88 N.Y.U. L. REV. 1414, 1448 (2013).

as external attacks."[234] Under our system of federalism the national government has broader reach.

Leaving regulation only to state and local officials would create disparate (and possibly conflicting) schemes to address harms from interstate and international digital transmissions. Moreover, a single sovereign entity enforcing anti-terrorist incitement will find it easier to track offenses, suspects, and IP addresses with repeated terrorist postings than would fifty states and many more municipal bodies.[235] Uniform federal law would further facilitate the establishment of bureaucratic hierarchies for data analysis, investigation, and prosecution. Federal law and regulations would also provide agencies with guidance for allocating resources and relevant duties to officers responsible for monitoring, reporting, and reacting to true threats or material support. Congress should take legislative initiative; empower U.S. marshals; allow for coordinated cooperation with state and local governments; rely on a liaison agency (perhaps the Department of Homeland Security) to facilitate intergovernmental cooperation and dialogue; create procedures for issuing emergency and ordinary warrants; and provide a federal forum for filing charges against terrorist incitements, true threats, or material support on the internet. Undoubtedly, transactional relationships between local and federal intelligence services can facilitate efficiency and elicit community cooperation. Yet, state and federal partnerships require leadership from a nerve center best suited to manage interstate operations and to coordinate with foreign governments when so required.

Congressional authority over matters of national security derives from the Constitution.[236] Congress's power extends to the regulation of corporations with substantial effects on the national economy, such as the ones that provide interstate and international

234. THE FEDERALIST NO. 23, at 146–47 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan Univ. Press 1961).

235. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 550 (1978) ("The [federal government's] prime area of concern in the licensing context . . . [is] national security, public health, and safety.").

236. I confine myself to legislative powers because the focus of this Essay limits the ability to discuss the extensive presidential powers over foreign affairs. *E.g.*, U.S. CONST. art. II, § 2, cl. 1, 2. (granting the President power "to make Treaties" and to "appoint Ambassadors, other public Ministers and Consuls"); Zivotofsky *ex rel* Zivotofsky v. Clinton, 566 U.S. 189, 219 (2012) (Breyer, J., dissenting) ("The Executive and Legislative Branches frequently work out disagreements through ongoing contacts and relationships . . . [which] ensure that, in practice, Members of Congress as well as the President play an important role in the shaping of foreign policy."). The President's authority is not absolute but subject to judicial oversight. Zadvydas v. Davis, 533 U.S. 678, 700 (2001).

internet services.[237] Given the expansive scope of the internet, it is likely that U.S. legislative initiatives will have some positive residual effects on foreign policies. Currently, a variety of terrorist groups that operate primarily outside the United States post messages on popular U.S. websites. A more stringent U.S. policy against their communications would therefore advance efforts to combat terrorism in other countries.

My argument is not one for imposing mass surveillance; rather, more modestly, to criminalize identifiable terrorist content *without* any clandestine surveillance on social media like Twitter, Facebook, and YouTube. This does not require any significant intrusion on personal privacy and no xenophobic profiling; to the contrary, it empowers law enforcement to identify speech that is currently readily searchable on any of those web services. In addition, this Essay does not deal with the liability of ISPs, which are typically protected by § 230 of the Communications Decency Act against claims based on the content of materials posted by third parties.[238] That will be the subject of a future article.[239]

Under the scheme outlined here, various remedies are available against persons who post terrorist communications or provide material support to others who post them, including ordinary criminal liability, deportation of convicted defendants, freezing of bank accounts, placing offenders on no fly lists, and revocation of permanent or nonpermanent immigrant status. Even persons who post incitements, true threats, and material supportive statements from overseas can be held accountable through ex parte hearings after proper notice and proof of criminality. The aim of my proposal is to preserve pluralistic institutions against the exploitation of electronic networks by violent associations in their efforts to spread terrorist propaganda and recruitment.

V. ADDRESSING COUNTERARGUMENTS

One of the most powerful counterarguments against the restraints I propose in this Essay comes from Professor David Cole, who staunchly argues against government interference. Cole served as an attorney for Humanitarian Law Project in *Holder v. Humanitarian*

237. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414, 424 n.14, 427 (2003) ("Congress holds express authority to regulate public and private dealings with other nations in its war and foreign commerce powers . . . .").

238. Communications Decency Act, 47 U.S.C. § 230 (2012).

239. Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. (forthcoming 2018).

Law Project.[240] In his scholarship, he has criticized the criminalization of "training" or "expert advice or assistance" provided to designated foreign terrorist organizations.[241] Cole regards restrictions of this form of support to be a silencing of political ideas and an interference with the right of association.[242]

The text of the material support statute belies Cole's claim that it abridges the right of association.[243] As we saw in Part II, the material support statute prohibits conduct, not membership, nor is it an abridgement on constitutionally protected speech.[244] The statute's rule of construction section prohibits the abridgement of free speech and recognizes the judiciary's authority to interpret the law consistently with First Amendment precedents.[245] The material support statute was enacted to deter parties from and to penalize parties for cooperating with terrorist organizations and, thereby, advancing or facilitating their operations. Any material support regulation of internet terrorist speech should contain a provision explicitly limiting its applicability to active members' intent on violently destructive ends and those who coordinate with them.[246] Passive membership should remain unabridged, as was the case with the statute upheld in *Humanitarian Law Project*.[247]

Professor Cole understands the holding very differently, writing: "For the first time in its history, the Court upheld the

240. 561 U.S. 1, 6 (2010). For an analysis of *Humanitarian Law Project*, see *supra* text accompanying notes 116–137.

241. David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 151 (2012).

242. David Cole, *Where Liberty Lies: Civil Society and Individual Rights After 9/11*, 57 WAYNE L. REV. 1203, 1263 (2011).

243. While the First Amendment does not explicitly mention a right of association, the Supreme Court has found it to be implicitly connected to the right of free speech. *See* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 300 (1981) ("[T]he right of association [and] the right of expression . . . overlap and blend."); Buckley v. Valeo, 424 U.S. 1, 25 (1976) (per curiam) ("The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom,' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' " (citations omitted)); Elfbrandt v. Russell, 384 U.S. 11, 18 (1966) (mentioning "the cherished freedom of association protected by the First Amendment").

244. *Humanitarian Law Project*, 561 U.S. at 28 ("The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.").

245. 18 U.S.C. § 2339B(i) (2012).

246. United States v. Robel, 389 U.S. 258, 262 (1967).

247. *Humanitarian Law Project*, 561 U.S. at 24 ("[A]ny independent advocacy in which plaintiffs wish to engage is not prohibited by § 2339B. On the other hand, a person of ordinary intelligence would understand the term 'service' to cover advocacy performed in coordination with, or at the direction of, a foreign terrorist organization.").

criminalization of speech advocating only nonviolent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing."[248] Upon examination, however, Cole's claim that *Humanitarian Law Project* violates free speech doctrine is misleading. For one, parties to the case were not merely advocating nor solely associating with like-minded people, but seeking to strengthen the terrorist organizations' standing in international forums, without the groups' prior renunciation of politically driven violence. Lending assistance to a terrorist organization is an intentional effort to increase the political standing of an illegal organization involved in the planning and perpetration of violence. Raising the official profile in coordination with terrorist organizations and helping it advance its purposes is not merely an independent endorsement.[249] To meet the highly rigorous standard of proof,[250] the government must proffer evidence that the communication was part of a coordinated terrorist enterprise.

Moreover, there are a variety of examples from other areas of First Amendment jurisprudence in which the Court has found nonviolent and even truthful expressions to be low value speech that advances wrongdoing. For instance, criminal statutes prohibiting the possession (just as those that prohibit production) of child pornography are constitutional, even though obtaining the sanctioned materials can be done without any violence, no personal abuse, no contact with the victims, and inure no monetary benefit to the defendant.[251] Antitrust laws also prohibit certain forms of otherwise truthful, lawful communications—limiting a person's ability to enter into monopolistic contracts—because they interfere with commercial dealings of third parties.[252] Also constitutional are federal laws that restrain those commercial advertisers who are licensed in states where gambling is illegal from broadcasting advertisements into states where gambling is legal, even though the statute regulates

248. Cole, *supra* note 241, at 149.

249. *Humanitarian Law Project*, 561 U.S. at 39 (clarifying that the Court "in no way suggest[s] that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations").

250. In *Humanitarian Law Project*, the Court specifically asserted that it was applying *Cohen v. California*, 403 U.S. 15 (1971), and thus "more rigorous" rather than intermediate scrutiny standard of review because of the communicative nature of Humanitarian Law Project's proposed conduct. *Humanitarian Law Project*, 561 U.S. at 27–28.

251. Osborne v. Ohio, 495 U.S. 103, 110–11 (1990). The Court regards child pornography to be a historically and traditionally classified form of low value speech. United States v. Stevens, 559 U.S. 460, 471 (2010).

252. Stefan Grundmann, *Trust and Treuhand at the End of the 20th Century. Key Problems and Shift of Interests*, 47 AM. J. COMP. L. 401, 411 (1999).

advocacy to engage in conduct that is unrelated to any violence, has no intrinsically criminal consequences, and the transmission could provide the public with factual information.[253]

Cole is undoubtedly correct that membership in a terrorist group, without any additional effort or agency to work on its behalf, would be protected by the First Amendment's right of association. The Court long ago determined that membership in a nefarious organization, even one that possesses national security risks, is protected under the Constitution absent a defendant's engagement in its illegality.[254] Indeed, in upholding the material support statute in *Humanitarian Law Project*, the Court specifically addressed Cole's concern that the law bars group association: contrary to his contention, the Court found the statute applies only to material support that is coordinated with a terrorist organization.[255] Criminal liability does not attach by guilt of association but by intentional, active involvement in the operations of a terrorist organization, albeit in an advisory rather than violent capacity. This distinction should guide lawmakers designing a statute to prevent terrorist organizations from using internet servers located in the United States. Cole discounts this critical element of the case.

Based on his incomplete reading of *Humanitarian Law Project*, Cole expresses concern that an American could be held liable for helping a foreign terrorist organization such as Hezbollah[256] to win a public election.[257] We need not merely imagine the possibility of an American working with Hezbollah; a webserver in Miami provided that group with a platform to stream its website al-Manar.[258] This

253. United States v. Edge Broad. Co., 509 U.S. 418, 428–29 (1993) (upholding a federal statute that prohibited the advertisement of lottery information by a radio station licensed in a non-lottery state but whose transmission reached a state where the lottery was lawful). However, the government cannot create a blanket prohibition against gambling advertisement in states where that activity is lawful. Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173, 195 (1999).

254. *See* Keyishian v. Bd. of Regents, 385 U.S. 589, 606 (1967) ("Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants."); Elfbrandt v. Russell, 384 U.S. 11, 19 (1966) ("A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms.").

255. *Humanitarian Law Project*, 561 U.S. at 37.

256. Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T STATE, http://www.state.gov/j/ct/rls/other/des/123085.htm (last visited Jan. 10, 2017) [https://perma.cc/3TGD-TDCC].

257. Cole, *supra* note 241, at 149.

258. Sara Carter, *Feds Take Little Action Against U.S. Web Companies Hosting Sites Linked to Terror*, WASH. TIMES (May 15, 2013), http://www.washingtontimes.com/news/2013/may/15/feds-take-little-action-against-us-web-companies-h/ [https://perma.cc/28HJ-99S3]. Another

does indeed appear to be cooperative, material support for advancing terrorist indoctrination and recruitment. On the other hand, speech delivered in favor of the group's ideology is protected by the Constitution, but working with it to gain the reins of international or domestic government is not. Cole apparently regards terrorist politicking to be protected by the First Amendment in the same way as democratic self-determination. As then Solicitor General and later Supreme Court Justice Elena Kagan put it at oral arguments to *Humanitarian Law Project*, "Hezbollah builds bombs. Hezbollah also builds homes. What Congress decided was when you help Hezbollah build homes, you are also helping Hezbollah build bombs."[259]

The Supreme Court made clear that the material support statute is unrelated to the suppression of pure political speech. Indeed, neither a prohibition against true threats nor against material support of terrorist organizations targets the discussion nor dissemination of public opinions. Terrorist organizations take up legitimate political methods to advance extremist political agendas. They often form political bureaucracies separate from their political wings. This enables their leaders to seek alternative strategies for achieving gains, while simultaneously continuing to plan and perpetrate ideologically driven acts of violence.[260] Hezbollah's violent threats are outside the purview of First Amendment political speech protection, even though the group demonstrated electorate strength by winning seats in the Lebanese Parliament.

The limited social value of terrorist speech, for such things as information acquisition or self-expression, is outweighed by the public interest to preserve safety and order. Courts have repeatedly found incitement, true threats, and material support laws to target unprotected, low value speech that can be restricted because of the substantial, and probably even compelling, aim of maintaining public safety. This history and tradition applies especially to cases involving

website, streamed from a New Jersey internet server, hosts an al-Qaeda affiliated website that teaches how to build and use explosive devices. *Id.*

259. Robert Barnes, *Supreme Court Weighs Free Speech Against Aid to Terrorists*, WASH. POST (Feb. 24, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/02/23/AR2010022304877.html [https://perma.cc/75ZQ-J3SE].

260. White House, *National Strategy for Combating Terrorism*, U.S. DEP'T. STATE 2001–2009 ARCHIVE (Sept. 2006), https://2001-2009.state.gov/s/ct/rls/wh/71803.htm [https://perma.cc/U4FE-3KTG] (asserting that terrorists "exploit Islam to serve a violent political vision," while they "deny all political and religious freedoms and serve as sanctuaries for extremists to launch additional attacks against not only the United States, its allies and partners, but the Muslim world itself"); *see also* LEONARD WEINBERG & AMI PEDAHZUR, POLITICAL PARTIES AND TERRORIST GROUPS 61–86 (2d ed. 2003) (discussing how some terrorist organizations form political arms, even as they continue perpetrating violence, while others renounce violence altogether).

a terrorist group with a long history of political violence; such as is the case with Hezbollah, which is responsible for the systematic murder of one thousand Americans and many foreign nationals.[261] Preventing Hezbollah or anyone working with it to exploit social media for the advancement of its murderous political agenda would be compelling for putting an end to the organization's mass criminality.[262] Cole's hyperbolic claim that a person can break the material support law by calling for the delisting of certain groups from the State Department's terrorist group list seems off-base, unless such lobbying is specifically coordinated with a terrorist organization.[263] Simply verbally supporting a group or even nominally being a member to make a statement without doing anything to support its organization, is protected by the First Amendment.[264] However, where a member begins to advance a terrorist cause, directly or indirectly (either by direct incitement or true threats on social media, training terrorists in the use of that media, or uploading such material on those websites), the actions give rise to probable cause of material support.

Another opponent of stringent control of terrorist speech is Professor Wadie Said, who raises concerns closely related to Cole's about the constitutionality of the material support statute. Said downplays the threats posed by terror indoctrination. He writes that laws prohibiting support of foreign terrorist organizations stigmatize speakers and remove "First Amendment protections to the point where mere speech on behalf of a group runs afoul" of the statute.[265] This statement, however, contradicts Said's admission that "technically one can still legally be a member of such a group,

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261. Hezbollah International Financing Prevention Act of 2015, H.R. 2297, 114th Cong. (2015); *Terrorist Groups, Hizballah*, NAT'L COUNTERTERRORISM CTR. https://www.nctc.gov/site/groups/hizballah.html (last visited Jan. 11, 2017) [https://perma.cc/7MZV-EB67].

262. Cole's claim that Jimmy Carter actually met with Hezbollah in preparation for the 2009 Lebanese election seems fallacious. The statement does not appear in the article to which Cole cites. Joshua Hersh, *Jimmy Carter Visits Lebanon*, NEW YORKER (Jun. 10, 2009), http://www.newyorker.com/news/news-desk/jimmy-carter-visits-lebanon [https://perma.cc/R8V2-TNFZ]. Indeed, in 2008 and again in 2009 Hezbollah expressly rejected meeting Carter, arguing that it would have been counterproductive. Hussein Dakroub, *Jimmy Carter Regrets Not Meeting with Hezbollah*, WORLD POST (Dec. 12, 2008, 5:28 PM), http://www.huffingtonpost.com/huff-wires/20081212/ml-lebanon-us-carter/ [https://perma.cc/M265-YU2T]; *US Stand Has Not Changed Under Obama—Lebanese Hezbollah Deputy Chief*, BBC MONITORING MIDDLE EAST (Oct. 16, 2009), http://search.proquest.com.proxy.library.vanderbilt.edu/docview/458595474?accountid=14816&rfr_id=info%3Axri%2Fsid%3Aprimo [https://perma.cc/43VX-MTQ8].

263. Cole, *supra* note 241, at 149.

264. Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (overturning Whitney v. California, 274 U.S. 357, 359 (1927), an earlier decision that held constitutional a statute that criminalized membership in a criminal syndicate).

265. Wadie E. Said, Humanitarian Law Project *and the Supreme Court's Construction of Terrorism*, BYU L. REV. 1455, 1508 (2011).

[however,] virtually any action on its behalf, such as paying membership dues, violates the law."[266] He, thereby, concedes that statements of support alone would not be enough for liability; it is only when one's actions are done in concert with the terrorist organization that he or she becomes subject to criminal conviction. Said, like Cole, discounts the cooperation component of material support that makes otherwise protected speech actionable, claiming instead that the statute bans "pure speech."[267]

In addition, Said argues that the Court's deference in *Humanitarian Law Project* to the State Department's list of designated terrorist organizations grants the Executive Branch "seemingly limitless" authority to define "what constitutes terrorist activity."[268] A problem with a material support statute, as Said sees it, is that it threatens to label as a foreign terrorist any "nonstate actor" who commits an act of "political violence."[269] Professors Cole and Jules Lobel also express the concern that the Court's unwillingness to second-guess the State Department's prerogative to designate who are foreign terrorist organizations amounts to "black-list[ing] foreign groups and prosecut[ing] their domestic supporters."[270]

Their concerns no doubt arise from sincere desires to prevent presidential overreaching. But they offer no alternative to the Executive following sufficiently robust procedures to identifying groups dangerous to national security. The process used to designate a group may be challenged for being arbitrary and capricious, but courts exhibit deference for the actual State Department list. A group can only be designated a foreign terrorist organization after the Secretary of State, with the consultation of the Attorney General and Secretary of the Treasury, follows extensive procedures to add it.[271] An organization that engages in terrorist activities is statutorily defined to engage in conduct such as hijacking of vehicles; seizing and detaining persons to murder, maim, and otherwise injure to compel actions by a third person; intentionally attacking an internationally protected person; engaging in assassination; using biological, chemical, or nuclear agents; and similar misconduct.[272] These

266. *Id.* at 1507.

267. Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 505 (2014).

268. Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 571 (2011).

269. *Id.* at 570.

270. DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 54 (2007).

271. 8 U.S.C. § 1189 (a), (d)(4) (2016).

272. *Id.* § 1182(a)(3)(B)(iii).

examples for designation are carefully spelled out by law to avoid arbitrary classification.

Despite the need for deference in matters of national security, courts can demand that prosecutors proffer evidence that the group designation has not been made arbitrarily. While secrecy might be necessary in the selection of designated terrorist groups, a court could nevertheless demand prosecutors bringing suits to provide judges with in camera evidence sufficient to meet the strict scrutiny burden of proof.[273]

As for singling out certain groups rather than including all terrorist organizations in the world on the list, the Supreme Court has found that in order to prevent persons from supporting terrorist organizations, Congress can harness expertise to determine that some groups are "particularly dangerous and lawless foreign organizations," without having to ban support to all foreign organizations.[274] The Secretary of State has designated groups after extensive evidence gathering of nefarious conduct, such as killing and bombing.[275] Before groups are put on the list, the Secretary must provide them with notice of the planned action, without granting unauthorized parties access to confidential information, and offer them the opportunity to rebut the findings.[276] The statute authorizing the Secretary of State to designate certain groups as foreign terrorist organizations is not an overextension of power, as Said, Cole, and Lobel purport, but only authorizes the Executive to provide for the "national defense, foreign relations, or economic interests."[277] Indeed a close examination of the federal regulation naming the designated terrorist organizations demonstrates a variety of violent foreign non-state organizations, rather than an arbitrary group.[278]

Courts that have reviewed the State Department designation procedures have found that, "[g]iven the stringent requirements that must be met before a group is designated a foreign terrorist

273. Professor Eric Berger has made a similar point about the use of in camera hearings in material support of terror prosecutions. Berger, *supra* note 133, at 515–16.

274. Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010).

275. *See* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 24–25 (D.C. Cir. 1999).

276. Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192, 208–09 (D.C. Cir. 2001).

277. 8 U.S.C. § 1189(a)(1)(C), (d)(2).

278. Among the terrorist organizations on the State Department list are the Abu Nidal Organization, Democratic Front for the Liberation of Palestine, Hamas, Khmer Rouge, Kach, National Liberation Army, Palestinian Islamic Jihad, and others that instigate indiscriminate attacks on civilians for political purposes. Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650, 52,650–01 (Oct. 8, 1997).

organization, Congress carefully limited its prohibition on funding as narrowly as possible in order to achieve the government's interest in preventing terrorism."[279] Such a government effort is not merely discretionary but imperative. Prohibiting the material support of terror, on the internet and otherwise, is not a First Amendment violation but a restriction on conduct that would provide succor on behalf of a foreign terrorist organization.[280]

Professor Aziz Huq, another critic of *Humanitarian Law Project* and its reasoning, argues that the Court was inconsistent in rejecting a constitutional challenge to the material support statute in that case, while in another decision, *Citizens United v. Federal Elections Commission*,[281] finding unconstitutional a federal restriction on corporate campaign financing.[282] Huq claims that, although those two cases dealt with different subjects, both of the challenged statutes—the Material Support for Foreign Terrorist Organization Statute[283] and the Bipartisan Campaign Reform Act[284]—bore a striking similarity in so far as they severally inhibited the political marketplace of ideas.[285] According to him, courts should conduct strict scrutiny review, whether they are confronted with facial challenges to statutes that prohibit succor to known terrorists or that limit corporate political participation in elective politics.

Huq's claim of parity between political advice to foreign terrorist organizations and corporate political expenditures ignores the distinction between speech subversive to egalitarian order and that supportive of candidates running for public office. This key difference between the two is especially clear when national security is at stake because one of the core purposes for the exercise of government is the advancement of public safety and common

279. Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1027 (7th Cir. 2002).

280. United States v. Hammoud, 381 F.3d 316, 328–29 (4th Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005), *reinstated in relevant part*, 405 F.3d 1034 (4th Cir. 2005).

281. 558 U.S. 310 (2010).

282. *See* Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16 (2012).

283. The statute's definition of "material support or resources" includes "property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation, except medicine or religious materials . . . ." 18 U.S.C. § 2339A(b)(1) (2006).

284. 52 U.S.C. § 30118 (2016) (formerly cited as 2 U.S.C. § 441b).

285. Huq, *supra* note 282, at 22 (arguing that suppressing speech coordinated with foreign terrorist organization distorts the political marketplace of ideas).

defense.[286] Giving inadequate thought to those central public imperatives, Huq's analysis elevates advisory support of designated foreign terrorists, aimed at helping them become savvy at gaining credibility and influence through international politics, with corporate expenditures for candidates seeking to gain political office.

It would appear that to Huq's mind a criminal statute prohibiting material support of terrorists is analogous to one regulating political campaign financing.[287] Although Huq does not mention it, his argument is compatible with Justice Holmes's statement that popular will should be given its reign, even if its demagoguery leads to the establishment of "proletarian dictatorship."[288] This argument regards free speech to be of a higher constitutional value than equal safety for the political community, preferring liberty over security against militant threats.

While bearing some resemblance to Holmes's Social Darwinism, Huq's view differs profoundly from the views of Justices Jackson and Goldberg that the Constitution is not a suicide pact.[289] Taken to its reduction ad absurdum, Huq's position would equate the material and coordinated support of foreign terrorist organizations, who are committed to the destruction of pluralistic governments, with company expenditures on democratic elections. Huq equivocates the value of terrorist support, albeit through nonviolent advice for the advancement of terrorist organizations in international forums (be they at the United Nations or on the internet), to the constitutional level typically reserved for legitimate political discourse and self-affirmation.[290] Entirely ignored by his essay are terrorist organizations' persistent uses of fighting words and true threats—both

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286. Holder v. Humanitarian Law Project, 561 U.S. 1, 40 (2010) ("The Preamble to the Constitution proclaims that the people of the United States ordained and established that charter of government in part to 'provide for the common defence.' ").

287. Huq, *supra* note 282, at 17 ("These lines of precedent are more alike, I will argue, than first appearances suggest. Both can be colorably read to involve state efforts to regulate the national political marketplace. Both also implicate a compelling government interest in preserving democracy, albeit from distinct internal and external threats.").

288. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

289. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963); Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

290. *Cf.* R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 403 (1992) (White, J., concurring) ("By placing fighting words, which the Court has long held to be valueless, on at least equal constitutional footing with political discourse and other forms of speech that we have deemed to have the greatest social value, the majority devalues the latter category."); *id.* at 422 (Stevens, J., concurring) (arguing against the mistaken notion that "fighting words and obscenity receive the same sort of protection afforded core political speech").

forms of speech the Court has long recognized to be unprotected by the First Amendment[291]—on a parallel track with the use of instructions from organizations like Humanitarian Law Project about how to ingratiate political offshoots of terrorist organizations with legitimate echelons of government and international order.[292]

Other authors address the protection of terrorist speech from a different perspective. Some, for instance, believe that courts should unfailingly adhere to the *Brandenburg* standard; according to this perspective, only imminently harmful terrorist speech is subject to censure.[293] But this perspective lacks the nuance to distinguish speech made at a private meeting, attended by a few Ku Klux Klan members in that case, and the national—indeed the global—reach of internet terrorist advocacy. The *Brandenburg*-based argument against the regulation of terrorist advocacy lacks contextual nuance of the multi-valent dangers involved. It further ignores two critically important strands of judicial thought, the true threats and material support doctrines, neither of which requires government to prove imminence of criminality. A federal law against terrorist incitement, true threats, and material support is the most robust way to address the threat of terrorist propaganda on social media while staying true to free speech doctrine.

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291. Virginia v. Black, 538 U.S. 343, 362 (2003) (holding that a Virginia statute banning cross burning with intent to intimidate did not violate the free speech clause of the First Amendment); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (holding the prevention of and punishment for "fighting words" to be constitutional).

292. Among the groups that have successfully exploited elections to gain political power while maintaining their authoritarian and violent practices are Hamas in the Gaza Strip, Hezbollah in Lebanon, and the Islamic Salvation Front and Armed Islamic Group in Algeria. *See* ARTICLE 19, THE RIGHT TO KNOW: HUMAN RIGHTS AND ACCESS TO REPRODUCTIVE HEALTH INFORMATION 99 (Sandra Coliver ed., 1995); BENEDETTA BERTI, ARMED POLITICAL ORGANIZATIONS: FROM CONFLICT TO INTEGRATION 77–78 (2013); CINDY R. JEBB ET AL., THE FIGHT FOR LEGITIMACY: DEMOCRACY VS. TERRORISM 125–26 (2006) (discussing Hamas's use of the political process to gain power while maintaining its right to violently attack civilian targets); MATTHEW LEVITT, HAMAS: POLITICS, CHARITY, AND TERRORISM IN THE SERVICE OF JIHAD (2006); ZONES OF CONFLICT IN AFRICA: THEORIES AND CASES 44 (George Klay Kieh, Jr. & Ida Rousseau Mukenge eds., 2002); Jonathan Masters & Zachary Laub, *Hezbollah (a.k.a. Hizbollah, Hizbu'llah)*, COUNCIL FOREIGN REL. (Jan. 3, 2014), http://www.cfr.org/lebanon/hezbollah-k-hizbollah-hizbullah/p9155 [https://perma.cc/K79C-DAR6].

293. *See, e.g.*, Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1685 (2015); Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 712 (2009); Elisa Kantor, Note, *New Threats, Old Problems: Adhering to* Brandenburg*'s Imminence Requirement in Terrorism Prosecutions*, 76 GEO. WASH. L. REV. 752, 754 (2008).

CONCLUSION

The internet has become a tool for fomenting and inspiring acts of terrorism. YouTube videos, Facebook pages, and tweets directly call on listeners to commit ideologically driven, violent crimes. Despite his death in 2011, al-Awlaki's sermons, articles, and videos continue to circulate on the internet and inspire new acts of terrorism.[294] More recently ISIS's presence on the internet has helped its recruitment, planning, and operations.[295] Violent advocacy through social media poses a challenge to the *Brandenburg* test for incitement. *Brandenburg*'s stringent intent, imminence, and likelihood requirements have complicated efforts to proscribe terrorist speech on the internet. In addition to the incitement doctrine, Supreme Court precedents establish two alternatives for formulating statutory strategies to confront the effects of terrorist communications through social media. True threats and material support of terrorist websites, chatrooms, blogs, sermons, YouTube postings, and similar digital content pose dangers to national security that the federal government is best equipped to confront.

Any law restricting the use of terrorist ideology on the internet must abide by constitutional standards. A narrowly tailored, multi-pronged law should be grounded on permissible restrictions against incitement, material support for terror, and true threats. These three separate doctrines can be used to stem the growing volume of terrorist recruitment, indoctrination, incitement, and coordination available on social media. Anti-terrorist efforts on the internet should be undertaken at the federal level, providing a prominent role for judicial oversight to issue warrants and injunctions. This proposal balances the public interest in deterring and punishing interstate threats, while remaining vigilant against abuses to free speech and associational rights.

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294. *See* Shane, *supra* note 29.

295. *See* Ellen Nakashima, *At Least 60 People Charged with Terrorism-Linked Crimes This Year–A Record*, WASH. POST (Dec. 25, 2015), https://www.washingtonpost.com/world/national-security/at-least-60-people-charged-with-terrorism-linked-crimes-this-year--a-record/2015/12/25/0aa8acda-ab42-11e5-8058-480b572b4aae_story.html?hpid=hp_hp-top-table-main_isiscases-410pm%3Ahomepage%2Fstory&utm_term=.ffb6b347e74c [https://perma.cc/6AKB-ULCL].