# *BRANDENBURG* IN A TIME OF TERROR

*Thomas Healy**

*For four decades, the Supreme Court's decision in* Brandenburg v. Ohio *has been celebrated as a landmark in First Amendment law. In one short unsigned opinion, the Court distanced itself from the embarrassment of the Red Scare and adopted a highly protective test that permits advocacy of unlawful conduct in all but the most dangerous cases. But 9/11 and the threat of terrorism pose a new challenge to* Brandenburg. *Although the government has not resorted to the excesses of McCarthyism, it has taken disturbing steps to silence the speech of political dissenters. These efforts raise questions about the adequacy of* Brandenburg *to protect speech during a time of crisis and fear. They also highlight ambiguities in the* Brandenburg *test that have been largely ignored by courts. For instance, does* Brandenburg *apply during war as well as peace? Does it apply to private advocacy as well as public advocacy? And is there anything about the current terrorist threat that would make its protections inapplicable?*

*To answer these and other important questions, this Article undertakes a comprehensive reexamination of* Brandenburg *and the issue of criminal advocacy. It begins by demonstrating that* Brandenburg *has been gradually eroded by lower courts, both before and after 9/11. It then examines two fundamental questions at the heart of* Brandenburg *that have never been adequately answered: (1) Why should criminal advocacy be protected in the first place? and (2) How much protection should it receive? The Article argues that criminal advocacy should be protected because it furthers the underlying values of the First Amendment, including the search for truth, self-government, and self-fulfillment. It then rejects claims that criminal advocacy should receive less*



* Professor, Seton Hall Law School. B.A., University of North Carolina at Chapel Hill; J.D., Columbia Law School. Thanks to Jake Barnes, Vincent Blasi, Arlene Chow, Carl Coleman, Tristin Green, Kent Greenawalt, and Edward Hartnett for helpful feedback and to Matthew Schueller, Carolyn Conway, and Tenica Peterfreund for excellent research assistance. Versions of this Article were presented at the New York Junior Scholars Workshop at Fordham Law School, at American University Washington College of Law, and at St. John's Law School.

*than full protection and explains, for the first time, that* Brandenburg *is properly understood as an application of strict scrutiny to a particular category of speech. Finally, the Article draws upon this reconceptualization of Brandenburg to resolve the many ambiguities in its framework.*



## INTRODUCTION

One of the oldest and most important questions in First Amendment law is whether the government can prohibit speech that encourages others to break the law. This question was at the heart of the Supreme Court's first major speech cases in the early twentieth century and was the focus of significant debate until the 1969 case of *Brandenburg v. Ohio*.[1] In that decision, the Court ruled that "advocacy of the use of force or of law violation" cannot be punished unless it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[2] More protective of speech

1 395 U.S. 444 (1969) (per curiam).

2 *Id.* at 447.

than any prior test,[3] the *Brandenburg* test has provided the governing standard in this area for four decades and is often hailed as the final word on the government's power to restrict criminal advocacy.[4] As the distinguished scholar Harry Kalven once said, the Court's decision in *Brandenburg* was "the perfect ending to a long story."[5]

But the story may not be over after all. The fallout from 9/11 and the "war on terror" are placing new pressures on the First Amendment that even *Brandenburg* may not be able to bear. Although the government generally has not reacted to 9/11 with the kind of repressive speech laws that characterized earlier periods of crisis,[6] both federal and state officials have engaged in quiet yet disturbing efforts to suppress the speech of political dissenters.[7] In one case, a nurse with the U.S. Department of Veterans Affairs was investigated after she published a letter that accused the Bush administration of criminal negligence and urged readers to "'act forcefully to remove a government administration playing games of smoke and mirrors and vicious deceit.'"[8] Veterans Affairs officials seized the nurse's hard drive and informed her that she was suspected of sedition.[9] They found no

3 Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 755 (1975) (describing the *Brandenburg* test as "the most speech-protective standard yet evolved by the Supreme Court").

4 Courts and scholars have used different words to refer to speech that encourages others to break the law. Some have used the term "incitement," while others have used phrases such as "advocacy of unlawful conduct." I will avoid the word "incitement" because it is sometimes used to refer only to speech that encourages *imminent* unlawful conduct, *see* Leslie Kendrick, Note, *A Test for Criminally Instructional Speech*, 91 VA. L. REV. 1973, 1987–88 (2005), and because it might imply that the speaker has been successful in his encouragement, *see* Frederick Schauer, *Speech, Behaviour and the Interdependence of Fact and Value*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 43, 53–54 n.20 (David Kretzmer & Francine Kershman Hazan eds., 2000). Instead, I will use the term "criminal advocacy" as shorthand for longer phrases such as "advocacy of unlawful conduct," though I will sometimes use the longer phrases as well. "Criminal advocacy" is not a perfect term since it excludes speech that encourages the violation of civil statutes, but it is suitable for my purposes.

5 HARRY KALVEN, JR., A WORTHY TRADITION 232 (1988).

6 For an excellent account of earlier efforts to restrict free speech, see generally GEOFFREY R. STONE, PERILOUS TIMES (2004) (discussing the application of the First Amendment during tumultuous periods throughout American history).

7 For an account of some of these efforts, see generally MATTHEW ROTHSCHILD, YOU HAVE NO RIGHTS (2007) (describing violations of civil liberties under the Bush administration).

8 David Weigel, *Treason of the Clerk*, REASON, July 2006, at 18, 18 (quoting Laura Berg, Letter to the Editor, *Wake Up, Get Real*, ALIBI, Sept. 15–21, 2005, http://alibi.com/index.php?scn=news&story=12767&fullstory=Y).

9 *Id.*

incriminating evidence, however, and dropped their investigation under pressure from the American Civil Liberties Union and the woman's Senator.[10]

In another case, federal prosecutors targeted a Muslim graduate student who ran a website for an Islamic charity that was suspected of links to terrorist-financing networks.[11] For a year, investigators monitored the student's phone calls and emails and followed him around campus. They eventually charged him with three counts of providing material support to terrorists and eleven immigration violations.[12] At trial, they argued that he had used the website to recruit terrorists, solicit donations, and spread inflammatory rhetoric. But the jury disagreed and acquitted him of the material support charges after just a few hours of discussion.[13] It also acquitted him of three of the eleven immigration charges and deadlocked on the rest.[14]

Perhaps the most troubling case, however, is the prosecution of Ali al-Timimi, an Islamic scholar who was convicted of counseling others to violate federal gun laws, aid the Taliban, and levy war against the United States and its allies.[15] According to testimony at his trial, al-Timimi attended a dinner five days after 9/11 with a small group of Muslim men in Virginia to discuss the attacks and the possible backlash against Muslims.[16] In response to questions, al-Timimi told the men they should leave the United States, join the *mujahideen*, and fight the enemies of Islam.[17] He also read the men a *fatwa* issued by a Saudi scholar who declared that all Muslims were obligated to defend Afghanistan in the event of a U.S. invasion.[18] Over the next few days, four of the men flew to Pakistan to train at a camp operated by Lashkar-e-Taiba, a group dedicated to driving India out of Kashmir.[19] After a few weeks of weapons training, however, they learned that Pakistan had closed its border with Afghanistan and returned to the United States.[20]

---

10 *Id.*

11 Maureen O'Hagan, *A Terrorism Case That Went Awry*, SEATTLE TIMES, Nov. 22, 2004, at A1.

12 *Id.*

13 *Id.*

14 *Id.*

15 *See infra* Part I.C (discussing the *al-Timimi* case in depth).

16 Defendant's Motion for Judgment of Acquittal at 20, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. July 13, 2005).

17 *Id.* at 25.

18 *Id.* at 31.

19 *Id.* at 34–41.

20 *Id.* at 42–43; *see* Matthew Barakat, *Defense Calls Trial Attack on Freedom*, RICHMOND TIMES-DISPATCH, Apr. 19, 2005, at B1 [hereinafter, Barakat, *Trial Attack*]; Mat-

Under a literal reading of *Brandenburg*, al-Timimi's speech seems clearly protected. Even if one concedes that his words were directed to inciting or producing lawless conduct, there was no evidence they were directed to inciting *imminent* action. Al-Timimi did not say when the men should join the *mujahideen*, and at the time of the dinner the United States had not yet begun hostilities in Afghanistan.[21] There was also little evidence that his words were *likely* to lead to imminent lawless conduct.[22] Although several of the men did travel to Pakistan, Lashkar-e-Taiba had not yet been declared a terrorist group, and it was legal for Americans to visit the camp.[23] Moreover, the men did not leave for Pakistan until several days after the dinner and did not arrive at the camp until several weeks later. And in a case decided shortly after *Brandenburg*, the Court reversed a conviction where the speaker's words could have led to illegal conduct later the same day, suggesting that "imminent" means immediate, not several days or weeks later.[24] Yet al-Timimi's conviction was upheld by a federal judge, and he was sentenced to life in prison.[25]

Al-Timimi has appealed his case to the Fourth Circuit, and it is possible that his conviction will be reversed.[26] But as the first successful prosecution of terrorist-related speech since 9/11, his case raises important questions about the adequacy of *Brandenburg* to protect

---

thew Barakat, *'Va. Jihad' Witness Says He Urged Holy War*, FREE REPUBLIC, Apr. 11, 2005, http://ww.freerepublic.com/focus/f-news/1381779/posts [hereinafter Barakat, *Holy War*].

21 *See* Elisabeth Bumiller, *Bush Pledges Attack on Afghanistan Unless It Surrenders Bin Laden Now: He Creates Cabinet Post for Security*, N.Y. TIMES, Oct. 8, 2001, at A1.

22 *See* John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN. ST. L. REV. 539, 571 (2006) (arguing that al-Timimi's speech did not meet the imminence requirement under "traditional *Brandenburg* analysis").

23 *See infra* note 194 and accompanying text.

24 Hess v. Indiana, 414 U.S. 105, 106–09 (1973) (per curiam) (reversing conviction of protestor who shouted, "We'll take the fucking street later [or again]" after police forced a group of demonstrators to move to the curb); *see also infra* notes 64–76 and accompanying text (discussing *Hess* in detail).

25 Eric Lichtblau, *Scholar Is Given Life Sentence in 'Virginia Jihad' Case*, N.Y. TIMES, July 14, 2005, at A21.

26 In addition to challenging his conviction on First Amendment grounds, his attorneys claim that al-Timimi was the subject of illegal National Security Agency (NSA) wiretaps. The Fourth Circuit remanded the case to the district court to consider this claim. Eric Lichtblau, *Cleric Wins Appeal Ruling Over Wiretaps*, N.Y. TIMES, Apr. 26, 2006, at A17. The district court has not yet finished its review of the case, but a congressional oversight committee recently announced that it plans to ask the National Security Agency to investigate al-Timimi's claim. Eric Lichtblau & James Risen, *Panel to call for N.S.A. Investigation into Wiretapping of Muslim Scholar*, N.Y. TIMES, Dec. 8, 2008, at A22.

speech during a time of national crisis and widespread fear.[27] Although *Brandenburg* was decided during the Vietnam War, the speech in that case was not related to the war and did not implicate concerns about national security. The decades since *Brandenburg* have also provided little opportunity to test the strength of its protections. But as the *al-Timimi* case shows, the threat of terrorism poses a significant challenge to the *Brandenburg* framework. Not since the Red Scare of the 1950s has there been such deep-seated suspicion and anxiety in the country, much of it directed at those with different religious and political beliefs. Whether *Brandenburg* can—or even should—survive in this climate is an important question that needs to be addressed.

The *al-Timimi* case also exposes gaps in the *Brandenburg* framework that have been largely glossed over by courts and scholars.[28] For instance, *Brandenburg* does not tell us how likely it must be that speech will lead to unlawful conduct or how imminent that conduct must be. Nor does it tell us whether the likelihood or imminence requirements vary depending upon the gravity of the harm that is advocated. *Brandenburg* also does not make clear whether it applies to private speech as well as public speech, whether it applies during war as well as peace, or whether it overrules the Cold War case of *Dennis v. United States*,[29] which upheld the conviction of communists for conspiring to advocate the overthrow of the government.[30] Finally, *Brandenburg* does not tell us whether there is anything about the current terrorist threat that would make its protections inapplicable.

The goal of this Article, then, is twofold. First, it aims to determine whether *Brandenburg* is adequate to protect speech during a time of terror. Second, it seeks to provide answers to the many questions left unresolved by *Brandenburg*. The two aims are closely related because *Brandenburg* is not likely to provide adequate protection for speech until some of its ambiguities are resolved. The history of the First Amendment is filled with cases in which courts failed to protect

27 *See, e.g.*, Larry Alexander, *Incitement and Freedom of Speech*, *in* FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY, *supra* note 4, at 118 (questioning whether *Brandenburg* could withstand a wave of "Oklahoma City-like bombings by militia groups"); Laura K. Donohue, *Terrorist Speech and the Future of Free Expression*, 27 CARDOZO L. REV. 233, 240 (2005) ("[*Brandenburg*'s] strength in the face of modern terrorism remains less than clear.").

28 *See* MARTIN H. REDISH, FREEDOM OF EXPRESSION 184–86 (1984) (highlighting the many ambiguities of the *Brandenburg* test); Marc Rohr, *Grand Illusion? The* Brandenburg *Test and Speech That Encourages or Facilitates Criminal Acts*, 38 WILLAMETTE L. REV. 1, 14 (2002) (same).

29 341 U.S. 494 (1951).

30 *Id.* at 516–17 (plurality opinion).

speech during times of crisis and fear.[31] As long as there are significant gaps in the *Brandenburg* framework, it will be too easy for courts to sacrifice speech during the present crisis.[32]

The Article has four parts. In Part I, I briefly discuss the history of the *Brandenburg* opinion and the few subsequent cases in which its test has been applied. I then discuss the application of *Brandenburg* by the lower courts to show how its protections have been gradually eroded over the years. Finally, I discuss the *al-Timimi* case in detail to demonstrate that, during times of crisis, even the celebrated *Brandenburg* test is vulnerable to backsliding.

In Parts II and III, I step back to address the normative questions that underlie the *Brandenburg* test: (1) why should criminal advocacy be protected in the first place? and (2) how much protection should it receive? Although the Court has spent considerable time addressing the second question, it has spent far less time addressing the first. This is unfortunate because the reasons we settle on for protecting criminal advocacy should dictate how much protection it receives. In addition, developing a strong theoretical foundation for the protection of criminal advocacy can help prevent slippage during periods when the temptation to suppress speech is particularly strong. In Part II, I therefore explore various justifications for protecting criminal advocacy before concluding that such speech should be protected because it furthers the underlying values of the First Amendment, including the search for truth, self-government, and self-fulfillment. In Part III, I consider and reject several arguments for giving criminal advocacy less than full First Amendment protection. Specifically, I reject claims that criminal advocacy is a hybrid of speech and action, that it should receive reduced protection because of the speaker's intent, and that it is inherently more dangerous than other speech that is fully protected. I then acknowledge that even fully protected speech is not absolutely protected. Under strict scrutiny, the government may prohibit speech when doing so is necessary to further a compelling governmental interest.[33] Applying this standard, I argue that criminal advocacy should be protected unless it is intended to,

---

31 *See generally* STONE, *supra* note 6 (discussing the application of the First Amendment during tumultuous periods throughout American history).

32 *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 10 (1970) (arguing that free speech doctrine must be precise or else "the forces that press toward restriction will break through the openings, and freedom of expression will become the exception and suppression the rule"). *But see* REDISH, *supra* note 28, at 211 (rejecting rigid tests because they force courts to choose between too much protection and too little).

33 *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

and likely to, produce imminent lawless conduct. This, of course, is identical to the *Brandenburg* test, and I conclude Part III by arguing that *Brandenburg* should be understood as an application of strict scrutiny to a particular category of speech and that its ambiguities should be resolved with that standard in mind.

In Part IV, I draw upon this reconceptualization of *Brandenburg* to resolve its many ambiguities and reach the following conclusions: (1) the likelihood requirement should be interpreted to mean that, in general, criminal advocacy can be prohibited only if there is a "substantial chance" or "fair probability" that it will produce imminent lawless conduct; (2) the imminence requirement should be interpreted to mean that, in general, criminal advocacy can be prohibited only if it is directed to, and is likely to, produce unlawful conduct within several days; (3) the likelihood and imminence requirements should not vary from case to case based upon the gravity of the harm advocated, but should be modified at the margins for advocacy of both extremely minor and extremely serious crimes; (4) *Brandenburg* should apply to all criminal advocacy, whether it takes place in public or private and whether it is ideological or nonideological in nature; (5) *Brandenburg* should apply during times of war as well as peace; (6) *Brandenburg* should be understood as undermining *Dennis v. United States* so significantly that the latter case is a remnant of abandoned doctrine that cannot be taken seriously as precedent; and (7) there is nothing about the war on terror that justifies abandoning *Brandenburg*. We have been through crises equally threatening to our security in the past, and just as it was a mistake to suppress speech unnecessarily during those periods, it would be a mistake to do so now.[34]

## I. CRIMINAL ADVOCACY AND THE FIRST AMENDMENT: *BRANDENBURG* AND BEYOND

### *A. The* Brandenburg *Decision*

When the Supreme Court decided *Brandenburg v. Ohio* in 1969, it was not writing on a clean slate. For a half-century, the Justices had

34 This Article addresses only criminal advocacy. It does not address a related category of speech—sometimes called criminal instruction or crime-facilitating speech—that provides knowledge and information that may facilitate crime by others. *See generally* Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005) (discussing the distinctions and uses of crime-facilitating speech, as well as the extent to which it is covered by existing First Amendment law). Although these two types of speech sometimes overlap (as when a speaker encourages another person to rob a bank while also providing the combination to the safe), they are sufficiently different that it makes sense to treat them separately. *Id.* at 1102 n.41.

been struggling to define the proper level of protection for dangerous and subversive speech. The story of this struggle is one of the most well-known in constitutional law, so I will not repeat it here.[35] But in order to properly understand the changes that *Brandenburg* brought about, it is helpful to briefly recall the arc of that struggle.

Prior to 1919, the Court took a limited view of the First Amendment, holding that speech could be prohibited if it had any tendency to cause harm, no matter how remote.[36] In that year, Justice Holmes announced his famous "clear and present danger" test,[37] which, as refined by him and Justice Brandeis over the next decade, protected speech unless it was likely to lead to serious imminent harm.[38] Although a majority of the Court initially resisted this view, it gradually grew more protective of speech,[39] and by World War II it had adopted the Holmes-Brandeis approach.[40] The Court's commitment to free speech faltered during the Cold War, and in *Dennis v. United*

35 For an account of this history, see generally John F. Wirenius, *The Road to* Brandenburg*: A Look at the Evolving Understanding of the First Amendment*, 43 DRAKE L. REV. 1 (1994) (tracing the history of First Amendment jurisprudence from the early ninteenth century to *Brandenburg*).

36 *See* Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 901 (1949).

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

38 Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that the "expression of opinions" is protected "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"); Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated or that the past conduct furnished reason to believe that such advocacy was then contemplated."), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

39 *See* Herndon v. Lowry, 301 U.S. 242, 259–64 (1937) (overturning convictions of a communist organizer because there was no evidence he had advocated unlawful action); De Jonge v. Oregon, 299 U.S. 353, 364–67 (1937) (same); Stromberg v. California, 283 U.S. 359, 368–70 (1931) (reversing a conviction for displaying a red flag in violation of state law because the jury instructions had permitted a conviction on the basis of mere opposition to the government); Fiske v. Kansas, 274 U.S. 380, 387 (1927) (reversing a conviction under a syndicalism law because there was no evidence the defendant had advocated the overthrow of government).

40 *See* Bridges v. California, 314 U.S. 252, 261–63 (1941) (describing the Court's adoption of the "clear and present danger" test in past cases); *see also* Thomas v. Collins, 323 U.S. 516, 530 (1945) ("[A]ny attempt to restrict [First Amendment] liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.").

*States* it upheld the convictions of communist leaders for conspiring to advocate the overthrow of the U.S. government.[41] *Dennis* significantly weakened the "clear and present danger" test, permitting speech to be prohibited as long as the feared harm was grave enough, regardless of whether it was imminent or likely.[42] But as the hysteria of McCarthyism abated during the 1950s, the Court slowly retreated from *Dennis*, holding in *Yates v. United States*[43] that speakers could not be punished merely for advocating beliefs, not action.[44]

That's where matters stood when the Court decided *Brandenburg*. The defendant was a Ku Klux Klan leader who had invited a television crew to a small rally on a farm outside Cincinnati.[45] During the rally, he gave a speech in which he said, "'We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengance [sic] taken.'"[46] He also said, "'Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.'"[47] After the speech was broadcast, he was arrested under Ohio's syndicalism law, which made it illegal to advocate crime or violence or to assemble with a group for that purpose.[48]

The Court's unanimous opinion was short and unsigned.[49] After describing the facts, it noted that the Ohio law was similar to a California law upheld forty-two years earlier in *Whitney v. California*.[50] But *Whitney* had been "thoroughly discredited by later decisions," the Court said, inexplicably citing *Dennis* as support.[51] It then offered the following statement of law:

---

41 *See* Dennis v. United States, 341 U.S. 494, 509 (1951) (plurality opinion).

42 *Id.* at 510 (embracing Learned Hand's statement that courts "'must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger'" (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950))).

43 354 U.S. 298 (1957), *overruled by* Burks v. United States, 437 U.S. 1 (1978).

44 *Id.* at 318–27 (rejecting interpretation of Smith Act that would have made advocacy of rebellion a crime).

45 Brandenburg v. Ohio, 395 U.S. 444, 445 (1969) (per curiam).

46 *Id.* at 446.

47 *Id.* at 447.

48 *Id.* at 444–45.

49 The first draft was written by Justice Fortas, who resigned before the decision was issued. Bernard Schwartz, *Justice Brennan and the* Brandenburg *Decision—A Lawgiver in Action*, 79 JUDICATURE 24, 27–28 (1995). Justice Brennan then revised the opinion, which was issued per curiam. *Id.* at 28.

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

51 *Id.* (citing Dennis v. United States, 341 U.S. 494, 507 (1951) (plurality opinion)).

> These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[52]

Applying this principle, the Court held that the Ohio law violated the First Amendment because it made no distinction between "mere advocacy" and "incitement to imminent lawless action."[53] The Court also expressly overruled *Whitney*.[54]

*Brandenburg* changed the law in several ways. First, it embraced the Holmes-Brandeis view of "clear and present danger" by stating that advocacy of unlawful conduct can be punished only if it is likely to lead to *imminent* lawless conduct.[55] It thus refuted the Court's statement eight years earlier in *Scales v. United States*[56] that speakers can be punished for merely advocating future law violations.[57] Second, *Brandenburg* added a new requirement to the "clear and present danger" test. In addition to proving that the speaker's words were *likely* to lead to imminent lawless conduct, the government must prove that they were *directed* to producing imminent lawless conduct.[58] This was a departure from the Holmes-Brandeis view. In 1919, Holmes had written that speech could be punished if it posed a present danger of bringing about immediate harm *or* was intended to do so.[59] *Brandenburg* changed that "or" to an "and," protecting speech unless it was both likely to lead to immediate harm *and* directed to doing so.

The Court offered no explanation for these changes. Instead, it portrayed the new test as a simple application of *Dennis* and *Yates*. After announcing the test, the Court wrote in a footnote: "It was on the theory that the Smith Act embodied such a principle and that it had been applied only in conformity with it that this Court sustained

---

52 *Id.*

53 *Id.* at 449.

54 *Id.*

55 *Id.* at 447.

56 367 U.S. 203 (1961).

57 *See id.* at 251 ("*Dennis* and *Yates* have definitely laid at rest any doubt that present advocacy of *future* action for violent overthrow satisfies statutory and constitutional requirements equally with advocacy of *immediate* action to that end.").

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

59 Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting) ("[T]he United States constitutionally may punish speech that produces *or* is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." (emphasis added)).

the Act's constitutionality. That this was the basis for *Dennis* was emphasized in *Yates v. United States* . . . ."[60] This footnote was either disingenuous or written by someone who had read neither *Dennis* nor *Yates*. Neither decision limited the Smith Act to advocacy of *imminent* unlawful conduct. As Justice Harlan explained in *Yates*, they stood merely for the principle that "those to whom the advocacy is addressed must be urged to *do* something, now *or in the future*, rather than merely to *believe* in something."[61]

There are other oddities to *Brandenburg* as well. Why did Justice Harlan, who had written *Yates* and *Scales*, join an opinion that so clearly mischaracterized their holdings? And why did the Court endorse such a bold principle when the facts did not require it? As several scholars have noted, the defendant in *Brandenburg* did not even clearly advocate unlawful conduct; at most, he suggested that the Klan might cause trouble if the government ignored its concerns.[62] Thus, the Court could have reversed his conviction on the ground that he had not urged unlawful conduct either now *or* in the future.

Indeed, because the *Brandenburg* test was broader than necessary to resolve the case, it is tempting to characterize it as dicta.[63] But the Court has not treated it that way. Four years later in *Hess v. Indiana*,[64] it reversed the conviction of a student who was arrested during an antiwar protest.[65] The evidence showed that more than 100 protestors had blocked traffic and refused orders to clear the street.[66] When police finally moved the crowd to the curb, the defendant shouted, "We'll take the fucking street later [or again]."[67] He was arrested, charged with disorderly conduct, and convicted.[68] The Indiana Supreme Court agreed with the trial court that his statement "'was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action.'"[69]

The U.S. Supreme Court disagreed. "At best," it asserted, "the statement could be taken as counsel for present moderation; at worst,

60 *Brandenburg*, 395 U.S. at 447 n.2 (citations omitted).

61 Yates v. United States, 354 U.S. 298, 325 (1957) (second emphasis added).

62 Rohr, *supra* note 28, at 7 (explaining that the "facts played no part in the Court's resolution of the case").

63 *See id.* at 9 (arguing that it is "inescapable" that the test articulated in *Brandenburg* was unnecessary for resolution of the case).

64 414 U.S. 105 (1973) (per curiam).

65 *See id.* at 108–09.

66 *See id.* at 106.

67 *Id.* at 107. There was apparently conflicting testimony as to whether the defendant said "later" or "again."

68 *Id.* at 105–06.

69 *Id.* at 108 (quoting Hess v. State, 297 N.E.2d 413, 415 (Ind. 1973)).

it amounted to nothing more than advocacy of illegal action at some indefinite future time."[70] The Court then held that this was insufficient to justify the conviction and quoted the *Brandenburg* test verbatim.[71] Three Justices dissented, arguing that the Court had impermissibly second-guessed the lower court's evidentiary findings. But they did not question the majority's reliance upon *Brandenburg*.[72]

*Hess* thus clearly understood the *Brandenburg* test to be controlling law. It also shed some light on the Court's understanding of the test. As a number of scholars have pointed out, when the defendant said, "We'll take the fucking street later [or again]," he "almost certainly meant later [or again] that same day."[73] Yet the Court held that his statement was not directed to produce imminent disorder: "[A]t worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time."[74] This suggests that the Court viewed the imminence requirement strictly.[75] Advocating unlawful conduct at some indefinite point on the same day is not sufficient. Instead, a speaker must advocate unlawful conduct within a shorter time frame.

This is not the only possible interpretation of *Hess*. One might argue that the Court was influenced more by the indefinite nature of the defendant's advocacy than by the time frame. One might also argue that the Court would relax the imminence requirement if the gravity of the harm were greater.[76] But at a minimum, *Hess* shows that the Court took *Brandenburg* seriously.

Aside from *Hess*, the Court has applied *Brandenburg* in only one other case. In *NAACP v. Claiborne Hardware Co.*,[77] it reversed a judgment against black defendants for organizing a boycott of white merchants in Mississippi.[78] One of the defendants was Charles Evers, a field secretary for the NAACP who had threatened retaliation

70 *Id.*

71 *See id.*

72 *Id.* at 111 (Rehnquist, J., dissenting) ("The simple explanation for the result in this case is that the majority has interpreted the evidence differently from the courts below.").

73 Rohr, *supra* note 28, at 12; *see also, e.g.*, KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 267 (1989) (reasoning that the defendant likely contemplated a delay of "hours" when he spoke).

74 *Hess*, 414 U.S. at 108.

75 *See* GREENAWALT, *supra* note 73, at 209 (stating that *Hess*' interpretation of imminence "is very restrictive"); Rohr, *supra* note 28, at 18–19 ("[I]n *Hess*, the Court did appear to require that the interval between speech and called-for response must be quite brief.").

76 *See infra* Part IV.C.

77 458 U.S. 886 (1982).

78 *See id.* at 934.

against blacks who violated the boycott.[79] The plaintiffs argued that Evers had encouraged violence against boycott breakers and should thus be liable for their losses.[80] The Court disagreed: "This Court has made clear . . . that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment."[81] It then quoted the *Brandenburg* test and concluded that Evers' statements were protected because no violence occurred until "weeks or months" after his speech.[82]

*Claiborne Hardware* does not reveal much about the meaning of *Brandenburg*. For one thing, it is not clear that *Brandenburg* was the correct test to apply. Evers never advocated unlawful conduct; instead, he threatened residents who violated the boycott.[83] In addition, the Court did not indicate how soon the violence would have to occur for Evers to be held liable. But the decision nonetheless reaffirmed that *Brandenburg* is good law and that advocacy of future violence is protected speech.

And that's it. In the twenty-six years since *Claiborne Hardware*, the Court has not decided another case that required application of *Brandenburg*. In part, this is because national politics were relatively calm during the 1980s and 90s. The demise of the Soviet Union brought an end to the Cold War, and the radicalism of the civil rights era subsided. But the lack of decisions applying *Brandenburg* also reflects the fact that the Court and legal scholars have turned their attention to other First Amendment issues, such as commercial speech, campaign finance regulation, and emerging media. As a result, the Court's understanding of *Brandenburg* remains largely undeveloped.

### *B.* Brandenburg *in the Lower Courts*

The lower courts, on the other hand, have been more active. Unlike the Supreme Court, they do not have the luxury of choosing their cases. So while the Justices have focused on other speech issues, the lower courts have decided many cases raising issues under *Brandenburg*.

In a recent article, Marc Rohr grouped these cases into four categories.[84] First are criminal prosecutions for solicitation, conspiracy, or

79 *Id.* at 902, 926.

80 *Id.*

81 *Id.* at 927.

82 *Id.* at 928.

83 *See infra* notes 89–92 and accompanying text (discussing the difference between the treatment of threats and criminal advocacy).

84 *See* Rohr, *supra* note 28, at 25.

threats to commit crimes.[85] Second are "imitation" or "copycat" cases, in which the plaintiff claims he was injured as a result of acts inspired by the defendant's speech.[86] Third are tax fraud cases in which the defendant is charged with aiding and assisting in the preparation of fraudulent tax returns.[87] And fourth are civil cases in which defendants are sued for publishing instructions on how to commit crimes.[88] Rohr thoroughly analyzed the cases in each category and I will not duplicate his work here. Instead, I will highlight some of the themes that emerge from these cases and consider what they reveal about the adequacy of *Brandenburg*'s protections.

The most prominent theme is that *Brandenburg* has been limited to advocacy of unlawful conduct and has not been applied to related categories of speech, such as threats, solicitations, criminal instructions, or words amounting to conspiracy. For instance, lower courts have concluded that the First Amendment does not protect the making of threats regardless of whether the threatened action is to occur imminently or in the future.[89] Likewise, lower courts agree that the First Amendment does not protect criminal conspiracies. Even though an agreement to violate the law may take the form of words, courts have held that *Brandenburg*'s imminence and likelihood requirements do not apply.[90]

For the most part, these decisions are unobjectionable. As explained more fully in Part III, there is a strong argument that threats, offers of inducement, and words of agreement are ways of doing things, not of saying things, and thus do not further the underlying values of free speech.[91] Moreover, the Supreme Court has never suggested that these categories of speech are entitled to the protec-

85 *Id.* at 26–29.

86 *Id.* at 29–32.

87 *Id.* at 32–39.

88 *Id.* at 39–46.

89 *See, e.g.*, White v. Lee, 227 F.3d 1214, 1230 (9th Cir. 2000) ("Threats of violence and other forms of coercion and intimidation directed against individuals or groups are, however, not advocacy, and are subject to regulation or prohibition."); United States v. Velasquez, 772 F.2d 1348, 1357 (7th Cir. 1985) (upholding a provision of the Victim and Witness Protection Act prohibiting threats against government informants against First Amendment challenge).

90 *See, e.g.*, United States v. Rahman, 189 F.3d 88, 114–16 (2d Cir. 1999) (finding that the seditious conspiracy statute did not violate First Amendment because it only proscribed speech when it constituted an agreement to use force against the United States); United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990) (finding speech or writing employed in connection with participation in alleged conspiracy not protected by First Amendment).

91 *See infra* notes 258–72 and accompanying text.

tions of *Brandenburg*. In fact, the Court has made clear that threats are outside the coverage of the First Amendment altogether.[92]

But some decisions applying these principles have reached questionable results. Consider *United States v. Rahman*,[93] which upheld the conviction of Omar Abdel Rahman,[94] also known as the Blind Sheik. Rahman was one of ten Muslims charged with seditious conspiracy and other crimes for plotting a campaign of terrorism in the early 1990s.[95] At trial, prosecutors argued that Rahman was the leader of the conspiracy and had induced the other men to carry out his wishes.[96] As support, they introduced evidence that he had advocated attacks against the United States, had issued *fatwas* approving specific acts of violence, and had encouraged the men to receive military training.[97] A jury convicted him on all counts, and he was sentenced to life in prison.[98]

Because he was convicted on the basis of speech, Rahman argued that his conviction violated the First Amendment.[99] The Second Circuit rejected this argument, stating that criminal conspiracies are not protected simply because they are formed through words.[100] It also distinguished Rahman's case from *Dennis* and later decisions, stating that to be convicted of seditious conspiracy, "one must conspire to *use* force, not just to *advocate* the use of force."[101]

But although the court treated Rahman's case as one involving conspiracy, not advocacy, much of the evidence it relied on consisted of the latter. For instance, in upholding his conviction for conspiracy to murder Egyptian President Hosni Mubarak, the court pointed to evidence that Rahman urged several of the men to commit the act.[102] And in upholding his conviction for a bombing conspiracy, the court noted that he described the bombing campaign to the men as a "duty."[103] Perhaps there was enough evidence without these statements to uphold the conspiracy convictions. But the court did not

92 Virginia v. Black, 538 U.S. 343, 359 (2003) ("[T]he First Amendment also permits a State to ban a 'true threat.'" (quoting Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam))).

93 189 F.3d 88.

94 *See id.* at 103.

95 *Id.* at 103–05.

96 *Id.* at 104.

97 *Id.*

98 *Id.* at 111.

99 *Id.* at 114.

100 *See id.* at 114–15.

101 *Id.* at 115.

102 *See id.* at 117.

103 *Id.* at 125.

acknowledge that it was relying largely upon advocacy to support a conviction for conspiracy.

Moreover, the court upheld his conviction on two counts that arguably should have been subjected to the *Brandenburg* test. In those counts, Rahman was charged with violating 18 U.S.C. § 373, which makes it unlawful to "'solicit[], command[], induce[], or otherwise endeavor[] to persuade'" another person to engage in a crime of violence.[104] The government argued that Rahman violated this law by urging the assassination of Mubarak and attacks on U.S. military bases.[105] Because there was no evidence that Rahman had commanded these crimes, it seems likely that he was convicted of inducing or persuading others to commit them instead.[106] Therefore, the *Brandenburg* test was applicable. Yet the court did not consider whether his statements were directed to inciting imminent unlawful conduct or were likely to lead to such conduct. Instead it simply stated that "[w]ords of this nature—ones that instruct, solicit, or persuade others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in private, or in a public speech, or in administering the duties of a religious ministry."[107] This is a clear misstatement of *Brandenburg*, which permits punishment for words of persuasion only upon a showing of imminence and likelihood.[108]

The lower courts' treatment of criminal instruction has also been questionable. Criminal instruction differs from criminal advocacy in that the speaker instructs or teaches others how to commit crime instead of, or in addition to, encouraging them to do so.[109] The Supreme Court has never addressed this type of speech, so it is unclear what level of protection it receives.[110] But a majority of lower courts to consider the issue have held that it is not protected by *Brandenburg*. In *United States v. Buttorff*,[111] for instance, the Eighth Circuit upheld the conviction of defendants who had explained to a group of factory workers how to avoid paying income taxes.[112] Although the

104 *Id.* at 117 (alterations in original) (quoting 18 U.S.C. § 373(a) (2006)).

105 *Id.* at 126.

106 *See id.* at 108 (showing that Rahman urged a United Nations complex bombing but was "insulated" from active control of a plot).

107 *Id.* at 117.

108 *See supra* Part I.A.

109 *See* Volokh, *supra* note 34, at 1107.

110 *But see* Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., concurring in denial of certiorari) (stating that "speech that performs a teaching function" should not be "glibly characterized as mere 'advocacy'").

111 572 F.2d 619 (8th Cir. 1978).

112 *See id.* at 628.

court acknowledged that *Brandenburg* protects "speech which merely advocates law violation," it concluded that the defendants had gone further: "[T]hey explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue."[113]

In addition to limiting the reach of *Brandenburg*, most lower courts have mischaracterized its holding. In *United States v. Kelley*,[114] the defendant appealed his conviction for aiding and abetting tax fraud, arguing that his advice to taxpayers was protected speech.[115] The Fourth Circuit rejected this argument, noting that the defendant had been paid for his advice and had provided forms to his clients.[116] The court could have stopped there, relying on *Buttorff*. But it added that the First Amendment "lends no protection to speech which urges the listeners to commit violations of current law."[117] This statement was followed by a citation to *Brandenburg* and the following description of the defendant's speech: "It was no theoretical discussion of non-compliance with laws; action was urged; the advice was heeded, and false forms were filed."[118] Nowhere did the court mention *Brandenburg*'s requirement of imminence.[119]

The Seventh Circuit also misread *Brandenburg* in *United States v. Kaun*.[120] There, the district court had enjoined the defendant from

113 *Id.* at 624; *see also* Rice v. Paladin Enters., 128 F.3d 233, 249–50 (4th Cir. 1997) (holding that First Amendment did not protect publisher of "Hit Man" instruction book in suit for civil damages); United States v. Daly, 756 F.2d 1076, 1082 (5th Cir. 1985) (upholding a conviction for tax fraud, because, despite not inspiring "imminent" lawless action, defendant advocated and assisted in the preparation of false forms); United States v. Moss, 604 F.2d 569, 571 (8th Cir. 1979) (upholding conviction for aiding and abetting tax fraud because defendant went beyond advocacy and explained how to avoid withholding of taxes). *But see* United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983) (reversing convictions for aiding and assisting tax fraud because "[n]othing in the record indicates that the advocacy practiced by these defendants contemplated *imminent* lawless action"); United States v. Freeman, 761 F.2d 549, 552–53 (9th Cir. 1982) (reversing convictions because the trial court did not give a First Amendment instruction and the jury could have found that defendant simply criticized tax laws without urging imminent violation of those laws).

114 769 F.2d 215 (4th Cir. 1985).

115 *Id.* at 216–17.

116 *See id.* at 217.

117 *Id.*

118 *Id.*

119 *See also* United States v. Fleschner, 98 F.3d 155, 158 (4th Cir. 1996) (reading *Brandenburg* to provide no protection for "'speech which urges the listener to commit violations of current law'" (quoting *Kelley*, 769 F.2d at 217)).

120 827 F.2d 1144 (7th Cir. 1987).

encouraging others to file false tax returns or selling materials under the guise of tax advice.[121] In response to the defendant's First Amendment claim, the appeals court interpreted the injunction narrowly so as not to prohibit all discussion of tax policy.[122] But, after quoting *Brandenburg*, it held that the defendant could be enjoined if he "actually persuaded others, directly or indirectly, to violate the tax laws, or if the evidence shows that Kaun's words and actions were directed toward such persuasion in a situation where the unlawful conduct was imminently likely to occur."[123] Although the court correctly required a showing of imminence in the second half of its formulation, it omitted this requirement in the first half.[124] As a result, the defendant could be punished if he successfully encouraged others to violate the tax laws, even if he did not urge that violation imminently.[125]

At least one lower court has also interpreted the imminence requirement quite loosely. In *People v. Rubin*,[126] the national director of the Jewish Defense League was charged with solicitation to murder after offering $500 for attacks against Nazis.[127] The offer was made during a press conference to protest the planned march of the Nazi Party through Skokie, Illinois, a largely Jewish community.[128] After announcing plans for a counter-demonstration, the director held up five $100 bills and offered them to any person who "kills, maims, or seriously injures a member of the American Nazi Party."[129] "And if they bring us the ears," he added, "we'll make it a thousand dollars. The fact of the matter is, that we're deadly serious. This is not said in jest, we are deadly serious."[130]

The trial court ruled that the defendant's speech was protected,[131] but the California appeals court reversed.[132] After identifying *Brandenburg* as the applicable test,[133] the court held that the

121 *Id.* at 1146.
122 *See id.* at 1150–52.
123 *Id.* at 1151–52.
124 *See id.*
125 *See id.* at 1149; *see also* United States v. Raymond, 228 F.3d 804, 815 (7th Cir. 2000) (following *Kaun*).
126 158 Cal. Rptr. 488 (Cal. Ct. App. 1979).
127 *Id.* at 488–89.
128 *Id.*
129 *Id.* at 488.
130 *Id.* at 488–89.
131 *Id.* at 490.
132 *Id.* at 494.
133 *Id.* at 492. The court might have avoided *Brandenburg* altogether by concluding, as other courts have, that it does not protect offers to engage in unlawful con-

defendant's speech was directed to inciting imminent lawless action even though the Skokie march was five weeks away. Imminence is a function of time, the court said.[134] "But time is a relative dimension and imminence a relative term, and the imminence of an event is related to its nature. A total eclipse of the sun next year is said to be imminent. An April shower thirty minutes away is not."[135] The court then concluded that, given the seriousness of the crime, the imminence requirement had been satisfied. "We think solicitation of murder in connection with a public event of this notoriety, even though five weeks away, can qualify as incitement to imminent lawless action."[136]

As these cases show, the lower courts' treatment of *Brandenburg* has not been reassuring. Many courts have been willing to limit its protections to abstract advocacy, and many others have misunderstood its requirements. Yet with the exception of *Rahman*, few of these cases involved speech threatening to national security. Which raises an important question: if *Brandenburg* can be circumvented in cases involving tax fraud, is it strong enough to protect unpopular speech in the current climate?

### C. *The* al-Timimi *Case*

The conviction of Ali al-Timimi may provide a tentative answer. Al-Timimi is an American citizen who was born in Washington, D.C. in 1963.[137] His parents had moved from Baghdad one year earlier, and his father worked as a lawyer in the Iraqi embassy.[138] Although his parents were committed Muslims, al-Timimi attended secular schools and knew little about his faith until the family moved to Saudi Arabia when he was fifteen.[139] There, he studied the Qu'ran, learned Islamic law, and embraced *Salafiya*, a fundamentalist strain of Islam.[140] He returned to the United States for college, but continued his Islamic studies and moved back to Saudi Arabia for a year in his

duct. *See, e.g.*, Christensen v. State, 468 S.E.2d 188, 190 (Ga. 1996) (holding that a statute preventing solicitation of sodomy is valid under *Brandenburg*); State v. Neal, 500 So. 2d 374, 377–78 (La. 1987) (reversing decision of lower court that solicitation of prostitution was protected speech under *Brandenburg*).

134 *Rubin*, 158 Cal. Rptr. at 492.

135 *Id.*

136 *Id.* at 493.

137 *See* Milton Viorst, *The Education of Ali al-Timimi*, ATL. MONTHLY, June 2006, at 68, 69.

138 *Id.* at 69.

139 *Id.* at 69–72.

140 *Id.* at 69, 72.

mid-twenties.[141] He eventually settled with his wife in Fairfax, Virginia, where he worked as a computer programmer by day and pursued a doctorate in computational biology by night.[142] At the time of his trial, he had just completed his dissertation, "Chaos and Complexity in Cancer."[143]

The charges against al-Timimi grew out of a larger investigation into a group of Muslims referred to by the government as the "Virginia Jihad Network."[144] According to testimony at al-Timimi's trial,[145] this group of about a dozen men began playing paintball in the woods of Northern Virginia in early 2000.[146] Their goal was to develop military skills in case they were needed by the *mujahideen* in places such as Kashmir and Chechnya.[147] They created a paintball website to communicate with each other, watched videos of attacks on Russian forces, and purchased guns that they fired at a local range.[148] At least two of the men had also received training at a Pakistani camp run by Lashkar-e-Taiba (LET), a military group initially formed to combat the Russians in Afghanistan but now dedicated primarily to driving India out of Kashmir.[149]

Al-Timimi did not participate in these activities, but knew the men who did.[150] They attended a mosque in Falls Church where he lectured, and they apparently looked up to him. At one point, one of the men asked al-Timimi what he thought of their paintball games. He replied that they were a good idea.[151] Later, after the FBI questioned one of the paintballers, two others asked al-Timimi for advice.[152] After they assured him they had not broken any laws, he

141 *Id.* at 72.

142 *Id.* at 73.

143 *Id.* at 72–73.

144 *Id.* at 76–78.

145 The following account is based on witness testimony at al-Timimi's trial, as described and quoted in post-trial briefs. The trial transcript is not included in publicly available court files, and the cost of obtaining a copy from the court reporter was prohibitive. In addition, there is no court opinion. Thus, I am relying upon the accuracy and completeness of the accounts provided by the prosecution and defense in their filings. Where witness testimony conflicts, I describe the facts in the light most favorable to the prosecution.

146 Defendant's Motion for Judgment of Acquittal, *supra* note 16, at 2.

147 *Id.*

148 *Id.* at 4, 6–8.

149 *Id.* at 9–10.

150 *Id.* at 2–12.

151 *Id.* at 4–5.

152 *Id.* at 5.

said they should keep playing so as not to look suspicious.[153] But he also suggested they play soccer instead.[154]

On the night of 9/11, al-Timimi attended a previously scheduled dinner in honor of the mosque's founder.[155] During a discussion of the attacks, he argued that although they were caused by American foreign policy they were not justified under Islamic law.[156] He also warned those present to be careful of anti-Muslim violence and predicted it would no longer be safe to preach Islam in the United States.[157] After dinner, he was given a ride home by Yong Ki Kwon, a paintballer who had also attended the meal.[158] Al-Timimi told Kwon that he and his friends should make plans to protect themselves in the event of a backlash against Muslims.[159] He suggested they store canned food and water in their cars and drive to the mountains if violence erupted.[160] He also suggested that Kwon return to his native Korea to avoid paying taxes to the United States.[161]

Five days later, on September 16, Kwon invited the paintballers to dinner at his house to discuss al-Timimi's suggestions.[162] Al-Timimi was not invited, but he called Kwon as the latter was picking up food and they agreed that he would join the group.[163] At some point in the evening, al-Timimi told Kwon to unplug the phone and close the blinds.[164] He also told the men that the meeting was an *amana*—or trust—and that they should not repeat what was said.[165] Then, in response to a series of questions, al-Timimi told the men they should leave America and join the *mujahideen*'s fight against the enemies of Islam.[166] When asked about Afghanistan, which the United States was threatening to invade, he read the men a *fatwa* that had been issued by a Saudi scholar.[167] The *fatwa* declared that all Muslims were obligated to help defend Afghanistan against the United States.[168] The

153 *Id.*
154 *Id.*
155 *Id.* at 17.
156 *Id.*
157 *Id.* at 17–18.
158 *Id.* at 18.
159 *Id.*
160 *Id.* at 19.
161 *Id.* at 18–19.
162 *Id.* at 20.
163 *Id.* at 21.
164 *Id.* at 22–24.
165 *Id.* at 24.
166 *Id.* at 25.
167 *Id.* at 31.
168 *Id.*

men then discussed where they could receive military training, and one of them mentioned LET.[169] Al-Timimi said LET was on the right path and encouraged the men to train there.[170]

Al-Timimi left after about two hours, and the men continued their discussion.[171] One of the paintballers already had plans to travel to Pakistan in a few days to pick up his wife and children,[172] and three others decided to join him.[173] Over the next few days, they bought tickets and arranged for visas.[174] Two of the men left on September 19, but the other two were not scheduled to leave until September 20. They had not spoken to al-Timimi since the dinner, so they met him for lunch.[175] They told him they were leaving for Pakistan the next day to train at LET.[176] Al-Timimi warned them to be careful and not to carry anything suspicious.[177] He also said they should travel apart[178] and, if stopped by the police, should act scared and ask for their mothers.[179]

Once in Pakistan, the men spent several weeks sightseeing, shopping, and visiting family.[180] They then traveled to LET, where they trained to fire AK-47s, machine guns, and rocket-propelled grenades.[181] They left after a few weeks, however, in part because of boredom and in part because the border to Afghanistan had been closed. One of the men briefly sold mangoes in Pakistan,[182] but eventually all four returned to the United States.[183]

A year and a half later, they and the other paintballers were indicted on multiple charges, including conspiracy to levy war against the United States and its allies, attempting to aid the Taliban, and using firearms and explosives in furtherance of a crime of violence.[184] Four were convicted after jury trials, two were acquitted, and six pleaded guilty and agreed to cooperate in exchange for lesser

169 *Id.* at 34.
170 *Id.*
171 *Id.* at 38.
172 *Id.* at 34.
173 *Id.* at 36.
174 *Id.* at 39–40.
175 *Id.* at 40.
176 *Id.*
177 *Id.* at 41.
178 *Id.* at 40–41.
179 *Id.* at 40.
180 *Id.* at 42.
181 *Id.* at 42–43.
182 *See* Barakat, *Holy War*, *supra* note 20.
183 *See* Barakat, *Trial Attack*, *supra* note 20.
184 *See* United States v. Khan, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004).

sentences.[185] In September 2004, al-Timimi also was charged, but not as a co-conspirator. Instead, he was charged with one count of counseling and inducing the others to form a conspiracy, eight counts of counseling and inducing them to commit various offenses, and one count of attempting to contribute services to the Taliban.[186] Three of the paintballers testified against him,[187] and he was found guilty by a jury on all counts.[188]

After his conviction, al-Timimi's lawyers moved for acquittal and a new trial.[189] They argued that the evidence was misstated and that prosecutors had made inappropriate comments about Islam to the jury.[190] They also argued that his conviction violated the First Amendment since it rested entirely on speech.[191] The judge rejected this argument from the bench, declaring it "unpersuasive."[192] She then sentenced al-Timimi to life in prison plus seventy years, describing the sentence as "very draconian" but nonetheless required by the sentencing guidelines.[193]

Because the judge did not write an opinion, it is unclear why she found al-Timimi's First Amendment claim unpersuasive. Whatever the reason, her conclusion is doubtful. Nine of the ten counts charged al-Timimi with advocating unlawful conduct, which makes *Brandenburg* applicable. Yet there was little evidence to satisfy its requirements. For one thing, it is not clear that al-Timimi's words were directed to producing lawless conduct. At the time of the dinner, LET had not been declared a terrorist organization by the United States, and it was legal for Americans to travel there.[194] In addition, al-Timimi did not counsel the men to fight against the United States in Afghanistan. He simply read them a *fatwa* that had been issued by a Saudi scholar.[195]

---

185 *See id.*

186 *See* Defendant's Motion for Judgment of Acquittal, *supra* note 16, at 47–59.

187 *See id.* at 4–6.

188 *See supra* note 25 and accompanying text.

189 *See* Defendant's Motion for Judgment of Acquittal, *supra* note 16; Defendant's Corrected Motion for a New Trial, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. July 13, 2005).

190 *See* Defendant's Corrected Motion for a New Trial, *supra* note 189, at 2.

191 *See* Defendant's Motion for Judgment of Acquittal, *supra* note 16, at 43–46.

192 *See* Lichtblau, *supra* note 25.

193 *See id.*

194 *See* Paul Bradley, *Muslim Cleric Urged Jihad, Says Witness*, RICHMOND TIMES-DISPATCH, Apr. 5, 2005, at A1.

195 Defendant's Motion for Judgment of Acquittal, *supra* note 16, at 31.

Of course, the jury found him guilty of counseling unlawful conduct, so the judge may have felt bound by its determination.[196] But even conceding that point, there was no evidence his words were directed to inciting *imminent* lawless conduct. Al-Timimi never told the men when they should join the jihad or levy war against the United States. And at the time of the dinner, the United States had not yet begun hostilities in Afghanistan. It was not until four days later, on September 20, that President Bush delivered his ultimatum to the Taliban.[197] And it was not until three weeks later, on October 7, that the United States' bombing campaign began.[198] Thus, there was nothing to suggest that al-Timimi's speech was directed to inciting *imminent* lawless conduct. As the Court stated in *Hess*, "at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time."[199]

It is also not clear that al-Timimi's speech was *likely* to incite imminent lawless conduct. Joining the *mujahideen* is not something one does on the spot, like storming the street or burning a draft card. It takes planning and a long flight to a Muslim country. Even in this case, the men did not arrive at the LET camp until several weeks after the dinner.[200] And of course, they never actually levied war against the United States or aided the Taliban, actions that likely would have taken more time to carry out.

In its response to al-Timimi's motion, the government offered several counterarguments. First, it claimed that al-Timimi's case was identical to that of Abdel Rahman, the blind Sheik convicted of seditious conspiracy.[201] But there is a significant difference between the two cases. Rahman was charged with conspiracy, not advocacy.[202] Al-Timimi, by contrast, was charged with advocacy, almost certainly because there was no evidence that he joined the conspiracy. This difference is not technical. As alluded to above and explained more fully below, there is a strong argument that words of conspiracy are

196 This would itself be an error since the Supreme Court has held that a court must review the jury's determination where a defendant is punished on the basis of speech. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

197 *See* Bumiller, *supra* note 21.

198 *See* Patrick E. Tyler, *U.S. and Britain Strike Afghanistan, Aiming at Bases and Terrorist Camps; Bush Warns 'Taliban Will Pay a Price,'* N.Y. TIMES, Oct. 8, 2001, at A1.

199 Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

200 *See supra* notes 180–81 and accompanying text.

201 *See* Government's Response to Defendant's Post-Trial Motions at 3–4, United States v. Al-Timimi, No. 1:04-cr-385 (E.D. Va. July 13, 2005).

202 Government's Response to Defendant's Post-Trial Motions, *supra* note 201, at 3.

not protected because they are "situation-altering utterances."[203] Words of encouragement are not situation-altering utterances, however, and are therefore entitled to First Amendment protection.[204]

The government also argued that although it took the men three days to leave for Pakistan, they left as soon as possible.[205] The implication is that because they could not have acted more quickly the imminence requirement was met. But this misapprehends the rationale behind the imminence requirement. The question is not how quickly the crime can be committed, but whether there is time for counterspeech, deliberation, or police intervention to prevent the crime from occurring.[206] Thus, if a speaker advocates a crime that cannot be committed for sixty days, it is irrelevant that a listener commits the crime on the sixtieth day. What matters is that there was time for counterspeech, deliberation, and police intervention before the commission of the crime.

Finally, although the government does not do so in its brief, the government might argue that the imminence requirement was met because the men *conspired* to commit their crimes immediately after al-Timimi's speech. In other words, the government might argue that as long as the conspiracy is likely to begin immediately, the imminence requirement is satisfied even if the substantive crime is not likely to be committed until later. But only one of the counts against al-Timimi charged him with encouraging conspiracy; the other counts charged him with encouraging substantive crimes.[207] Moreover, accepting this argument would seriously undermine *Brandenburg*. Almost any speaker who advocates unlawful conduct can be viewed as also advocating a conspiracy to commit unlawful conduct. And because listeners can form conspiracies far more quickly than they can commit the underlying crime, the government could gut *Brandenburg*'s requirements by simply charging speakers with advocating conspiracy.

The bottom line is that under a careful application of *Brandenburg*, al-Timimi's speech should have been protected. And yet a federal judge rejected his free speech claim without even writing an opinion. One might suggest that his case is an aberration and that *Brandenburg* will prove sturdier in the future. But his case at least demonstrates that *Brandenburg* is subject to backsliding during times

203 *See infra* notes 251–65 and accompanying text.

204 *See infra* notes 266–89 and accompanying text.

205 *See* Government's Response to Defendant's Post-Trial Motions, *supra* note 201, at 31.

206 *See infra* Part IV.B.

207 *See supra* note 186 and accompanying text.

of crisis and insecurity. Prosecutors played heavily on fears of terrorism throughout the trial, comparing al-Timimi to Osama bin Laden.[208] The judge should have ignored such rhetoric and focused on the facts and law, but it would not be surprising if she succumbed to the same fears that have gripped much of the country over the past seven years.

The case also highlights many of the ambiguities of the *Brandenburg* test. Although I argue that al-Timimi's speech should be protected under a careful application of the test, it nonetheless raises numerous questions about *Brandenburg* that have never been resolved. For instance, what does imminence mean? Does it mean within a few hours, as arguably implied by *Hess v. Indiana*, or does it indicate a longer time frame? Is imminence a relative term that depends on the nature of the event, so that "a total eclipse of the sun next year is said to be imminent," while "[a]n April shower thirty minutes away is not"?[209] How likely must it be that the harm will occur? More likely than not or only somewhat likely? And how broad is *Brandenburg*'s reach? Does it cover all advocacy, including private encouragement to commit ordinary crimes, or only public advocacy that appeals to ideological commitments? Does it apply during war as well as peace? Does it overrule *Dennis v. United States*, or might a court analogize the threat of terrorism to the communist threat of the 1950s? Might a court go even further and conclude that the current threat is so serious that *Brandenburg*'s protections do not apply at all to speech that encourages acts of terrorism?

These are important questions that go to the heart of the *Brandenburg* test. Moreover, they are questions that must be answered before *Brandenburg* can fulfill its promise of providing strong protection for unpopular speech. The history of the First Amendment is filled with cases in which courts failed to protect speech during periods of crisis. Perhaps this is inevitable and no test can substitute for reasoned judgment. But it also seems likely that uncertainty about the appropriate standard is part of the problem. With no clear standard to guide them, courts can too easily revert to ad hoc balancing in which they weigh the costs of speech against its benefits. And because the costs are usually more tangible than the benefits, courts are likely to suppress some speech that deserves protection. It is therefore important to resolve the ambiguities of *Brandenburg* so that courts will have less discretion to act on their repressive inclinations.

---

208 *See* Defendant's Corrected Motion for a New Trial, *supra* note 189, at 7.

209 People v. Rubin, 158 Cal. Rptr. 488, 492 (Cal. Ct. App. 1979).

Before doing so, however, there are two larger questions that must be answered: Why should criminal advocacy be protected in the first place? And assuming it should be protected, why is *Brandenburg* the correct test? I address these questions in Parts II and III. Part IV then attempts to fill in the gaps of the *Brandenburg* framework.

## II. WHY SHOULD CRIMINAL ADVOCACY BE PROTECTED?

Any effort to determine the appropriate level of protection for advocacy of unlawful conduct must confront a threshold issue, which is why such speech should receive *any* protection. After all, if government can criminalize a particular act, why should it be forbidden from punishing speech that encourages the commission of that act? Common sense suggests that encouragement of an act makes it more likely that the act will occur.[210] And even if encouragement does not increase the likelihood, it is hard to sympathize with someone who urges others to break the law. As Abraham Lincoln asked, "'Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?'"[211]

Among those who would answer yes, there are several theories for why such speech should be protected. Thomas Scanlon has attempted to ground protection in Kantian notions of autonomy, arguing that autonomous individuals could not "regard themselves as being under an 'obligation' to believe the decrees of the state to be correct, nor could they concede to the state the right to have its decrees obeyed without deliberation."[212] Sheldon Leader has invoked social contract theory, asserting that no rational individual would agree to be kept ignorant of reasons for thinking that government had broken the social contract by passing unjust laws.[213] And T.R.S. Allan has argued that protection for criminal advocacy is mandated by

---

210 *See* Alexander, *supra* note 27, at 101 (noting that because people often act on the reasons provided by others, "[i]t therefore is plausible to assume that limiting the communication of certain ideas may decrease the incidence of violent and insurrectionary acts").

211 Geoffrey R. Stone, *Abraham Lincoln's First Amendment*, 78 N.Y.U. L. REV. 1, 19 (2003) (quoting Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS, 1859–1865, at 454, 460 (Don E. Fehrenbacher ed., 1989)).

212 Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 217 (1972).

213 *See* Sheldon L. Leader, *Free Speech and the Advocacy of Illegal Action in Law and Political Theory*, 82 COLUM. L. REV. 412, 423–24 (1982).

the rule of law, which, he says, gives each individual the right to resist laws that conflict with his own sense of moral obligations.[214]

Although intriguing, each of these theories has weaknesses. Scanlon's theory overlooks the possibility that individuals entering into the social contract might agree to give up some autonomy in exchange for a more stable society.[215] Leader sidesteps that objection by arguing that no rational individual would enter into a contract under which he could be kept ignorant of arguments that the contract had been broken. But there is a difference between arguments that the contract has been broken and arguments that the law should therefore be violated, and Leader does not adequately explain why a rational person would insist on hearing the latter. If one thought freedom to advocate unlawful conduct would cause sufficient instability, he might agree to be kept ignorant of such arguments, and we would be hard pressed to call him irrational. Finally, Allan avoids debate about the social contract, but relies upon the dubious assertion that the rule of law gives each individual the right to decide for himself which laws are legitimate and should be obeyed. This assertion runs counter to the prevailing view of justice, which is that citizens must generally accept and support reasonably just political institutions regardless of their personal and moral views.[216]

If these theories do not adequately explain why criminal advocacy should be protected, how can we justify such protection? I think the most persuasive justification is rooted in the values served by a principle of free speech.[217] Scholars have identified a number of values underlying free speech, but three have received particular attention.[218] First, free speech is said to promote the search for truth.[219]

---

214 *See* T.R.S. Allan, *Citizenship and Obligation: Civil Disobedience and Civil Dissent*, 55 CAMBRIDGE L.J. 89, 93–94, 112–13 (1996).

215 *See* Robert Amdur, *Scanlon on Freedom of Expression*, 9 PHIL. & PUB. AFF. 287, 298–300 (1980). Scanlon subsequently accepted Amdur's criticism and retreated from his initial position. *See* T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 532–34 (1979).

216 *See* JOHN RAWLS, A THEORY OF JUSTICE 99 (rev. ed. 1999).

217 In taking this approach, I follow the example of Kent Greenawalt, who has examined the relationship between free speech and criminal law in terms of the underlying justifications for free speech. *See* GREENAWALT, *supra* note 73. I reach many of the same conclusions about criminal advocacy as Greenawalt, though, as will be seen, I believe it is more closely tied to the underlying justifications for free speech than he does. *See infra* Part III.A.

218 *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 4–7 (3d ed. 2007).

219 For classic statements of the truth-seeking justification, see Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring); Abrams v. United States,

By forbidding the government from shutting off debate on particular topics or disfavoring particular viewpoints, freedom of speech creates a "marketplace of ideas" in which received opinion can be challenged and put to the test. Second, free speech promotes the self-government that is essential to a well-functioning democracy.[220] It enables individuals to discuss policies openly and ensures that they have access to information they need to make political and personal choices. Finally, free speech contributes to the autonomy of the individual and enables him to engage in expression vital to his self-fulfillment.[221]

If we accept that these values underlie the First Amendment,[222] we should provide at least some protection for any speech that furthers them.[223] And in most cases, advocacy of unlawful conduct furthers one or more of these values.[224] Consider a speaker who says, "I urge conscripts to resist military service because the draft is equivalent to slavery." This statement, though it advocates violation of the draft laws, contributes to the search for truth about the moral and legal propriety of the draft. It also promotes self-government because it criticizes existing policy and gives listeners a reason to oppose the draft and any candidates who support it. And, although the argument

---

250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting); JOHN STUART MILL, ON LIBERTY 78–110 (Michael B. Mathias ed., Pearson Educ. 2007) (1859); JOHN MILTON, AREOPAGITICA 25–33 (Richard C. Jebb ed., Cambridge Univ. Press 1918) (1644).

220 The canonical treatment is ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (2000).

221 *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 47 (1989); REDISH, *supra* note 28, at 84; David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 353–60 (1991). In addition to these values, scholars have argued that free speech provides a release valve for dissent, serves as a check on the misuse of governmental power, and reflects a mistrust of government's ability to decide which ideas are acceptable. *See* GREENAWALT, *supra* note 73, at 114. I focus on the three values discussed in the text because they are the most prominent, but my argument also applies to these additional values.

222 Not everyone does, of course. Scholars have criticized each of these justifications, and to the extent one accepts their criticisms, my argument will carry less weight. But these justifications are so entrenched in First Amendment theory that it makes sense to use them as building blocks. In this way, my argument is foundational. And those who do not accept the foundation will not accept the analysis I build on top of it.

223 How much protection is a separate question that I consider in Part III. Here, I am concerned with whether criminal advocacy is entitled to any protection. My discussion thus tracks the familiar distinction in First Amendment law between issues of coverage and protection. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).

224 *See* GREENAWALT, *supra* note 73, at 114 ("[M]any of the justifications for free speech apply with considerable force to urgings of crime and to urgings of criminal revolutionary action.").

is less compelling, the statement promotes the values of autonomy and self-fulfillment by giving the speaker a means of expressing his views.[225]

One might respond that a speaker could still further these values without encouraging violations of the law.[226] In the example above, the speaker could criticize the draft without urging draftees to violate the law (for example, "The draft is equivalent to slavery."). This abridged statement would still promote the search for truth about the draft, criticize existing policy, and vent the speaker's feelings about the draft. Therefore, there is no reason to permit him to encourage violation of the draft laws.

I see three problems with this argument. First, encouraging violations of the law may reflect the depth and intensity of the speaker's beliefs in a way that merely criticizing the law does not. By advocating unlawful conduct, a speaker can signal to his listeners that he is serious, that drastic measures are called for, and that the beliefs he is expressing are worth going to jail to defend.[227] The Supreme Court has recognized the value of such signals, stating that much verbal expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well."[228] It has also rejected the view that "the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."[229]

Second, it is very difficult to draw a clear line between speech that advocates unlawful conduct and speech that simply justifies such con-

225 *See* REDISH, *supra* note 28, at 84. The argument is less compelling because almost any form of expression can be viewed as furthering a speaker's autonomy and self-fulfillment. A speaker who threatens someone can claim that doing so makes him feel self-fulfilled, as can a person who perjures himself. At some point, however, the benefits of self-fulfillment would seem too minor and subjective to justify the costs that such speech imposes. *See* Volokh, *supra* note 34, at 1145 (suggesting that there are limits to the self-expression justification).

226 *See* STONE, *supra* note 6, at 405 (noting that Judge Learned Hand "thought the speaker should 'separate the wheat from the chaff' " (quoting Letter from Learned Hand to Elliot Richardson (Feb. 29, 1925))).

227 Of course, this latter point might be made even more forcefully if the government could punish criminal advocacy, since the speaker would then be risking his own freedom. But the issue here is whether encouraging people to violate the law has any value over and above simple criticism of the law.

228 Cohen v. California, 403 U.S. 15, 26 (1971) (reversing the defendant's conviction for wearing a jacket reading "Fuck the Draft" in a Los Angeles courthouse).

229 *Id.*

duct or criticizes existing policy.[230] The statement above provides a good example. If the speaker says, "I urge you to resist the draft," he is clearly advocating unlawful conduct. But what if he says, "The draft is morally unjust, and you have a moral duty to resist unjust laws"? Is he encouraging violation of the law or simply explaining his view of his listeners' moral duties? Or what if he says, "The draft is the equivalent of slavery, and the government has no power to enslave men"? These statements do not unequivocally advocate violation of the law, but their practical significance and effect may be the same.[231]

The government could address this problem by punishing only speech that expressly urges law violation through words such as "I encourage you to violate the law." But this would accomplish little since speakers would simply avoid these or similar words, while still communicating the same point. As a result, courts would likely permit the government to punish any speech that might be interpreted as advocating law violation, even if not explicitly. But this approach would chill much valuable speech. Because speakers would not know in advance how their speech would be interpreted, they likely would be hesitant to use strong language to criticize the government or perhaps to criticize the government at all.[232] This approach also would put too much discretion in the hands of prosecutors and juries, who might use it to punish those who express unpopular views.[233]

Third, although speakers sometimes can make their point simply by criticizing existing policy, in some instances advocacy of unlawful conduct is essential to the speaker's message. If two people are debating the morality of the draft, an opponent of the draft can express his views fully by arguing that the draft is immoral. But if the issue is whether people have a duty to resist the draft, mere criticism of the

230 *See* GREENAWALT, *supra* note 73, at 123.

231 Learned Hand argued that a speaker crosses the line into advocacy when he urges a listener "either that it is [in] his interest or his duty to" act. Masses Publ'g Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). But Hand's line was far from clear. For instance, he conceded that he would not protect Marc Antony's funeral oration even though it does not explicitly urge unlawful conduct. *See* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1237 n.166 (1983).

232 *See* Dennis v. United States, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring) ("Suppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed.").

233 *See* Thomas v. Collins, 323 U.S. 516, 535 (1945) ("[T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.").

draft is not enough. A speaker who believes that draft resistance is required can only express his views by arguing just that. To prohibit him from doing so is to shut off one side of the debate.

One might acknowledge that advocacy of unlawful conduct is necessary to this debate, but think the debate itself is unnecessary. In other words, one might argue that there is no value in debating whether violation of the law is ever justified or required. In a society governed by the rule of law, obedience to the law is a given, not open for discussion. But this argument presumes the truth of the very proposition at issue: that law violation is never justified or necessary. And one of the fundamental principles of free speech is that debate cannot be shut off on the presumption that we already know the truth that will emerge from that debate.[234]

Denying the value of the debate also seems inconsistent with the principle of self-government. The premise of self-government is that ultimate authority rests with the people, not with elected officials. The people therefore must be free to discuss and criticize the acts of elected officials. They also must be free to discuss whether the laws passed by those officials are entitled to obedience. To see this point, imagine that ten castaways agree to establish a government to manage their affairs until they are rescued. They decide to create a single legislature with three representatives elected from among the group. They also decide that whenever two of the three representatives agree on a policy it will become law. At this point, the question arises whether all laws passed by the legislature must be obeyed regardless of whether they are sensible or just. A debate ensues in which one castaway argues that all laws properly enacted must be obeyed, while a second argues that bad laws should be ignored. If a third castaway suggested that the second castaway was forbidden from making this argument, we would reject his suggestion outright. As an equal participant in the project of self-government, the second castaway is entitled to advocate the form of government he thinks best. And if he thinks the best form of government is one in which bad laws should be ignored, he must be allowed to make that argument.

Now imagine that the other castaways disagree with him and decide that all laws must be obeyed until they are changed. Does the second castaway lose his right to argue that bad laws should be ignored? The answer is no. Self-government is a continuing enterprise, not a one-time event. Therefore, although he must now obey all laws or face the consequences, he retains the right to argue that bad

234 *See, e.g.*, MILL, *supra* note 219, at 76–78.

laws should be ignored. To deny him this right is to deny him the ability to participate in the continuing project of self-government.[235]

To put a more timely spin on the point, consider a recent essay by Daniel Ellsberg encouraging government officials to leak classified information about the Bush administration's plans for a possible war against Iran.[236] Ellsberg, who was prosecuted for leaking the Pentagon Papers in 1971, acknowledged that any official who followed his encouragement could be sent to prison.[237] But he urged officials not to be deterred by that possibility. Recounting his own experience, he speculated that he might have prevented the escalation of the Vietnam War had he gone public in 1964 rather than in 1971.[238] He also argued that the Iraq War might have been prevented had insiders opposed to the war disclosed the basis for their opposition.[239] With the White House reportedly planning a war against Iran, Ellsberg argued, government officials are obligated to leak any information that might enlighten the public. "They owe us the truth," he wrote, "before the next war begins."[240]

Ellsberg's essay clearly advocates unlawful conduct—the unauthorized disclosure of classified documents. But it just as clearly furthers self-government. His argument is that the Bush administration cannot be trusted to level with the public about the need for, and likely outcome of, a war against Iran and that the only alternative is for conscientious officials to share their knowledge with the public. This is the essence of self-government: one citizen urging others to take action that will illuminate public debate on a matter of great importance. To deny the value of Ellsberg's essay is to deny the people the power to govern themselves.

Of course, not all criminal advocacy so directly furthers self-government. If a speaker encourages others to smoke marijuana, his listeners are not likely to take action that illuminates public debate. But even this speaker contributes something to self-government. He expresses his view that marijuana should be legal and that the laws prohibiting it should be disobeyed. And just as the castaway must be

235 To say that the castaway has a right to make the argument does not mean the right is absolute. As discussed in Part III.D, even fully protected speech can be prohibited when necessary to further a compelling governmental interest.

236 Daniel Ellsberg, *The Next War*, HARPER'S MAG., Oct. 2006, at 7, 7–10.

237 *See id.* at 10. Ellsberg's conviction was overturned on appeal, and the charges against him were dropped because of prosecutorial misconduct. Robin Toner, *When Secrets Are Passed to the Press*, N.Y. TIMES, Oct. 20, 1985, at E4.

238 *See* Ellsberg, *supra* note 236, at 7–8.

239 *See id.* at 8–9.

240 *Id.* at 10.

permitted to encourage disobedience of bad laws, so must the advocate of pot smoking be permitted to urge violation of the drug laws.

## III. How Much Protection Should Criminal Advocacy Receive?

Having established that criminal advocacy deserves at least some protection, the next question is, "how much?" Should it receive full First Amendment protection or some reduced level of protection? This is not an easy question to answer because the Supreme Court has never articulated a formula for determining how much protection particular categories of speech deserve, and I have not devised a formula myself. But one way to approach the problem is to ask whether there is any reason to treat criminal advocacy differently from other speech that receives full protection. If not, then it follows that criminal advocacy should also receive full protection. In this Part, I therefore consider several arguments for giving criminal advocacy less protection than other speech. First, I consider whether encouragements to commit crime should be viewed as weak imperatives that fall somewhere between speech and action. Second, I consider whether criminal advocacy should receive less protection because of the speaker's intent. Third, I consider whether criminal advocacy is inherently more dangerous than other speech that receives full protection. After rejecting each of these possibilities, I acknowledge that even if criminal advocacy deserves full protection, that does not mean it can never be prohibited. Under strict scrutiny, the government may prohibit even fully protected speech if doing so is necessary to further a compelling governmental interest.[241] Applying this standard to criminal advocacy, I conclude that prohibitions of criminal advocacy are necessary to further a compelling interest only when the advocacy is intended to produce imminent lawless conduct and is likely to produce such conduct—in other words, only when the *Brandenburg* test is met. Finally, I argue that *Brandenburg* should be understood as an application of strict scrutiny and that we should resolve its ambiguities with that standard in mind.

### *A. Criminal Advocacy and Situation-Altering Utterances*

The first argument for giving criminal advocacy reduced protection has been advanced by Kent Greenawalt and relies upon theories about the way we use language. In his excellent book *Speech, Crime,*

241 *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("The Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means [of doing so].").

*and the Uses of Language*, Greenawalt distinguishes between two uses of language: "assertions of fact and value" and what he refers to as "situation-altering utterances."[242] Assertions of fact and value are statements about the way things are or the way things should be.[243] "The sky is blue," is an assertion of fact, as is the statement, "Human pollutants are contributing to global climate change." One may disagree with these statements, but they purport to state a fact about the world.[244] Assertions of value are either evaluative claims, such as, "The sky is pretty," or normative claims, such as, "Humans should stop polluting the environment."[245] As Greenawalt points out, the line between assertions of fact and value is not sharp.[246] Depending upon one's views about objectivity and subjectivity, the claim that "human pollution of the environment is immoral" could be viewed as an assertion of either fact or value.

Assertions of fact and value are entitled to full First Amendment protection, Greenawalt argues, because they are closely tied to the underlying justifications for free speech.[247] Assertions of fact promote the search for truth, provide us the information we need to evaluate public policies and personal choices, and allow us to express and exercise our judgment as autonomous individuals.[248] Assertions of value also contribute to full deliberation of public policy and the exercise of autonomous judgment.[249] In addition, if one believes in the concept of objective truth, assertions of value also promote the search for truth.[250]

In contrast to assertions of fact and value are situation-altering utterances, which are similar to J.L. Austin's concept of "performative utterances" or "speech acts."[251] In lay terms, situation-altering utterances are "ways of doing things, not of asserting things," and are thus more like action than speech.[252] Common examples are when a bride and groom say, "I do," when a card player says, "I bid three hearts," or

242 GREENAWALT, *supra* note 73, at 43–44, 57.
243 *See id.* at 43–44.
244 *See id.* at 44.
245 *Id.*
246 *Id.*
247 *Id.* at 43–44.
248 *Id.*
249 *Id.* at 44.
250 *Id.*
251 *See* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 6, 20 (1962). Greenawalt uses the term "situation-altering utterances" rather than "performative utterances" in part because the category of speech he is referring to is narrower than Austin's category of performatives. GREENAWALT, *supra* note 73, at 58.
252 GREENAWALT, *supra* note 73, at 58.

when a baseball umpire says, "You're out."[253] Greenawalt describes such utterances as situation-altering because they change the social context in which we live by either (a) changing legal relations (for example, "I do"); (b) changing one's status according to institutional standards or non-legal conventions (for example, "You're out" or "I bid three hearts"); or (c) altering one's normative obligations (for example, "I promise").[254]

Because situation-altering utterances are ways of doing things, not of asserting things, Greenawalt argues that they are not tied to the underlying justifications for free speech.[255] The statement "I do" does not contribute to the search for truth or self-government because it does not assert the truth or falsity of any proposition; it simply brings about the state of marriage. The statement does further the speaker's autonomy, but no more than the act of getting married itself. The same is true of the statements "I bid three hearts" or "You're out." These statements do not primarily describe the world as it exists (that is, that I have a good hand or that the runner was tagged before reaching base). Instead they purport to change that world by creating an obligation (to win three hearts) or by shifting rights (the right of the runner to stay on the field).[256] Thus, Greenawalt concludes, situation-altering utterances are not entitled to First Amendment protection.[257]

Greenawalt's concept of situation-altering utterances is central to his views on the relationship between crime and free speech. Many laws punish individuals for the words they use. If two people verbally agree to commit a crime, they can be convicted of conspiracy even if they never carry out the crime.[258] A person who orders a subordinate to commit a crime or offers someone money to break the law is guilty of solicitation.[259] And a person who uses words to threaten another

253 *Id.* at 57–58.

254 *Id.*

255 *Id.* at 58.

256 Greenawalt acknowledges that assertions of fact and value may sometimes be implicit in situation-altering utterances. *Id.* at 60. When a groom says "I will," he implies that he is not already married and wants to marry the bride. But assertions of fact and value are implicit in most behavior, Greenawalt maintains. When a person plays tennis, he implies that he thinks tennis is worth playing and that the rules are acceptable. *Id.* Furthermore, "whatever one wants to communicate about facts and values can typically be asserted much more straightforwardly by means other than a situation-altering utterance." *Id.*

257 *Id.* at 58.

258 *See, e.g.*, 18 U.S.C. § 371 (2006).

259 *See, e.g.*, MODEL PENAL CODE § 5.02 (Official Draft and Revised Comments 1985).

person can be convicted of making threats.[260] Lawyers and judges have long assumed that such punishment does not violate the First Amendment, but have not had a theory to support that view.

Greenawalt fills that gap. He argues that punishment for such statements does not implicate the First Amendment because they are situation-altering utterances that change the world by altering normative obligations.[261] When two people agree to commit a crime, Greenawalt argues, they undertake an obligation to each other that did not exist before.[262] That agreement alters their expectations and perceived responsibilities and makes it more likely that each will follow through on the crime than if no agreement had been made.[263] Likewise, when a boss orders a subordinate to perform an act, his order imposes a duty that did not previously exist.[264] The subordinate can ignore the order, but if he does he will suffer the consequences.[265]

How does this theory relate to advocacy of unlawful conduct? Greenawalt argues that statements of encouragement are "weak imperatives" that fall somewhere between assertions of fact and value and situation-altering utterances.[266] They differ from situation-altering utterances in that they are often intertwined with assertions of fact and value.[267] They also "do not accomplish a significant change in normative relations or other aspects of the listener's environment."[268] On the other hand, Greenawalt argues, whatever assertions of fact and value are contained in encouragements usually can be communicated more straightforwardly.[269] In addition, encouragements are similar to situation-altering utterances in that they are "designed to produce action by someone else."[270] For these reasons, Greenawalt claims that encouragements "lie at the margin of a principle of free speech, but such a principle cannot disregard them altogether."[271] He then proposes a standard of protection for such statements that varies depend-

260 *See, e.g.*, 18 U.S.C. § 871 (2006) (making punishable a threat against the life of the President); MODEL PENAL CODE § 211.3 (Official Draft and Revised Comments 1980) (terrorist threats).

261 GREENAWALT, *supra* note 73, at 239–41.

262 *Id.* at 63, 239–40.

263 *Id.* at 63–64.

264 *Id.* at 65–66.

265 *Id.*

266 *Id.* at 68–71.

267 *Id.* at 70–71.

268 *Id.* at 68.

269 *See id.* at 69.

270 *Id.* at 68.

271 *Id.* at 71.

ing upon content and context but at its most protective closely resembles the *Brandenburg* test.[272]

Greenawalt is no doubt correct that encouragements—including encouragements to break the law—often include assertions of fact and value. In my example above, the speaker urges draftees to resist conscription because of his assertion that the draft is equivalent to slavery. Greenawalt is also correct that encouragements do not alter normative obligations.[273] Unlike an order from someone in authority, encouragements do not create an obligation on the part of the listener. If I urge people on the street to vote for a candidate, they can ignore me without any consequences. Friends or relatives might feel obligated to listen out of courtesy, but they would feel the same obligation if I were merely asserting facts and values, and they are certainly under no obligation to follow my encouragement.[274]

Greenawalt is wrong, however, in suggesting that encouragements are like situation-altering utterances because they are "designed to produce action by someone else." Assertions of fact and value are also frequently designed to produce action by someone else.[275] If I say that a political candidate is unqualified for office, I am trying to get people to vote against that candidate. If I say that SUVs are destroying the environment, I am trying to get people to drive smaller cars. Indeed, we rarely make assertions of fact and value simply to share our knowledge. Even a seemingly trivial statement such as "the faculty meeting is at 2 p.m." may be intended to ensure that the listener shows up on time. What distinguishes situation-altering utterances is not that they are designed to produce action, but that they are themselves more like action than speech because they alter legal relations or normative obligations. Encouragements do not alter legal relations or normative obligations, and the fact that they are designed

272 *See id.* at 260–77. For the details of Greenawalt's proposal, see *infra* notes 373–78 and accompanying text.

273 *Id.* at 68.

274 Listeners might feel obligated by encouragements when the speaker possesses significant influence, as do religious and political leaders. But basing First Amendment protection on whether a speaker has significant influence would require difficult and subjective judgments, which would likely chill valuable speech. *See infra* notes 288–89 and accompanying text.

275 *See* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.").

to produce action is not a reason for giving them less protection than assertions of fact and value.[276]

To be fair, Greenawalt acknowledges the difficulty of distinguishing encouragements from assertions of fact and value.[277] He notes that some assertions of value might be viewed as prescriptions for what others should do.[278] If a speaker tells a draftee "it is immoral to fight in this war," we might interpret that statement as encouraging the draftee not to fight. But even viewed in this light, Greenawalt argues, assertions of value are still "quite different" from encouragements.[279] "[A] value statement typically invokes some universal claim, appeals to the considered judgment of the listener, does not purport to *alter* the sorts of factors that are relevant to decision, and does not rest its force on happening to be asserted by a particular speaker."[280] An encouragement, by contrast, does "not appeal to preexisting factors relevant to decision making" and "injects the force of the speaker's personality toward a particular result."[281]

Greenawalt's distinction is not persuasive. First, he claims that assertions of value typically invoke some universal claim and appeal to the considered judgment of the listener. However, the same can be said of many encouragements, as illustrated by my draft example. If a speaker says "I urge conscripts to resist military service because the draft is equivalent to slavery," he is making a claim about the moral

276 Greenawalt might respond that although assertions of fact and value are sometimes designed to produce action, that is not their dominant purpose, whereas it is the dominant purpose of encouragements. But I am not sure one can generalize across the entire category of assertions of fact and value. Some assertions of fact and value are not designed to produce action, such as "the sky is blue." But there are probably an equal number that are, such as: "Human pollutants are contributing to global climate change." Should the latter statement receive less protection than the former? If not, why should encouragements receive less protection than assertions of fact and value?

Greenawalt also argues that whatever assertions of fact and value are contained in encouragements could be communicated more straightforwardly without the encouragement. *See* GREENAWALT, *supra* note 73, at 70–71. However, this depends on what the speaker is trying to communicate. If the speaker is only trying to communicate raw facts, Greenawalt may be right. But as pointed out above, criminal advocacy may express the intensity and depths of the speaker's beliefs in a way that simple assertions of fact and value cannot. *See supra* notes 227–29 and accompanying text.

277 GREENAWALT, *supra* note 73, at 69 ("Indeed, perhaps the most troubling problem about weak imperatives is determining whether they are really distinguishable for our purposes from assertions of fact and value.").

278 *See id.* at 69–70.

279 *See id.* at 70.

280 *Id.*

281 *Id.*

status of the draft and is appealing to the considered judgment of the listener. It is true that the simplest encouragements—"Please shut the door," "Kill him, Jack"—do not invoke universal claims or appeal to the listeners' judgment, and Greenawalt uses such examples to support his claim.[282] But the same is true of the simplest value statements, such as "that movie sucks" or "he's a jerk." Moreover, simple encouragements, stripped of all assertions of fact or value, are rare. People who encourage others to act almost always offer reasons for that action.[283] Thus, simple encouragements should not be treated as representative of the category of encouragements.

Second, Greenawalt says value statements do not rest their force on happening to be asserted by a particular speaker, whereas encouragements inject the force of the speaker's personality toward a particular result.[284] This is not entirely accurate. Listeners often give more or less weight to an assertion of fact or value depending upon the identity of the speaker. The statement "the war in Iraq is a mistake" would carry more force if said by Colin Powell than by a stranger on the street. Likewise, most people would probably take more seriously a claim about global warming from a scientist who has studied the issue than from a layperson. At the same time, not all encouragements depend on the force of the speaker's personality. If I publish an anonymous pamphlet urging workers at a munitions factory to strike, the force of that appeal does not rest on my identity or personality.

Still, it is true that encouragements are often more personal than assertions of fact and value. A speaker who encourages others to act does not just offer reasons for that action; he necessarily implies that he *wants* the listener to perform that act and will be gratified if the listener complies.[285] Indeed, I think this is the aspect of criminal

282 *Id.* at 69. An interesting example that Greenawalt does not consider is "fuck the draft." Technically, this is an encouragement that does not invoke universal claims or appeal to the considered judgment of the listener, yet the Supreme Court held that it was protected in *Cohen v. California*, 403 U.S. 15, 26 (1971). Perhaps Greenawalt would argue that "fuck the draft" is an expression of feeling rather than an encouragement since what it urges people to do is not literally possible. But the statement might easily be interpreted as encouragement to resist the draft.

283 And as explained above, it would undermine the values of the First Amendment if speakers were required to extract all encouragements from their assertions of fact and value. *See supra* notes 226–33 and accompanying text. Greenawalt appears to agree with this point. *See* GREENAWALT, *supra* note 73, at 70–71.

284 *See* GREENAWALT, *supra* note 73, at 70.

285 *Cf.* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result.").

advocacy that many people find particularly objectionable. It is bad enough when a speaker makes assertions that might lead listeners to break the law; for the speaker to also imply that their violation of the law will please him is downright galling.

But why should this matter for purposes of the First Amendment? One possibility is that when a speaker says he wants a listener to do something, he is not appealing to the listener's rational judgment; he is simply appealing to the listener's desire to please him. However, this argument suggests that the only worthy reasons for action are those based on rational judgment. It ignores the value of emotion and sentiment in decisionmaking. It also ignores the Court's statement that the First Amendment protects speech for its emotive function as well as its cognitive content.[286]

Moreover, this argument wrongly suggests that wanting to please another person is not a rational basis for action. We often take into account what other people want when deciding how to act. If my wife urges me not to talk politics at dinner, I may agree because dinner will be more pleasant if politics are avoided. But I may also agree because I know it will make her happy. Is that irrational? My wife does not think so. For a less freighted example, consider a colleague's request that I attend an admissions event at school. In addition to my desire to attract good students, I may attend in part because it will please my colleague who has worked hard on admissions. Again, it would be hard to call such a motivation irrational.[287]

There might be some situations in which a speaker has such influence over a listener that we would be troubled by an appeal to the listener's desire to please him. If a parent encourages a child to commit a crime, we may doubt whether the child is really exercising independent judgment.[288] We may have similar concerns when a popular religious or political figure encourages his followers to break the law. In these situations, the encouragement comes close to resembling an order that alters normative obligations. Thus, one might argue that encouragements under these circumstances do not deserve protection.

---

286 *See supra* notes 227–29 and accompanying text.

287 Notice also that assertions of fact and value sometimes appeal to a listener's desire to please someone. If a speaker says, "John wants you to resist the draft because it's immoral," he has asserted a fact about what John wants. But the basis of the appeal is the same—it would please another person for the listener to resist the draft.

288 A good example is the Beltway Sniper case, in which a father and his son killed at least ten people in the Washington, D.C. area. *See* Charlie LeDuff & Dean E. Murphy, *The Devoted 'Stepson,'* N.Y. TIMES, Oct. 26, 2002, at A1.

The problem is that, absent clear evidence of a hierarchical relationship, it would be very difficult to make protection for speech depend on the level of influence the speaker has over the listener. How would we determine whether a particular speaker has undue influence over his listeners? We might create a list of relationships in which one person usually has excessive influence over another: parent-child, religious leader-disciple, teacher-student. But this list would inevitably be over- and underinclusive. Not all religious leaders have substantial influence over their followers, and some children have more influence over their parents than vice versa. Alternatively, we might look at the nature of each relationship after the words have been spoken. But this would not give speakers sufficient warning as to when they could be held liable for criminal advocacy and would therefore likely chill protected speech.[289]

In short, Greenawalt's theory does not justify giving criminal advocacy less than full First Amendment protection. Encouragements typically invoke universal claims, appeal to the considered judgment of the listener, and are no more designed to produce action than many assertions of fact and value. Moreover, the fact that encouragements often appeal to the listener's desire to please the speaker is not a good reason for denying them full protection. Therefore, Greenawalt is wrong to treat encouragements as falling between assertions of fact and value and situation-altering utterances. With respect to the underlying justifications for free speech, encouragements are just as valuable as assertions of fact and value.

### *B. Speaker Intent*

Perhaps the reason criminal advocacy deserves reduced protection is not because it is less valuable than other speech but because of the speaker's intent. Criminal liability and punishment are often premised on intent. A driver who intentionally hits a pedestrian is guilty of murder, while a driver who does so by accident is not.[290] A person who tries to open the door of a locked bank with the intention of robbing it is guilty of attempted robbery, while a person who tries to

289 This same problem might arise when trying to determine whether a speaker has the authority to order a listener to do something. But there will usually be some objective criteria by which to make this determination, such as whether the listener is employed by the speaker.

290 *Compare* MODEL PENAL CODE § 210.2 (Official Draft and Revised Comments 1985) (murder includes any criminal homicide committed purposely, knowingly, or recklessly), *with id.* § 210.4 (making negligent homicide a separate crime from murder).

open the door to make a deposit is not.[291] The theory behind these distinctions is that people who intend to cause harm are more culpable, more dangerous, and more easily deterred than those who do so accidentally.

Drawing on this reasoning, one might argue that a speaker who advocates unlawful conduct is not entitled to full First Amendment protection because the speaker's intent is to bring about crime.[292] The guarantee of free speech is an extraordinary privilege. It gives people wide latitude to express their views even when doing so conflicts with the social interest in order and decency. But this privilege should not extend to those who use speech in an effort to bring about unlawful conduct. They have abused the privilege of free speech and should not be permitted to hide behind its protections.

I see three problems with this argument. First, although most speakers who use language advocating criminal conduct probably intend to bring about crime, some do not. Imagine a fan at a football game who yells to the players rushing the quarterback, "Knock his head off." The fan does not seriously intend for the players to commit a crime; he is using hyperbole to signal his enthusiasm for strong defense. Or, to borrow an example from Greenawalt, imagine a man who has just learned that his sister was raped by a stranger and who tells her husband he should kill whoever did it.[293] The man may simply be venting his emotions and may have no real intent that the husband commit murder.

Of course, courts might still deny full protection to criminal advocacy where the speaker *does* intend to bring about crime. Indeed, the Supreme Court appears to have embraced this approach in *Brandenburg*, stating that advocacy of unlawful conduct is protected unless it is "directed to inciting or producing imminent lawless action" and is likely to do so.[294] But this approach has its drawbacks. Determining a speaker's intent is a difficult task. There is often little evidence of intent, and the evidence that exists is frequently subject to differing

---

291 *See, e.g.*, *id.* § 5.01 (taking a "substantial step" toward committing a crime constitutes attempt of that crime).

292 *See* GREENAWALT, *supra* note 73, at 191 ("Holmes and Brandeis assumed that at least in some circumstances expression with an *intent* to create a clear and present danger could be deprived of constitutional protection.").

293 *See id.* at 112.

294 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam). Scholars have interpreted the words "directed to" as imposing an intent requirement. *See, e.g.*, Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2017 (2002) ("*Brandenburg* contains an intent requirement . . . .").

interpretations.[295] This means that determinations of intent are likely to be influenced by the factfinders' opinions of the speaker's views. If the factfinders dislike those views—as is usually the case in prosecutions for criminal advocacy—they are more likely to infer bad intent than if they agree with the speaker's views.[296] The result is that speakers may sometimes be punished for their views, not for intending to bring about crime.

I do not want to overstate this concern. Problems of determining intent are not limited to cases involving speech, and courts have managed to deal with these problems in other contexts.[297] Moreover, given that most speakers who advocate unlawful conduct probably do intend to bring about crime, it will be the rare case where a jury wrongly infers intent because it disagrees with the speaker's views. Still, concerns about determining intent may be sufficient to preclude us from punishing criminal advocacy on the basis of intent alone. We may feel more comfortable combining a requirement of intent with a requirement that the speech pose a high risk of danger. As I note in Part III.D, that is the approach the Court has taken in *Brandenburg*, and it is one that makes good sense.

Second, if bad intent alone were sufficient to reduce First Amendment protection, lots of speech other than criminal advocacy would lose protection. Many assertions of fact and value are said with bad intent. Consider a statement that makes it easier for others to commit a crime, such as a description of the gaps in airport security.[298] Or consider a statement that provides a reason for others to commit a crime, such as "the draft is the equivalent of slavery." Both types of statements may be said with the intent to bring about unlawful conduct. But it would severely limit the scope of free speech to deny protection to such statements on the basis of the speaker's intent. Moreover, determining the speaker's intent in such situations would be especially difficult. Unlike language advocating criminal conduct, most assertions of fact and value are not made with bad intent. Therefore, we cannot presume that the risk of an erroneous determination of intent is low. Given the difficulty of determining intent, juries might well find bad intent simply because of disagreement with the

295 *See* GREENAWALT, *supra* note 73, at 111–13, 261–62, 267.

296 *See id.* at 266.

297 *See* Dennis v. United States, 341 U.S. 494, 500 (1951) (plurality opinion).

298 *See* Eric Lipton, *Report Presses Easy Ways to Fix Airline Security*, N.Y. TIMES, June 5, 2005, at A1.

speaker's views.[299] Speakers, in turn, might be deterred from expressing unpopular views, which would diminish public debate.[300]

Third, and most importantly, the speaker's intent has nothing to do with why we protect speech in the first place. We do not protect speech to reward speakers for good intentions. We protect speech because we think doing so will further the values underlying the First Amendment, such as the search for truth, self-government, and self-fulfillment. And these values can be promoted regardless of whether the speaker has bad intent. Consider a person who, with the intent to cause a riot, releases a video of the police beating a suspect. The person's intent may be bad, but the value of the speech for society is considerable. The video sheds light on police misconduct and helps us evaluate how public officials are performing their jobs. That the speaker acted with bad intent is irrelevant to the video's value; its value would be the same if the speaker acted with good intent.[301]

This illustrates a larger point about the First Amendment, which is that we protect speech primarily for its value to society, not speakers. In this respect, free speech is different from many other constitutional rights. For instance, we protect the right to abortion and contraception primarily out of respect for the private choices of individuals, not because we think doing so benefits society.[302] The same is true of the right to be free from unreasonable searches and seizures. Although this freedom might make people less inhibited in how they lead their lives, which might ultimately lead to a happier, more creative society, we prohibit unreasonable searches primarily out of respect for individual privacy. Free speech is different. With the exception of the self-fulfillment rationale, nearly all of the underlying justifications for free speech emphasize the benefits to society, not the

299 *See* GREENAWALT, *supra* note 73, at 266.

300 Of course, one might agree that assertions of fact and value should not be punished on the basis of speaker intent but still argue that advocacy of unlawful conduct with the intent to bring about crime should be unprotected. Because the risk of chilling well-intentioned speech is lower in the context of criminal advocacy, it would arguably be justifiable to treat the two types of speech differently.

301 *See, e.g.*, People v. Rubin, 158 Cal. Rptr. 488, 491 (Cal. Ct. App. 1979) ("Speech is protected or not in the context of its expression and surroundings, and, if protected, the constitutional protection takes hold, regardless of the purity or malignancy of the speaker's motives."); Alexander, *supra* note 27, at 107 ("[N]either the value of the speech as information nor the danger of the speech to legitimate interests turns on the speaker's purpose.").

302 *See* Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) ("We protect those [privacy] rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life.").

speaker.[303] Thus, speech should not lose protection just because the speaker has bad intent. What matters is not whether the speaker deserves protection, but whether protecting the speech will benefit society by promoting the underlying values of the First Amendment.

This is not to say that a speaker's mental state should play no role in First Amendment analysis. Under *New York Times Co. v. Sullivan*,[304] for instance, a speaker cannot be held liable for false defamatory statements about public officials unless the speaker knows the statements are false or acts with reckless disregard as to whether they are false.[305] But such statements are not unprotected *because* of the speaker's knowledge or recklessness. Such statements are unprotected because, being false, they have little value and cause significant harm. In fact, this is true of all false defamatory statements. But we extend protection to such statements made *without* knowledge or recklessness because, although they have little value themselves, punishing them could chill valuable speech.[306] Punishing false defamatory statements that the speaker knows are false or when the speaker has acted recklessly, however, is not likely to chill valuable speech. As a result, they are not protected under *Sullivan*.[307]

We might apply the same reasoning to criminal advocacy. As I explain in Part III.D, criminal advocacy is sometimes sufficiently dangerous that we are justified in prohibiting it despite its value. But because of concerns about the chilling effect, we may not want to punish such advocacy where the speaker does not intend to bring about harm. That is, we may worry that if speakers know they can be punished for dangerous statements made recklessly or negligently, they will censor themselves, and we will lose valuable speech.[308] Where speakers know they can be punished only if they intend to bring about crime, however, there is less risk that valuable speech will be chilled. As long as they do not intend to cause harm, speakers have less reason to worry about being punished for their speech.[309] Indeed, this is the approach taken by *Brandenburg*. It requires the government to show

303 *See supra* notes 217–21 and accompanying text.

304 376 U.S. 254 (1964).

305 *See id.* at 279–80.

306 *See id.* at 271–72.

307 *See id.* at 279–80.

308 *See* Rice v. Paladin Enters., 128 F.3d 233, 247 (4th Cir. 1997) (noting that punishing speakers on the basis of "mere foreseeability or knowledge" may chill "entirely innocent, lawfully useful speech").

309 I say "less reason" rather than "no reason" because there is still a possibility that juries will impute bad intent to speakers who express unpopular or dangerous views. *See supra* notes 297–98 and accompanying text.

not only that speech is likely to produce imminent unlawful conduct, but also that it is directed to produce such conduct.[310] In this way, it ensures that speakers do not censor themselves for fear of inadvertently crossing the line into unprotected speech.

In sum, a speaker's intent to bring about crime is not a sufficient reason by itself for denying criminal advocacy full protection. But if we deny protection to such speech for other reasons—for instance, because under some circumstances it is especially dangerous—it makes sense to require a showing of intent in order to avoid the self-censorship that would result if speakers could be punished on the basis of recklessness or negligence.

### *C. Dangerousness*

A third argument for giving reduced protection to criminal advocacy is that it is inherently more dangerous than other speech. As I said at the beginning of Part II, common sense suggests that encouragement of an act makes it more likely that the act will occur. If this is correct, we might conclude that criminal advocacy deserves less protection because it poses a greater risk of harm than other speech that is fully protected.

But is this true? If we compare criminal advocacy as a class to assertions of fact and value as a class, the answer is probably yes. Most criminal advocacy creates at least a slight risk of harm, while many assertions of fact and value, such as "the sky is blue," pose no danger at all. However, if we compare criminal advocacy to assertions of fact and value that provide reasons for violating the law, the answer is probably no. Consider two statements about the draft. One speaker says "I urge you to resist the draft because it is the equivalent of slavery." Another speaker says "the draft is the equivalent of slavery." The first speaker has explicitly encouraged violation of the draft laws, while the second speaker has merely offered a reason for violating those laws. Yet it is not clear that the first statement is more likely to lead to draft resistance than the second.

In some instances, assertions of fact and value may pose a greater risk of harm than encouragements to crime. If a speaker tells draftees that nine out of ten soldiers sent into battle will be injured or killed, that may have a greater impact than explicit advocacy of draft resistance. Assertions of fact that facilitate crime, such as bomb-making instructions, may also pose a greater risk than criminal advocacy. As Eugene Volokh has explained, a person usually needs three things to

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

commit a crime: (1) the desire; (2) the knowledge; and (3) either a) the belief that the risk of getting caught is low enough to make it worthwhile, b) the willingness—often born of rage or felt ideological imperative—to act without regard to risk, or c) a careless disregard for the risk.[311] Criminal advocacy can create (1) (the desire) and (3)(b) (the willingness to disregard risk), though desire usually develops over time, not as the result of a single speech, and can be mitigated by counterspeech.[312] Crime-facilitating speech, on the other hand, can instantly create (2) (the knowledge) and (3)(a) (the confidence of not getting caught), and once that knowledge is acquired counterspeech is not likely to eliminate it.[313] Thus, Volokh concludes that "the danger of crime-facilitating speech may be greater than the danger of crime-advocating speech."[314]

Of course, just because some assertions of fact pose an equal or greater danger than criminal advocacy does not mean the latter should be fully protected. It might mean we should reduce protection for dangerous assertions of fact. Indeed, as noted above, some courts have concluded that instructions on how to commit crime should not receive full protection.[315] The Supreme Court has not yet considered these arguments, though Justice Stevens appeared receptive to them recently in a statement accompanying a denial of certiorari.[316]

But the argument for restricting such speech is not strong. As Volokh has also pointed out, most crime-facilitating speech has both harmful and valuable uses.[317] A book on explosives can teach criminals how to build bombs, but it can also teach engineers how to blow up buildings slated for demolition. A newspaper article describing gaps in airport security can help terrorists avoid detection, but it can also stimulate public debate about improving security. Restricting such speech will prevent the harmful uses, but it will also prevent the valuable uses. Therefore, Volokh argues, courts should be extremely

311 Volokh, *supra* note 34, at 1107.

312 *Id.* I discuss the role of counterspeech *infra* at notes 379–80 and accompanying text, as well as in Part IV.B.

313 *See* Volokh, *supra* note 34, at 1107–08.

314 *Id.* at 1107. Volokh qualifies his statement by "setting aside the speech that advocates imminent crime." *Id.* As I argue in Part III.D, this is the most dangerous type of criminal advocacy and thus deserves the least protection.

315 *See supra* notes 109–13 and accompanying text; *see also* Kendrick, *supra* note 4, at 2001 (discussing federal and state cases regarding criminally instructional speech).

316 *See* Stewart v. McCoy, 537 U.S. 993, 995 (2002) (Stevens, J., concurring in denial of certiorari) ("[Speech that performs a teaching function] should not be glibly characterized as mere 'advocacy'. . . .").

317 *See* Volokh, *supra* note 34, at 1107–26.

reluctant to permit restrictions on crime-facilitating speech.[318] Criminal advocacy also has value, as I have explained above. And given that it is no more dangerous than many other types of speech that receive full protection—and perhaps less dangerous than some—it is difficult to cite its dangerousness as a reason for giving it reduced protection.

### *D.* Brandenburg *As Strict Scrutiny*

If these arguments do not justify reduced protection for criminal advocacy, does that mean it can never be prohibited? Not at all. As the Supreme Court has recognized, constitutional rights—including freedom of speech—are not absolute.[319] Where overriding societal interests are seriously threatened by the exercise of constitutional rights, those rights must give way. This is not a license for government to abuse its power or target unpopular minorities. It is simply an acknowledgment that any constitution intended to endure must achieve a balance between individual freedom and societal needs.

The Supreme Court's recognition of this principle is reflected in the doctrine of strict scrutiny, which allows the government to infringe even fundamental rights when doing so is necessary to further a compelling interest.[320] Strict scrutiny is the standard that applies to content-based restrictions of fully protected speech under the First Amendment.[321] Therefore, if I am right that criminal advocacy is entitled to full protection, the government can still prohibit it when there is no other way to further a compelling interest.

Under what circumstances might this standard be satisfied? Let's start with the compelling interest prong. The governmental interest threatened by criminal advocacy is compliance with the law: if criminal advocacy is successful, it will lead to crime. Does government have a compelling interest in preventing crime? With the exception of all but the most minor crimes, the answer is certainly yes.[322] Government

---

318 *See id.* at 1217. Volokh argues that such restrictions should be permitted in only three circumstances:

> (1) When the speech is said to a few people who the speaker knows are likely to use it to commit a crime or to escape punishment . . . .
>
> (2) When the speech, even though broadly published, has virtually no noncriminal uses . . . .
>
> (3) When the speech facilitates extraordinarily serious harms, such as nuclear or biological attacks . . . .

*Id.* (emphases omitted).

319 *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

320 *See, e.g.*, Burson v. Freeman, 504 U.S. 191, 198, 211 (1992) (plurality opinion).

321 *See id.* at 198.

322 *See infra* notes 363–65 and accompanying text.

cannot protect the security and property of citizens if it cannot take steps to prevent crime. Therefore, when criminal advocacy is *likely* to lead to crime, the government has a compelling interest in prohibiting it. But when criminal advocacy is *un*likely to lead to crime, it cannot be prohibited because such advocacy, by definition, does not implicate the government's compelling interest in preventing crime.[323]

Establishing the existence of a compelling interest is only half the task. The government must also show that there is no less restrictive alternative for furthering its compelling interest—or, to put it differently, that the infringement of a fundamental right is necessary to achieve the desired benefit or prevent the feared harm.[324] The feared harm of criminal advocacy is that it will lead to unlawful conduct, so the question is whether prohibiting criminal advocacy that is likely to lead to crime is necessary to prevent the crime from occurring.

With respect to criminal advocacy that is likely to lead to *imminent* unlawful conduct, the answer is probably yes. When a speaker urges listeners to commit a crime right now or very soon and those listeners are likely to comply, there is almost nothing the government or anyone else can do to prevent the crime from occurring. There is little time for police intervention, counterarguments from other speakers, or reflection and deliberation on the part of the listeners. The government's only alternative is to criminalize the advocacy in the hope of deterring speakers from engaging in it to begin with.

But when a speaker urges listeners to violate the law *in the future*, the government has several alternatives. First, assuming the speech is public,[325] the police have at least some ability to prevent the crime from occurring. They can monitor the listeners and arrest them for attempt or conspiracy if they take steps toward commission of the crime.[326] They can also deter the listeners by making clear that they are being monitored, that the crime will not succeed if attempted, and that anyone attempting the crime will be caught and punished. Of course, police intervention will not always be effective. When a speaker addresses a large audience, it may not be feasible for police to monitor the actions of all the listeners. In addition, some listeners may be so persuaded by the speaker's encouragement that they are willing to commit the crime even if they know they will be caught. But

323 I discuss the issue of how likely the crime must be in Part IV.A.

324 *Freeman*, 504 U.S. at 198 (plurality opinion).

325 I consider criminal advocacy that is private in Part IV.D.

326 *See, e.g.*, MODEL PENAL CODE § 5.01, .03 (Official Draft and Revised Comments 1985) (defining attempt and conspiracy).

police intervention seems likely to be effective in at least some cases and should therefore be taken into account when determining whether there are less restrictive alternatives for furthering the government's interest.[327]

Second, when a speaker advocates future crime, other speakers have an opportunity to rebut his arguments and discourage his listeners from breaking the law. This is the theory of counterspeech that Justice Brandeis articulated so eloquently in *Whitney v. California*. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education," he wrote, "the remedy to be applied is more speech, not enforced silence."[328] Counterspeech theory has played an important role in First Amendment doctrine and is often invoked as an argument against speech regulation.[329] But it is not without its critics,[330] and so we must consider several possible objections before concluding that counterspeech is a viable alternative to regulation.

One objection might be that reliance on counterspeech reflects a naïve faith in the power of words. People are usually quite set in their beliefs, one might argue, and rarely change their minds in response to argument. It is therefore futile to rely on counterspeech to rebut criminal advocacy since listeners are not likely to be influenced by what the counterspeakers say. Framed this broadly, however, the argument proves too much. If words have no power to influence beliefs or action, then criminal advocacy can have no effect either. People will either break the law or not, and nothing that speakers or counterspeakers say makes any difference.

The objection must be narrower—not that words have no power, but that counterspeech is likely to be less effectual than criminal advocacy. Why might this be? I can think of two reasons, although I find neither persuasive. First, one might argue that the marketplace of ideas is not the idealized debate club we sometimes imagine it to be.[331] Instead, it is a chaotic, rambunctious space where reasoned argument is drowned out by impassioned rhetoric and listeners ignore ideas they do not want to hear. I agree that the marketplace of ideas

327 *See* GREENAWALT, *supra* note 73, at 268 (suggesting that police intervention might be an effective alternative to the prohibition of speech that urges future crime).

328 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

329 *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 586 (2001) (Thomas, J., concurring); Texas v. Johnson, 491 U.S. 397, 419–20 (1989); Brown v. Hartlage, 456 U.S. 45, 61 (1982).

330 *See* REDISH, *supra* note 28, at 191.

331 *See* BAKER, *supra* note 221, at 12–17.

is not always a meritocracy and that audiences are often self-selecting. But I am not convinced that counterspeech will therefore be ineffective. Counterspeech does not have to be dispassionate and sober; like criminal advocacy, it can be fiery, provocative, and manipulative. Think of Joseph McCarthy's attacks on communists in the 1950s or the way right-wing pundits have demonized critics of the Iraq War. Moreover, to say that listeners tune out arguments they do not want to hear is just another way of saying that words have no power to influence beliefs. Yet people's views do change, often in response to arguments they initially ignored or resisted.

The other argument is that counterspeech will not be as effective as criminal advocacy because listeners are most likely to be persuaded by the first speaker they hear. This argument assumes a sort of path dependency in the art of persuasion that I am not sure exists. But even if it does, the argument would fail because criminal advocacy does not always precede the speech that opposes it. Take the draft example I have used throughout this Article. Long before anyone advocates resistance to the draft, listeners will likely have been told that the draft is noble and just and that strict compliance with it is necessary to protect the country. It is true that some listeners will have rejected that message since we are dealing now only with criminal advocacy that is *likely* to lead to crime. But listeners will hear the message again after they are encouraged to resist the draft, and they may be more receptive to it the second time around. Moreover, if listeners rejected the initial message in favor of the draft, that undermines the premise of the path dependency argument, which is that listeners are most likely to be persuaded by the first speaker they hear.

Finally, even if counterspeech is effective, one might argue that government should not have to rely on the efforts of others to prevent crime. The "less restrictive alternative" inquiry is about what government can do to further its compelling interest, not what people can do. Under the Constitution, however, the people are the government.[332] And if they can minimize the danger of criminal advocacy through counterspeech, it is hard to see why they should not be required to do so before authorizing their representatives to prohibit it. Moreover, the official organs of government can engage in counterspeech too. If a speaker urges young men to resist the draft because they will be sent to fight a war that is unjust, unwise, or unwinnable, the government can respond by defending the war. Government—particularly at the federal level—has massive resources and a

332 *See* U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union . . . .").

long history of information campaigns to rebut critics, so it is not implausible to suggest that it can engage in counterspeech to undermine criminal advocacy.

The third alternative to government regulation is not so much an alternative as a reason to think that prohibiting advocacy of future crime is not necessary to prevent the crime from occurring. When a speaker urges listeners to break the law, they may initially be persuaded by the force of his arguments and the intensity of his convictions. But as time passes and listeners reflect on the speaker's message, the persuasive force of his words may diminish. This seems especially likely when listeners are urged to violate the law. Most people are socially conditioned to follow the law and do not commit crimes lightly. Impassioned language and forceful arguments may temporarily rouse them to a state of lawlessness. But when they wake the next morning and consider actually breaking the law, they are likely to have second thoughts. There are exceptions, of course. Reflection and deliberation will sometimes reinforce the listener's agreement with the speaker and embolden him to act. But at least where crime is advocated, it seems likely that the passage of time will reduce the likelihood that listeners will act on the speaker's encouragement.

There are three alternatives, then, to the regulation of criminal advocacy that is likely to lead to *future* crime. The government can rely on police intervention, counterspeech, or the passage of time to prevent the crime from occurring. These alternatives may not always be effective at furthering the government's compelling interest in crime prevention. But even a ban on criminal advocacy will not always be effective. And without good reason to think that these alternatives will be less effective than regulation, strict scrutiny requires the government to rely on them instead of prohibiting fully protected speech.[333]

In addition to the existence of less restrictive alternatives, there is another reason to conclude that government cannot prohibit advocacy to engage in future crime. As noted above, we are dealing in this section with criminal advocacy that is *likely* to lead to crime, since it is only such advocacy that implicates the government's compelling interest in crime prevention. But determining whether criminal advocacy is likely to lead to crime is not easy. The success of speech depends on a range of factors that cannot easily be assessed by the speaker at the time he speaks, by the police at the time of arrest, or by courts at the time of trial. In addition, because those who advocate crime are usu-

333 *See* Burson v. Freeman, 504 U.S. 191, 198 (1992) (plurality opinion).

ally not sympathetic, the likelihood of success is almost certain to be overestimated by both the police and the courts.[334] This means we must be very careful about how the likelihood determination is made. And all other things being equal, it is far easier to predict whether a speaker's words are likely to lead to imminent unlawful conduct than future unlawful conduct. If a speaker urges a group of people to storm city hall immediately, we can gauge the likely success of his words by looking at the surrounding circumstances. Is the speaker influential? Is the crowd angry? Are the police present? But if a speaker urges a group of people to storm city hall next week, next month, or next year, it is far harder to predict whether they will act on his words. As the time frame expands outward, it becomes increasingly difficult to assess all the circumstances that bear on the question. At a certain point, we are just speculating. And because criminal advocacy is valuable and fully protected speech, it should not be prohibited based upon speculation about its effects.

We are close to having a final test for the protection of criminal advocacy, but there is one further element to add. In my discussion of intent in Part III.B, I noted that although speech should not be restricted on the basis of intent, that does not mean a speaker's mens rea is irrelevant. Because of concerns about the chilling effect of speech regulations, it is often necessary to impose a mens rea requirement before government may punish speech.[335] Without this protection, people would likely be hesitant to engage in some protected speech for fear of inadvertently breaking the law, and society would be deprived of valuable speech. This concern applies equally to criminal advocacy. Although government has a compelling interest in prohibiting criminal advocacy that is likely to lead to imminent unlawful conduct and although there are no less restrictive alternatives for furthering that interest, such speech should not be punished unless the speaker has a specified mens rea. Without such a requirement, speakers might be hesitant to criticize government or the law for fear that their words would be interpreted as likely to lead to imminent lawless conduct.

The only question is what level of mens rea should apply. There are four possibilities: negligence, recklessness, knowledge, or intent. A negligence standard seems clearly inadequate to prevent self-censorship. Negligence is a notoriously vague and subjective concept and can too easily be manipulated by a judge or jury hostile to a speaker's views. Indeed, the Court rejected a negligence standard for defama-

334 *See* GREENAWALT, *supra* note 73, at 266.

335 *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964).

tion cases in *New York Times Co. v. Sullivan*, finding it to be "constitutionally insufficient."[336] A knowledge standard also seems inappropriate. How would a court determine whether a speaker knew that his words were likely to lead to imminent unlawful conduct? The future is not something one can know; it is something one can only speculate about. It is true that knowledge is sufficient for liability in defamation cases. But those cases turn on statements of fact. And while it makes sense to ask whether a defendant knew that a statement of fact was false, it does not make sense to ask whether he knew that his speech would lead to imminent lawless conduct.

That leaves us with recklessness and intent. In *Sullivan*, the Court ruled that speakers can be held liable for defamation if they knew that the defamatory statement was false *or* acted with reckless disregard as to whether it was false.[337] *Sullivan* thus approved a recklessness standard for defamation, which might suggest that this standard is also appropriate for criminal advocacy. However, there is good reason to reject that conclusion. In post-*Sullivan* cases, the Court has held that speakers have no duty to check the accuracy of defamatory statements before publishing them. Instead, defendants are reckless only if they entertained serious doubts about the truth of the statements.[338] This means that the recklessness determination in defamation cases turns largely on an objective inquiry: was the speaker aware of facts that gave rise to serious doubts about the truth of the statements? In criminal advocacy cases, however, a recklessness inquiry would likely be subjective: was it grossly irresponsible of the speaker to advocate unlawful conduct given the circumstances in which he spoke? Subjective standards are dangerous in the free speech context. They are imprecise, which means judges and juries can easily manipulate them to punish speakers with unpopular views. And they are unpredictable, which means they can chill valuable speech. We should therefore reject a recklessness standard in favor of intent. Requiring proof that a speaker intended to bring about imminent unlawful conduct will limit the discretion of judges and juries and help ensure that speakers do not censor themselves for fear of inadvertently crossing the line into unprotected speech.

We now have a complete standard for assessing criminal advocacy that we can state succinctly. Criminal advocacy is fully protected speech that is generally not subject to punishment. But where it is (1) *intended* to produce *imminent* unlawful conduct and (2) *likely* to pro-

336 *Id.* at 279–80.

337 *Id.*

338 *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991).

duce such conduct, it can be prohibited because the government has a compelling interest that cannot be furthered by less restrictive means.

As the careful reader will have noticed, this test bears a striking resemblance to *Brandenburg*. Indeed, it is the same in all respects except for use of the word "intended" instead of "directed." But most courts and scholars have interpreted "directed" to mean "intended,"[339] so the difference is purely semantic. My standard, arrived at through an application of strict scrutiny, is identical to the *Brandenburg* test.

What should we make of this? Is it a coincidence that the standard I have arrived at by applying strict scrutiny is identical to the *Brandenburg* test? I do not think so. Although the Court did not characterize *Brandenburg* as an application of strict scrutiny, we should not be surprised that the test it adopted rests on the same principles that underlie that standard. As Stephen Siegel convincingly argued in a recent article, strict scrutiny has its origins in the clear and present danger test articulated by Holmes and Brandeis.[340] Consider Brandeis' statement in *Whitney* that restrictions on speech are permitted only if they are "*required* in order to protect the State from destruction or from *serious injury*."[341] Or consider the Court's statement in *Thomas v. Collins*[342] that intrusions on free speech are justified "only if *grave* and impending public danger *requires* this."[343] *Brandenburg*, of course, is the modern version of the clear and present danger test. So although *Brandenburg* and strict scrutiny have never been formally linked by the Court (or anyone else), it makes sense that an application of strict scrutiny to criminal advocacy would produce the *Brandenburg* test.

Let me be clear: I am not suggesting that the Court replace *Brandenburg* with strict scrutiny. Strict scrutiny is a balancing test, and like all balancing tests, it is subject to abuse and manipulation. To independently apply strict scrutiny in every prosecution for criminal advocacy would give judges too much discretion and speakers too little notice. It makes more sense to strike the balance at a categorical level and adopt a detailed rule like *Brandenburg* to guide judges.

---

339 *See supra* note 294 and accompanying text.

340 Stephen A. Siegel, *The Death and Rebirth of the Clear and Present Danger Test*, *in* TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 211, 223–25 (Alfred L. Brophy & Daniel W. Hamilton eds., 2009), *available at* http://ssrn.com/abstract=964553.

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

342 323 U.S. 516 (1945)

343 *Id.* at 532 (emphases added).

But there are several advantages to emphasizing the relationship between the two doctrines. First, understanding *Brandenburg* as an application of strict scrutiny makes clear that criminal advocacy is fully protected speech. For a long time, free speech casebooks have treated criminal advocacy as one of several unprotected categories of speech and the *Brandenburg* test as an exception to that rule.[344] But this view is backwards. As my analysis in this Part shows, we should instead view criminal advocacy as fully protected speech subject only to the qualifications of strict scrutiny. Stressing the link between *Brandenburg* and strict scrutiny reinforces this view and elevates criminal advocacy to the same plane as other fully protected speech.

Second, understanding *Brandenburg* as an application of strict scrutiny may lead courts to apply its test more rigorously. Strict scrutiny has often been characterized as "'strict in theory, but fatal in fact.'"[345] And although scholars have shown that this is an overstatement, judges are still very reluctant to uphold laws subject to strict scrutiny, especially where free speech is involved.[346] *Brandenburg*, standing alone, might easily be dismissed by judges as an outlier that does not demand strict adherence. But once it is understood as an application of strict scrutiny, it may invite greater respect.

Finally and most importantly, understanding *Brandenburg* as an application of strict scrutiny can help resolve some of its many ambiguities. As noted above, there are numerous questions about the *Brandenburg* framework that remain unanswered: What does "imminent" mean? Is the gravity of the harm relevant? Does it matter whether the speech takes place in public or private? Resolving these and other questions has been difficult because we have had no coherent theory to explain the *Brandenburg* test. But once we recognize that *Brandenburg* is an application of strict scrutiny, filling in its gaps becomes easier. Not only does strict scrutiny provide a framework for thinking about *Brandenburg*, but it also provides a body of law to draw upon in working out the details. Unfortunately, as Part IV demonstrates, strict scrutiny does not provide as much guidance as one would hope, in part because there are many unanswered questions about strict scrutiny itself. But as the Court resolves those questions in future cases, we can further refine the *Brandenburg* test. In that way, the law governing criminal advocacy will develop alongside the law

344 *See, e.g.*, SULLIVAN & GUNTHER, *supra* note 218, at 1–50.

345 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

346 *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 794–98 (2006).

governing other fully protected speech, and First Amendment doctrine will achieve a measure of coherence that it currently lacks.

## IV. FILLING IN THE *BRANDENBURG* FRAMEWORK

Now for the hard part. Having explained why criminal advocacy is entitled to protection and why *Brandenburg* provides the proper level of protection, we must fill in its framework. The goal is to make *Brandenburg* as precise as possible so that courts cannot easily circumvent its protections in times of paranoia and fear. In pursuing this goal, however, it is important not to be seduced by the allure of absolute precision. This is law, after all, not science, and efforts to eliminate all uncertainty are usually forced and artificial. Therefore, although I aim in this Part to answer many of the lingering questions about *Brandenburg*, I resist the temptation to eliminate all ambiguity. The result, although perhaps less satisfying, strikes me as more realistic and sensitive to the limits of doctrinal reform.

### *A. What Does "Likely" Mean?*

The first question is what it means to say that criminal advocacy is "likely" to produce lawless conduct. Neither the Supreme Court nor the lower courts have addressed this question, but it is key to the *Brandenburg* framework. If the government can punish speech that has only a slight chance of producing crime, *Brandenburg* will offer much less protection than if the government is required to show that speech poses a more substantial risk of crime.

So how can we determine what level of probability is required? If we view *Brandenburg* as an application of strict scrutiny, we can start by asking at what point the government's interest in preventing the risk of crime becomes compelling. Although the Supreme Court has never addressed this issue, it seems clear that, in general, the government does not have a compelling interest in preventing a very small risk of crime.[347] If that were the case, the government could punish even criticism of public officials, since such speech creates at least some risk that listeners will respond by breaking the law. On the other hand, it also seems clear that the government should not have to establish that criminal advocacy is certain to lead to crime. It is nearly impossible to prove that an event is certain to happen—especially when human responses are involved—and it would be unreasonable (and inconsistent with strict scrutiny) to adopt a standard that is

347 This is true at least with respect to crimes of ordinary gravity. In Part IV.C, I consider whether the answer varies depending upon the gravity of the harm.

all but impossible to meet. As a starting point, therefore, we can say that the degree of probability required under *Brandenburg* must fall somewhere between a very small chance and certainty.

How might we narrow the range further? One possibility is to look to other areas of law in which personal freedoms can be infringed based on some probability of harm. Under *Terry v. Ohio*,[348] for instance, police can stop and frisk an individual if they have reasonable suspicion that he has committed or is about to commit a crime and is armed and dangerous.[349] The Court has never precisely defined reasonable suspicion, but it has said that it is more than a hunch and must be based on specific and articulable facts.[350] Should the same standard be applied to *Brandenburg*, so that the government can prohibit criminal advocacy if there is a reasonable chance that it will lead to crime? I do not think so. The Court has made clear that *Terry* permits only a brief seizure and pat-down of an individual; it does not permit a custodial detention or even a full-body search.[351] If the government cannot conduct a full search of a person based on reasonable suspicion that a crime is about to be committed, it would seem odd to say that it can prohibit fully protected speech based on the same level of probability.

What about probable cause? Although police cannot arrest an individual on the basis of reasonable suspicion, they can arrest him if there is probable cause to believe he has committed or is committing a crime.[352] They can also search his car,[353] and, if they have a warrant, his person or home.[354] As with reasonable suspicion, the Court has not precisely defined probable cause. But it has said that probable cause means a "substantial chance" or "fair probability," and that it is more than reasonable suspicion but less than a "more likely than not" standard.[355] Is this an appropriate standard for *Brandenburg*? For the general run of cases, I think it is.[356] The "probable cause" standard was written into the Constitution to protect people's interest in the privacy of their "persons, houses, papers, and effects."[357] The right of

348 392 U.S. 1 (1968).

349 *Id.* at 27.

350 *See* Illinois v. Wardlow, 528 U.S. 119, 123–24 (2000) (citing *Terry*, 392 U.S. at 27).

351 *See* Dunaway v. New York, 442 U.S. 200, 210–16 (1979).

352 *See* United States v. Watson, 423 U.S. 411, 421–24 (1976).

353 *See* Chambers v. Maroney, 399 U.S. 42, 48–52 (1970).

354 *See* Johnson v. United States, 333 U.S. 10, 14–17 (1948).

355 *See* Illinois v. Gates, 462 U.S. 213, 238, 243 n.13 (1983).

356 I consider exceptional cases in Part IV.C.

357 U.S. CONST. amend. IV.

privacy serves different functions than free speech, and the two sometimes conflict. But there is no reason to think that privacy is less important as a constitutional interest than free speech. Therefore, if the government can invade the right to privacy when there is a substantial chance or fair probability that an individual has violated the law, it should be able to prohibit criminal advocacy that has a substantial chance or fair probability of leading to crime.[358]

Admittedly, this is not a precise formula. Even in the Fourth Amendment context, courts have struggled to determine exactly what is meant by "substantial chance" or "fair probability." But it does tell us that the government need not prove that criminal advocacy is more likely than not to lead to unlawful conduct. It also tells us that the government must establish more than reasonable suspicion, which is itself more than a hunch. So although the probable cause standard does not resolve all ambiguities about how likely it must be that criminal advocacy will lead to crime, it provides a range of probability that will narrow the discretion of judges.

### *B. What Does "Imminent" Mean?*

The next question is: What does "imminent" mean? Does imminent mean immediately, as the Court appeared to suggest in *Hess v. Indiana*?[359] Or does imminent mean as much as five weeks away, as a California court of appeal held in *People v. Rubin*?[360] Unlike the likelihood requirement, the imminence requirement is not directly related to the "compelling interest" prong of strict scrutiny. The government has a compelling interest in preventing crime whether that crime is likely to happen imminently or in the future. But the imminence requirement is indirectly related to the compelling interest prong because, as pointed out above, it is generally harder to predict whether criminal advocacy is likely to lead to future crime than to imminent crime.[361] In addition, and as also pointed out above, the imminence requirement is related to the "less restrictive alternative"

358 Greenawalt has proposed a similar standard, arguing that there must be a "reasonable likelihood" that criminal advocacy will lead to crime. GREENAWALT, *supra* note 73, at 266–68. Although Greenawalt does not define "reasonable likelihood," he notes that, at least for grave crimes, it would not require a showing that crime was more probable than not to occur. *Id.* at 267–68. For petty crimes, however, he argues that a "more-probable-than-not" standard might be appropriate. *Id.* I discuss whether the probability requirement should vary with the gravity of the harm in Part IV.C.

359 *See supra* notes 73–75 and accompanying text.

360 *See supra* notes 126–36 and accompanying text.

361 *See supra* Part III.D.

prong of strict scrutiny.[362] Where criminal advocacy is likely to lead to imminent lawless conduct, the government has no alternative but to criminalize the speech in the hope of deterring speakers from engaging in it. But where criminal advocacy is likely to lead to future lawless conduct, the government can rely on police intervention, counterspeech, and the deliberation of listeners to prevent the crime from occurring. In determining what "imminent" means, therefore, we must ask two questions: First, how imminent must the advocated crime be for a court to confidently assess the likelihood that it will occur? Second, how imminent must the advocated crime be to make police intervention, counterspeech, and listener deliberation ineffective as less restrictive alternatives?

As to the first question, it seems clear that, all other things being equal, it is easiest to predict the likelihood that crime will occur when a speaker urges action within a very short time frame, such as five or ten minutes. We can look at the relevant circumstances—the identity of the listeners and the speaker, the place, and the crime being advocated—and predict with some confidence whether the listeners are likely to act on his advice. As the time frame expands outward, however, the prediction becomes increasingly difficult because of the many unknowable variables involved. If a speaker urges a rowdy audience to storm city hall five hours later, it may initially appear likely that they will do so. But many things could happen between now and then to dissuade them. The police might arrive. The listeners might grow bored. A thundershower might drive them home. Because we do not know whether these things will happen, it is harder to predict whether the listeners are likely to follow the speaker's advice than if he urged them to storm city hall immediately.

At what point does the prediction of likelihood become too speculative to support the government's compelling interest in preventing crime? There is no easy answer. Although it is certainly harder to predict whether listeners will commit a crime in five hours than in five minutes, it still seems possible to predict with some confidence whether there is a "substantial chance" that the crime will occur. After all, we can look at the crowd to assess whether it might grow bored and we can look at the sky to see whether dark clouds are approaching. We may even be able to predict whether there is a substantial chance that a crime will occur within twelve hours, twenty-four hours, or, in some circumstances, within several days. But when a speaker urges listeners to commit a crime more than several days in the future, the number of unknowable variables seems so high that, in

362 *See supra* notes 324–32 and accompanying text.

most cases, we would simply be speculating if we said that the crime was likely to occur.

What about less restrictive alternatives? How imminent must the advocated crime be for the alternatives I have identified to be ineffective? Let us start with police intervention. When a speaker advocates crime, there are several things that must occur for police intervention to be effective. The police must learn of the speech, investigate whether it poses a serious threat, coordinate their response, and deploy their resources to prevent the crime from occurring. If the police are fortunate enough to be on the scene in large numbers when the speech takes place, they may be able to prevent even immediate crime from occurring. But in most cases, it is likely to take at least a day or more for the police to even begin their efforts at preventing the crime, and in some cases it may take longer. Precisely how long the police need will depend on a variety of circumstances, including whether the speech is made public—an issue I explore further in Part IV.D. But assuming that the speech is made public, it seems reasonable to say that, in most cases, the police need no more than several days to take steps to prevent the crime from occurring. As I noted in Part III.D, those steps will not always be effective. But police intervention is viable enough that it should at least be taken into account when deciding whether there are less restrictive alternatives for furthering the government's interest in crime prevention.

The analysis for counterspeech is similar. For counterspeech to be effective, the counterspeakers must be aware of the criminal advocacy, must prepare their rebuttal, and must find and reach listeners who are likely to commit the crime. Unless they are present when the criminal advocacy takes place, counterspeakers have little chance of preventing immediate crime. But assuming that the speech is made public, it seems reasonable to say that, in most cases, they need no more than several days to communicate their message. Like police intervention, counterspeech will not always be effective, and its success will depend on a variety of circumstances. But it is also viable enough to be given some weight in our assessment of less restrictive alternatives.

Finally, there is listener reflection and deliberation. How imminent must the crime be for this to be an ineffective alternative for furthering the government's interest? Listener reflection is different from the other two alternatives. Instead of relying on the actions of third parties, we are relying on the listener's conscience and fear to dissuade him from following through on a crime he was initially inclined to commit. What is key, therefore, is that enough time pass for the listener's emotions to subside and for him to see things in a

calmer, more rational light. How long does that take? Again, there is no easy answer. Some people are quick to anger and quick to calm down, while others burn more slowly. For many people, however, something critical frequently happens overnight. Having slept on the matter, they often view the situation differently in the morning, so that what seemed enormously important the day before seems less pressing now. This does not always happen, of course. Sometimes it takes several days for a person to calm down, and sometimes they never do. But in most cases, a few nights of sleep and a few days of reflection should be sufficient to diminish the likelihood that the listener will commit the crime.

What conclusion can we draw from this analysis? In general, it seems as though several days is the critical time period. When a speaker urges crime within that time frame, we can predict with some confidence whether the crime is likely to occur, and there is usually not enough time for police intervention, counterspeech, or listener reflection and deliberation to be effective. But when a speaker advocates crime outside that time frame, our prediction about whether the crime will occur becomes too speculative, and police intervention, counterspeech, and listener deliberation become viable alternatives to the regulation of speech. There is no guarantee that any one of these alternatives will be successful in a given case. But taken as a group and given the time frame involved, there is no reason to think they will be less effective than prohibiting the speech. Therefore, speech generally should be protected unless it is intended to and likely to produce crime within several days.

### *C. Is the Gravity of the Harm Relevant?*

So far, I have considered how we should apply the likelihood and imminence requirements in the general run of cases. But one might argue that these requirements should vary depending upon the gravity of the harm that is feared. That is, one might think we should apply different standards to speakers who advocate minor crimes than to speakers who advocate more serious crimes.

Let me begin by saying that I do not think the likelihood and imminence requirements should be treated as sliding scales that vary from case to case. If courts were permitted to fine-tune these requirements depending upon the particular crime advocated, judges would have too much discretion and speakers would have too little notice. Such fine-tuning might also result in an absurd proliferation of standards for the many different crimes on the books. Far better to adopt

a single standard for the general run of cases even if that standard is not perfectly tailored to every fact pattern that arises.

That said, I do think it makes sense to adjust *Brandenburg* at the margins for extremely minor crimes and extremely serious crimes. These two categories of crime raise issues that are sufficiently distinct to warrant independent analysis under strict scrutiny. Moreover, by adopting separate standards for these categories, we can make *Brandenburg* more responsive to exceptional circumstances without giving judges too much discretion.

So how should we treat these two categories of crimes? First, consider extremely minor crimes. In *Whitney*, Brandeis argued that "even imminent danger cannot justify" restrictions on speech "unless the evil apprehended is relatively serious."[363] To illustrate this point, Brandeis argued that although the government could prohibit trespass, it could not prohibit speakers from asserting "that pedestrians had the moral right to cross unenclosed, unposted, waste lands . . . even if there was imminent danger that advocacy would lead to a trespass."[364]

I agree with Brandeis for the most part. The government does not have a compelling interest in enforcing the law for its own sake. If it did, any ban on speech could be justified by the government's interest in enforcing that ban, and the compelling interest analysis would become a tautology. Instead, the government has a compelling interest in enforcing only those laws that themselves further compelling interests. Thus, the government could prohibit advocacy of murder (where the advocacy is intended to, and likely to, produce imminent murder) because the law against murder furthers the government's compelling interest in preserving human life. But the government could not prohibit advocacy of jumping rope even if jumping rope were a crime (and even if the advocacy was intended to, and likely to, produce imminent jumping rope) because a law against jumping rope does not further a compelling governmental interest.[365]

What about extremely serious crimes? If the government cannot prohibit advocacy of extremely minor crimes because it lacks a compelling interest, should the government have more leeway to prohibit advocacy of extremely serious crimes because its interest is especially

363 Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

364 *Id.* at 378.

365 The Supreme Court has never provided a list of compelling interests, so it is unclear which laws serve compelling interests. But it seems likely that most laws addressing legitimate threats to the safety and health of the community further a compelling interest, and thus this limitation on the government's power to restrict criminal advocacy is not a significant one.

compelling? I think the answer is yes. Strict scrutiny is a balancing test that weighs the individual and societal interest in protecting fundamental rights against the government's interest in pursuing important ends. In most cases involving criminal advocacy, the appropriate balance between these competing interests is achieved by applying the likelihood and imminence standards proposed above. But there are some cases in which the government's interest is so overwhelming that these standards seem inadequate. Consider a speaker who advocates a nuclear attack on the United States. Can we really say that the government's interest in prohibiting this speech is only compelling if there is a substantial chance that it will lead to a nuclear attack? Doesn't the government have a compelling interest in preventing even a slight chance of such a devastating event? Likewise, is it really plausible to say that this speech can be prohibited only if it is likely to lead to a nuclear attack within several days? We may be confident that police intervention, counterspeech, and listener reflection are ordinarily sufficient to prevent crime urged more than several days in the future. But what if we are wrong? Are we prepared to take the chance that advocacy of a nuclear attack two weeks in the future will not be thwarted by these alternatives? I doubt we are.

If I am right and there are some cases so serious that different standards should apply, we must answer two questions. First, which cases fall into this category? And second, what standard should apply to those cases? With respect to the first question, I would embrace a suggestion made by Eugene Volokh in the context of crime-facilitating speech. Volokh argues that protection for such speech generally should not turn on the severity of the harms it facilitates.[366] Like me, he thinks allowing judges to adjust protection based on the severity of the harm will reduce predictability for speakers.[367] He also argues that there is no easy way for judges to draw lines between serious and non-serious harms and that, over time, any lines they draw will gradually be pushed downward.[368] However, Volokh argues that we should make an exception for speech that facilitates extraordinarily serious harms, such as nuclear or biological attacks that could lead to the death of tens of thousands of people.[369] Cases involving harms of this magnitude, he argues, are so "outside the run of normal circum-

366 Volokh, *supra* note 34, at 1209–12, 1217.
367 *Id.* at 1207.
368 *Id.*
369 *Id.* at 1210.

stances" that they can easily be identified and "would always be seen as highly unusual exceptions to the normal rule of protection."[370]

Volokh's approach makes sense. If the category of extremely serious crimes were drawn broader, say to include any crime that could lead to physical injury or death, the protections of *Brandenburg* would be significantly compromised. Many encouragements of crime could, if successful, result in death. Think of speakers who urge their listeners to riot, storm city hall, rob banks, resist the draft, sabotage military facilities, harm abortion doctors, or take illegal drugs. Moreover, as Volokh points out, freedom of speech, like other civil liberties, requires us to run certain risks, including an elevated risk that some lives will be lost.[371] So the possibility that criminal advocacy will lead to injury or death does not seem sufficient to depart from the ordinary rules. But when the harm is catastrophic—mass casualties, enormous destruction of property, major disruption to the economy—we can, without substantially eroding free speech and without venturing too far on the slippery slope, give the government more leeway to prevent the harm from occurring.

So what standard should apply to these cases? As noted above, it seems implausible to say that the government can only prohibit advocacy of extraordinary harm if there is a substantial chance that the harm will occur. But the government should also have to show more than a theoretical possibility. Advocacy of even the gravest crimes usually has value, and if there is virtually no chance that it will lead to harm, it should be protected. As a middle position, therefore, we might conclude that the government can prohibit advocacy of extraordinary harm if there is a "reasonable chance" that the harm will result. Thus, if I stand on a street corner with a sign saying "Stop the Evil Empire—Nuke the U.S.," the government does not have a compelling interest in prohibiting my speech. But if a retired five-star general urges a large group of disaffected munitions officers to detonate chemical weapons in New York, and they have access to such weapons, the government probably does have a compelling interest in prohibiting his speech.

In addition, we should require some showing of imminence. Although I argued above that government should not have to show that extraordinary harm will occur within several days, it should not be permitted to prohibit speech that could lead to extraordinary harm only in the distant future. It is simply too difficult to predict what will happen in the distant future, and the risk is too great that officials

370 *Id.* at 1211.
371 *Id.* at 1208–09.

would use this power to punish critics in times of paranoia and fear. This is what happened in the 1950s when communists were prosecuted on the theory that their teachings would eventually lead to an attempted overthrow of the government.[372] Therefore, unless criminal advocacy poses a reasonable threat of leading to extraordinary harm within the foreseeable future—say, within a year—it should be protected.

One might object that modifying the standard for advocacy of extremely serious crimes will undermine the integrity of *Brandenburg*. This is a reasonable concern, but I think it is mitigated by narrowly defining the category of crimes that qualify as extremely serious. Moreover, there are probably few cases where criminal advocacy poses a reasonable chance of leading to extraordinary harm within a year. Crime-facilitating speech, such as instructions on how to build a nuclear or biological weapon, seems much more likely to create this kind of risk. Thus, the exception for extremely serious crimes should not significantly limit the reach of *Brandenburg*.

### *D. Public v. Private Speech and Ideological v. Nonideological Speech*

If we modify *Brandenburg* for advocacy of extremely minor crimes and extremely serious crimes, should we also modify it based on where the advocacy takes place and whether it is ideological or nonideological in nature? Kent Greenawalt argues that we should. In *Speech, Crime, and the Uses of Language*, Greenawalt divides criminal advocacy into four categories: (1) public ideological advocacy; (2) public nonideological advocacy; (3) private ideological advocacy; and (4) private nonideological advocacy.[373] Greenawalt argues that speech in the first category, which takes place in public and has an ideological motive or appeal, should receive the most protection, and he proposes a standard similar to *Brandenburg*.[374] Speech in the fourth category, which takes place in private and lacks ideological motive or appeal, should receive almost no protection; government need only prove serious intent on the part of the speaker.[375] And speech in the middle two categories, which either takes place in public and is nonideological or takes place in private and is ideological, should receive an intermediate level of protection.[376]

372 *See supra* notes 41–42 and accompanying text.

373 GREENAWALT, *supra* note 73, at 260–71.

374 *Id.* at 266–69.

375 *Id.* at 261–65.

376 For private ideological speech, Greenawalt argues, the government should be required to show only that the speech presents a significant danger of criminal harm.

In order to assess Greenawalt's framework, we must consider the distinctions he draws between public and private speech and ideological and nonideological speech. As to the first distinction, Greenawalt argues that private criminal advocacy contributes less to the values underlying the First Amendment than public criminal advocacy. Because private speech is not widely circulated, he suggests, it has less impact on the search for truth and self-government.[377] He also argues that private advocacy is more dangerous than public advocacy because there is less opportunity for police intervention and counterspeech to prevent the crime from occurring.[378]

Although Greenawalt's arguments have some merit, I am not persuaded. The extent to which speech contributes to the First Amendment's underlying values is not necessarily a function of where it takes place or how many people hear it. A silly argument made publicly to one thousand people may contribute less to the search for truth and self-government than a good argument made privately to ten people, especially if those ten people are likely to repeat the argument. Moreover, basing protection on the size of the audience has dangerous implications. It suggests that courts should offer more protection to speech in the mainstream that reaches millions of listeners than to speech on the fringes that reaches only a fraction of that audience.

Greenawalt is correct that police intervention and counterspeech are less effective at combating private criminal advocacy than public criminal advocacy. When a speaker privately urges a group of listeners to break the law, the police and counterspeakers may not be aware of the advocacy and therefore cannot respond to it directly. But that does not mean these alternatives are entirely ineffective. Even when criminal advocacy takes place in private, the police may still learn about it, either directly through listeners or indirectly through word of mouth.[379] Moreover, just because speech takes place in private does not mean listeners are not exposed to counterspeech. As pointed out in Part III.D, counterspeech does not always follow criminal advocacy; it sometimes precedes it or takes place at the same time. Thus, if a speaker privately urges a group of listeners to kill abortion doctors, counterspeakers may not be aware of that speech. But they likely have already argued that killing abortion doctors is wrong. And

---

*Id.* at 270. He proposes the same standard for public nonideological speech that is commercial in nature. *Id.* at 271.

377 *Id.* at 116 (arguing that when speech is private, "any 'enlightenment' the message provides will be limited").

378 *Id.*

379 Police may also already be monitoring the speaker and the listeners if they are members of a group that has caused trouble in the past.

they are likely to continue making these arguments even if they do not know about a particular instance of criminal advocacy.

Perhaps the biggest problem with Greenawalt's argument is the difficulty of drawing lines. How would we determine whether speech is public or private? One possibility is to count the listeners, so that a speech given to fewer than, say, ten people would be considered private. But that suggests that a speech outside city hall to an audience of five is private—surely an odd result. Another possibility is to ask whether the speech is open to the general public. But that suggests that a speech given to two hundred people at a country club is private—another odd result. We might combine the two factors and say that a speech given to a small group of people in a nonpublic space is private. But what if I send an email to six people urging them to break the law? Is that private because it is not generally accessible or public because it is sent over the Internet and can easily be forwarded? Or what if I give a speech to four colleagues in my office at work? Is that private because the school is not open to the public, or is it public because the office is owned by my employer and hundreds of people walk by it every day? Does it matter if the door is open or closed?[380]

Greenawalt acknowledges the difficulty of drawing these lines, but argues that it is not particularly troubling in this context because speakers who advocate crime in private usually do so as part of a conspiracy or an offer of inducement, neither of which is protected by the First Amendment.[381] I agree with this last point, but do not think it supports his conclusion. If those who advocate crime in private can usually be punished for conspiracy or solicitation, we do not need to eliminate *Brandenburg*'s protections for criminal advocacy; we can simply enforce the laws against conspiracies and solicitation. That way, government can prevent the harm, and we can avoid drawing questionable lines that could be manipulated by courts and lessen predictability for speakers.

I have similar concerns about Greenawalt's distinction between ideological and nonideological speech. Greenawalt says criminal advocacy lacks ideological motive or appeal if it is "without serious reference to duty, right, overall welfare, or some historical, philosophical, political, or religious view that would make the crime appropriate."[382] As an example, he describes a scenario in which a man who

380 Greenawalt says the crucial difference is whether the message is "communicated in a way in which its content can become known to a wide audience." GREENAWALT, *supra* note 73, at 271. As my examples illustrate, this is not an easy determination to make.

381 *See id.* at 263.

382 *Id.* at 261.

expects to inherit under his uncle's will writes to his cousin urging her to kill the uncle so that they can both profit financially.[383] According to Greenawalt, the value of this speech is so negligible compared to the threat it poses that protecting it would "misinterpret the significance of free speech and do so in a setting that thoughtful people would find disturbing."[384]

As an initial matter, I should point out that Greenawalt does not deny that nonideological speech has value. In an earlier chapter, he writes that there is value in even personal and trivial speech, such as "Your boyfriend is considerate."[385] Instead, his argument is that the value of nonideological criminal advocacy is vastly outweighed by the threat it poses. This is a plausible argument, but it assumes that we can easily distinguish between ideological and nonideological speech. In practice, this is likely to be quite difficult. How would courts determine whether advocacy makes *serious* reference to right, duty, or overall welfare? Is it sufficient if the speaker uses the word "right," as in "You have a right not to pay income taxes"? If so, it is hard to see what is gained by Greenawalt's distinction, since people who advocate crime could simply tell listeners they have a right to commit that crime. On the other hand, requiring speakers to explain the source and nature of the right would disadvantage the less educated and articulate. And how would courts determine whether advocacy makes reference to "some historical, philosophical, political, or religious view?" Consider the statement "You should smoke pot because it feels good." This might be seen as an appeal to self-interest, which would not count as ideological under Greenawalt's definition.[386] But it might also be seen as an appeal to defy the conventions of bourgeois society and experience the pleasures of nature. Would a speaker have to use my grandiose language to be protected? If so, thoughtful people might also find that result disturbing.

It is true that the Court has drawn similar distinctions in other contexts. In *Connick v. Myers*,[387] it held that public employees are protected by the First Amendment when they speak on matters of public concern, but not matters of private concern.[388] And in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[389] it held that the standard for damage awards in defamation cases depends on whether the speech

383 *Id.* at 116, 261.
384 *Id.* at 263.
385 *Id.* at 44–46.
386 *Id.* at 116, 271–72.
387 461 U.S. 138 (1983).
388 *Id.* at 146–47.
389 472 U.S. 749 (1985).

concerns matters of private or public concern.[390] But the Court's line-drawing efforts in these areas have not been reassuring. In *Connick*, it held that the issue of morale in the district attorney's office was not of public concern[391] even though such issues are frequently raised in political campaigns. And in *Dun & Bradstreet*, it held that a construction company's credit report was not of public concern[392] even though the financial health of local companies is frequently discussed in the business pages of local newspapers. Perhaps the Court would have more success drawing the line between ideological and nonideological speech. But given its track record, we should not take that risk. Instead, we should apply *Brandenburg*'s protections to all criminal advocacy, no matter what the nature of its appeal.

### *E.* Brandenburg *in War and Peace*

The next question is whether *Brandenburg* applies during times of war as well as peace. This question was raised in a recent article by Ronald Collins and David Skover.[393] Noting that *Brandenburg* did not involve "speech that interfered with war efforts,"[394] they suggest that *Brandenburg* might be interpreted to apply only in times of peace.[395] Although Collins and Skover do not agree with this interpretation, they say it is conceivable that government lawyers would propose it and that the Court would accept it.[396] I agree that *Brandenburg* might be interpreted this way, but think it clear that, *correctly* interpreted, it applies during both peace and war.

To start with, there is no reason *Brandenburg* should not apply to advocacy of ordinary crimes during war. If a speaker urges listeners to kill abortion doctors or use illegal drugs, the fact that the country is at war has no bearing on whether that speech should be protected. The government's interest in preventing ordinary crime is not more compelling during war, and the less restrictive alternatives that are available during peace are also available during war. One might argue that advocacy of ordinary crimes would distract from the war effort and require the government to divert valuable resources from the military to law enforcement. But most wars (like the current one) do not require the complete and undivided attention of government such

390 *Id.* at 760–61 (plurality opinion).
391 *Connick*, 461 U.S. at 148.
392 *Dun & Bradstreet*, 472 U.S. at 761–62 (plurality opinion).
393 Ronald K.L. Collins & David M. Skover, *What Is War?: Reflections on Free Speech in "Wartime,"* 36 RUTGERS L.J. 833, 834 (2005).
394 *Id.* at 849.
395 *Id.* at 848–53.
396 *Id.* at 850–51.

that basic law enforcement is compromised. And even during all-consuming wars (like World War II), it is pure speculation to say that advocacy of ordinary crime will affect the war. It is also dangerous because it suggests that government can infringe other rights—such as due process and the requirements of the Fourth Amendment—on the ground that compliance with them would divert time and energy away from the war.

Of course, advocacy of ordinary crime is not what government worries about during war. Instead, it worries about advocacy of crime that is directed at the war effort, such as the sabotage of military bases or mass strikes or draft resistance. Does *Brandenburg* apply to this type of advocacy? This question is largely answered by my discussion in Part IV.C. There, I explained that advocacy of even extraordinary harm should be protected unless the government makes some showing of likelihood and imminence.[397] However, because the government's interest in preventing extraordinary harm is especially compelling, the normal likelihood and imminence requirements should not apply.[398] Instead, the government should be permitted to prohibit such speech where there is a "reasonable chance" that it will lead to extraordinary harm within the foreseeable future.[399] This standard also seems appropriate for advocacy of crime directed at the war effort. Where there is a "reasonable chance" that such advocacy will lead to extraordinary harm within the foreseeable future, the government should be permitted to prohibit it. But where the government cannot make this minimal showing, advocacy of even the gravest crimes during war should be protected.

A related question is whether *Dennis v. United States*[400] is still good law. Recall that the Court in *Dennis* upheld the convictions of Communist Party leaders on charges of conspiring to advocate overthrow of the U.S. government.[401] In doing so, the Court adopted Learned Hand's formulation of the clear and present danger test, asking "'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.'"[402] According to Collins and Skover, neither *Dennis* nor many of the World War I speech cases have ever been formally overruled.[403]

397 *See supra* notes 366–72 and accompanying text.
398 *See supra* notes 371–72 and accompanying text.
399 *See supra* notes 371–72 and accompanying text.
400 341 U.S. 494 (1951).
401 *See supra* note 29 and accompanying text.
402 *Dennis*, 341 U.S. at 510 (plurality opinion) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).
403 *See* Collins & Skover, *supra* note 393, at 849.

Therefore, they say, it is possible that these cases could make a "constitutional come-back."[404]

Collins and Skover are correct that *Brandenburg* did not formally overrule *Dennis*. To the contrary, the Court cited *Dennis* as support for its holding and portrayed the *Brandenburg* test as a simple application of *Dennis* and *Yates v. United States*.[405] As pointed out in Part I.A, however, this claim was transparently disingenuous.[406] Although *Dennis* and *Yates* limited the reach of the Smith Act to advocacy of action (as opposed to advocacy of ideas), neither decision suggested that speakers could only be punished if they advocated *imminent* action. "The essential distinction," *Yates* held, "is that those to whom the advocacy is addressed must be urged to *do* something, now *or in the future*, rather than merely to *believe* in something."[407] Nor did either decision suggest that speakers could be punished only if their advocacy was *likely* to produce unlawful conduct. Although the formula adopted in *Dennis* does take into account the probability of harm, it does so only in relation to the gravity of that harm. Thus, it permits government to punish speech that poses virtually no risk of harm if the feared harm is grave enough.

One might suggest that even though *Dennis* and *Brandenburg* applied different legal tests, the results of the two cases can be reconciled. But they cannot. If we apply the *Brandenburg* test to the facts of *Dennis*, it is clear that the convictions should have been reversed. There was no evidence that the defendants had urged imminent overthrow of the government or even an imminent attempt of overthrow, no matter how broadly we define "imminent."[408] At best, the evidence showed that they organized the Communist Party to advocate Marxist-Leninist doctrine so that an overthrow might be attempted at some indefinite future date.[409] There was also no evidence that an overthrow was likely, even if we apply the "reasonable chance" definition of likelihood I have proposed for extremely serious crimes.[410] Perhaps there was a reasonable chance that an overthrow would be attempted. But it is not clear that any attempt launched by the Com-

404 *Id.* at 853.

405 *See supra* note 60 and accompanying text.

406 *See supra* notes 60–61 and accompanying text.

407 Yates v. United States, 354 U.S. 298, 324–25 (1957) (second emphasis added).

408 *See supra* note 372 and accompanying text (proposing a broader definition of "imminent" for advocacy of extremely serious crimes).

409 Dennis v. United States, 341 U.S. 494, 497 (1951) (plurality opinion).

410 *See supra* Part IV.C.

munist Party of the 1950s would qualify as an extremely serious crime.[411] And in any case, no attempt was foreseeable.

With *Brandenburg* and *Dennis* thus hopelessly at odds, which should prevail? The answer is *Brandenburg*. *Dennis* was decided without a majority opinion in 1951 and was significantly undermined within a decade by *Yates* and two other Smith Act cases, *Scales v. United States*[412] and *Noto v. United States*.[413] *Brandenburg* was decided unanimously in 1969 and was reaffirmed by two subsequent decisions, *Hess v. Indiana* and *NAACP v. Claiborne Hardware Co.*[414] It is true that both of these cases might have been decided without invoking *Brandenburg*.[415] But the Court repeated the *Brandenburg* test in both cases and never cast any doubt on its viability.[416] As a result, it seems clear that *Dennis* is a remnant of abandoned doctrine that is no longer entitled to any weight as precedent.[417]

### *F. Is Advocacy of Terrorism Different?*

The final question is whether there is anything about the current terrorist threat that makes *Brandenburg* inapplicable. When I teach the First Amendment, most of my students agree that *Schenck*, *Whitney*, and *Dennis* were bad decisions motivated by fear and paranoia. But when I pose a hypothetical involving advocacy of terrorism, they frequently change their tune. Terrorism is different, they say, and those who advocate it should not be protected by the First Amendment. The question is, are they right? Is terrorism different, and if so, why?

Most of the arguments one might make for treating terrorism differently have been addressed in earlier parts of this Article. For instance, one might claim that advocacy of terrorism should not be

411 *See supra* Part IV.C (describing extremely serious crimes as those involving mass casualties, enormous destruction of property, or major disruption to the economy). According to Justice Douglas' dissent in *Dennis*, the Communist Party "ha[d] been so thoroughly exposed in this country that it ha[d] been crippled as a political force." 341 U.S. at 588 (Douglas, J., dissenting).

412 367 U.S. 203, 222 (1961) (holding that an individual could be convicted under Smith Act's membership clause only if he was an "active" member with the specific intent to further the group's unlawful ends).

413 367 U.S. 290, 297–300 (1961) (reversing the conviction of a Communist Party member under the Smith Act because there was insufficient evidence that the Party advocated violent overthrow of the government).

414 *See supra* notes 64–83 and accompanying text.

415 *See supra* notes 64–83 and accompanying text.

416 *See supra* notes 64–83 and accompanying text.

417 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (stating that stare decisis does not apply where "related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine").

protected because terrorism can cause extraordinary harm. With the spread of technology and the ease of international travel, terrorists have the potential to cause enormous destruction through the use of chemical, biological, and perhaps even nuclear, weapons.[418] I agree that this is a deeply troubling prospect, but have already dealt with it in Part IV.C. There, I explained that advocacy of even the gravest crimes usually has value and should be protected if there is virtually no chance it will lead to harm. However, I also explained that the government should have more leeway to prohibit advocacy of extraordinary harm because its interest in preventing such harm is especially compelling. Thus, where there is a reasonable chance that criminal advocacy (including advocacy of terrorism) will lead to extraordinary harm in the foreseeable future, it should not be protected.[419] This standard takes seriously the government's interest in preventing the extraordinary harms of terrorism while also protecting speech that poses virtually no threat of harm.

One might also argue that advocacy of terrorism is different because of the covert nature of terrorist operations.[420] Those who advocate terrorism rarely do so in the public square. Instead, they usually communicate their desires secretly, which makes it harder for the police to intervene and for other speakers to rebut their arguments. I am not certain that the assumption underlying this argument is true; many Islamic jihadists seem quite willing to advocate terrorism openly. But even if true, it does not justify an abandonment of *Brandenburg*. As explained in Part IV.D, police intervention and counterspeech may be less effective at combating private advocacy, but they are not entirely ineffective. Most terrorist suspects are likely being monitored by the police already, and opponents of terrorism are likely to engage in counterspeech regardless of whether advocacy of terrorism takes place in public. More importantly, it would be extremely difficult for courts to draw a clear line between private advocacy and public advocacy. Therefore, the fact that advocacy of terrorism sometimes (or often) takes place in private is not a reason for treating it differently from other criminal advocacy.

Finally, one might argue that advocacy of terrorism simply has no value in our society. In a recent book, Richard Posner argues that the tenets of Islamic holy war, unlike communism, are so far outside the mainstream of Western thought that they have no First Amendment

418 *See* RICHARD A. POSNER, NOT A SUICIDE PACT 2 (2006).

419 *See supra* notes 366–72 and accompanying text.

420 *See* Robert S. Tanenbaum, Comment, *Preaching Terror: Free Speech or Wartime Incitement?*, 55 AM. U. L. REV. 785, 816–17 (2006).

value.[421] As an initial response, I would question Posner's use of Western thought as the yardstick against which the value of speech is measured. If ideas outside the Western tradition can contribute to the search for truth, self-government, and self-fulfillment—and there is no reason to think they cannot—it is unclear why they should be viewed as lacking value. But even accepting Western thought as the yardstick, Posner's claim is highly debatable. Many of the issues addressed by Islamic jihadists—the role of religion in society, the conflict between religious and secular values, the decline of morality—are extremely relevant within Western society. In fact, the battle between fundamentalism and liberalism that has fueled Islamic jihad has also sparked a culture war in the United States. It is true that the methods advocated by Islamic jihadists are extreme and radical. But that does not make their speech less valuable, only more unsettling. And suppressing speech because it is unsettling is contrary to the best aspects of our First Amendment tradition.

## CONCLUSION

*Brandenburg v. Ohio* was a major breakthrough for freedom of speech. After its long struggle to define the boundaries of the First Amendment, the Court embraced an enlightenment view of free speech that rejected the fear and paranoia of the past. But *Brandenburg* is not the end of the story. As the *al-Timimi* case shows, 9/11 and the threat of terrorism pose a significant challenge to free speech and highlight the many ambiguities in the *Brandenburg* test that have never been adequately resolved.

This Article both strengthens and clarifies *Brandenburg*. By focusing on the values that underlie the First Amendment, it makes clear why criminal advocacy is entitled to protection and why *Brandenburg* provides the proper level of protection. In addition, by reconceptualizing *Brandenburg* as an application of strict scrutiny, it provides a framework for answering the many unresolved questions about its test. This framework does not always yield precise or easy answers. But it does focus the inquiry and provide long-needed guidance to courts so that *Brandenburg* will survive the current, and any future, crisis.

421 POSNER, *supra* note 418, at 113–14.