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RESPONSE

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*Thomas P. Crocker**

INTRODUCTION

There can be no doubt that the development of new means of communicating ideas through the internet, and even more so via social media, has vastly expanded the human archive of ideas and events. These textual, photographic, and audio-visual recordings are now available with a few keystrokes in a fraction of a second. All of this speech is virtually unfettered by government censorship under the First Amendment to the United States' Constitution. The proliferation of this free speech tradition, and the democratic culture it nourishes, would be cause for unconstrained "dancing in the streets,"[1] were it not for the presence of darker underbellies that accompany so much speech. Both new, and problematic versions of old, categories of speech challenge free speech principles within a democratic culture. It is not simply a matter of old forms of speech that are no "essential part of any exposition of

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1. Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting from a conversation with Alexander Meiklejohn praising the result in *New York Times v. Sullivan*).

ideas"[2] finding a new home in the media platforms the internet makes possible.[3] The social practices new digital media make possible can lead to new categories of speech—such as revenge pornography—capable of wrecking great harm on individual lives without colorable claim to participation in the free expression of ideas.[4] Old categories of speech similarly comprising no part of the expression of ideas—such as incitement to unlawful activity—arise in new and far more dangerous contexts. Indeed, this marriage of old and new produces what Professor Alexander Tsesis addresses as the problem of terrorist speech on social media.[5]

Professor Tsesis identifies a speech-related problem: terrorists and terrorist organizations recruit and indoctrinate through speech on the internet. Indoctrination can also include exhortation to commit violent actions. Professor Tsesis has a solution. He proposes a law authorizing government to criminalize speech based on its content, a law authorizing the complete suppression of the internet during specified emergencies, and seemingly by implication (though not his focus), a law authorizing government officials to force Internet Service Providers to take down offending content. The latter implication seems inevitable, because the former solution may add very little to the "war on terror," since offending speakers exist beyond the jurisdiction of U.S. law. Professor Tsesis focuses, for example, on the availability of Anwar al-Awlaki's lectures through social media, the circulation of "Inspire" (a publication disseminated by al-Qaeda), and the use of other interactive forums as examples of "terrorist speech" that pose security threats to the United States and others. This "terrorist speech" spreads propaganda and incites actions in ways Professor Tsesis argues may be regulated consistent with First Amendment principles and doctrine. The strength of the First Amendment's free speech protections, even for politically dangerous speech, shapes his goal of articulating the doctrinal basis and guidelines for legislation regulating "internet-based terrorist incitement, propaganda, and indoctrination,"[6] without running afoul of constitutional protections. Such legislation, he argues, "should prohibit imminently dangerous, truly threatening, and materially supportive forms of terrorist digital content."[7]

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2. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

3. *See generally* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

4. *See, e.g.*, DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014); Mary Anne Franks & Danielle Keats Citron, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345 (2014).

5. Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651 (2017).

6. *Id.* at 684.

7. *Id.* at 685.

This impulse to legislate against dangerous ideas is also part of a free speech tradition, but it often serves as a negative exemplar or an anti-canon, rather than an affirmative model to follow.[8] From the use of the 1917 Espionage Act to suppress dissent during World War I,[9] to the use of criminal syndicalism statutes to criminalize leftist political activity,[10] to the use of the Smith Act to pursue communists purportedly bent on overthrowing the government through violence,[11] the American free speech tradition is replete with the suppression of "dangerous ideas" later disavowed or judicially undercut.[12] A proposal to "prohibit imminently dangerous . . . digital content"[13] constituting "terrorist speech," falls within this anti-tradition in free speech. In what follows, I will argue that the argument for re-engaging this anti-tradition is built on fatally imprecise conceptualizations, is factually unnecessary, and imposes a real danger to core constitutional values to achieve chimerical gains in security.

I. THE FIRST AMENDMENT PROBLEM WITH PROSCRIBING "TERRORIST SPEECH"

It is a mistake, Professor Tsesis writes, "to believe that the Free Speech Clause does not enable government to prohibit violent political advocacy" of the kind that comprises "terrorist speech."[14] Why would such a belief be mistaken? He explores three First Amendment doctrines to arrive at the conclusion that a content-based law regulating "terrorist speech" could be constructed that does not violate the incitement standard in *Brandenburg v. Ohio*,[15] is aimed at non-protected "true threats," or is "materially supportive" to a terrorist organization.

The Supreme Court's decision in *Brandenburg*, which defines the modern standard for incitement under the First Amendment,

8. *See, e.g.*, Thomas P. Crocker, *Dystopian Constitutionalism*, 18 U. PA. J. CONST. L. 593 (2015); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011); J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–19 (1998).

9. Espionage Act prosecutions were upheld in the inauspicious start of the American free speech tradition. *See* Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Abrams v. United States, 250 U.S. 616 (1919).

10. *See* Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927).

11. *See* Dennis v. United States, 341 U.S. 494 (1951).

12. For an account of this history, see GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004).

13. Tsesis, *supra* note 5, at 685.

14. *Id.* at 686.

15. 395 U.S. 444 (1969).

applies only to speech that poses an imminent threat of harm and "is hence of limited value to combat internet terrorist incitement,"[16] in Professor Tsesis' view. This conclusion follows because much of the "terrorist speech" he aims to regulate takes the form of "long term indoctrination, mentoring recruitment, and so on . . ."[17] Under the *Brandenburg* standard, government can punish speech only where "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[18] The temporal horizon between the speech and the possibility of undertaking unlawful action requires a showing of immediacy. To avoid criminalizing abstract teaching of the general desirability of using violence, the link between speech and action cannot be speculative or indefinite. Although immediate incitement to commit terrorism might constitute one kind of "terrorist speech," Professor Tsesis seeks to regulate the content of communications that exhort others to join the fight on behalf of the terrorist organization's cause over a much longer temporal frame, and thus, do not constitute "incitement" under *Brandenburg*. Because the Supreme Court has also made clear in later cases that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action,"[19] any showing of group incitement to future lawless action would also require immediacy, not "advocacy of the use of force or of law violation"[20] shorn of imminence. Interestingly, when it came to the prosecution of Communist Party leaders in *Dennis*, the Court was willing to accept a lesser degree of imminence for First Amendment compliance due to the totalitarian menace posed by the Cold War. [21] However, later cases such as *Yates v. United States*[22] and *Noto v. United States*[23] retreated from this lesser standard, as the court in *Communist Party of Indiana v. Whitcomb* clarified.[24] Any attempt to circumvent the *Brandenburg* and *Yates* lines of cases by criminalizing "indoctrination," "recruitment," "dangerous menacing," or "threatening" speech will run afoul of the First Amendment.[25]

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16. Tsesis, *supra* note 5, at 667.

17. *Id.*

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

19. Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 448 (1974) (quoting *Brandenburg*, 395 U.S. at 447–48.

20. *Id.*

21. *See* Dennis v. United States, 341 U.S. 494 (1951).

22. 354 U.S. 298 (1957).

23. 367 U.S. 290 (1961).

24. *Whitcomb*, 414 U.S. at 448.

25. Oddly, Professor Tsesis seems to suggest that a line of cases exemplified by *Brandenburg*, in which the Supreme Court articulates robust limits on government censorship, might instead be

Second, when "terrorist speech" constitutes a true threat issued against specific individuals or groups, then it receives no First Amendment protection.[26] As the Supreme Court explains, "true threats" "encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[27] Because true threats can be proscribed on the basis of their content, a demanding First Amendment standard exists for imposing criminal liability. "True threats" are targeted to specific persons and have a scienter requirement, narrowing their application under the First Amendment to avoid criminalization of abstract or general advocacy of violence.[28] "True threats" receive no First Amendment protection, in part, because of the specific harm they cause to those individuals to whom they are directed.[29] Speech that expresses violence on social media sites such as Facebook is protected unless it can be shown to contain "any threat . . . to injure the person of another."[30] General encouragement of violence against unspecified persons would not meet this high bar, even if such expressions nonetheless might constitute "terrorist speech." Because "true threats" can be criminalized only under narrowly drawn criteria, they comprise a narrow category of speech unlikely to provide a useful model for criminalizing "terrorist speech" more broadly.

Finally, the Supreme Court upheld a content-based speech regulation that imposed criminal sanctions on non-violent political expression because of a seemingly reduced level of purported "strict scrutiny" it applied in *Holder v. Humanitarian Law Project*.[31] Finding no applicable First Amendment limitation, the Court concluded that

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judged for its "value to combat internet terrorist incitement," Tsesis, *supra* note 5, at 667, inverting the First Amendment role of protecting against, rather than facilitating, government restrictions.

26. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992) ("[T]hreats of violence are outside the First Amendment . . . .").

27. Virginia v. Black, 538 U.S. 343, 359 (2003).

28. *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001 (2015); Planned Parenthood of Columbia/Willamette v. Am. Coal. of Life Activists, 290 F.3d 1058, 1072 (9th Cir. 2002); United States v. Manning, 923 F.2d 83, 86 (8th Cir. 1991).

29. *See R.A.V.*, 505 U.S. at 388 (articulating "the reasons why threats of violence are outside the First Amendment (protecting individuals form the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur)").

30. 18 U.S.C. § 875(c).

31. 561 U.S. 1 (2010); s*ee* David Cole, *The First Amendment's Borders: The Place of* Holder v. Humanitarian Law Project *in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 149 (2012) ("For the first time in its history, the Court upheld the criminalization of speech advocating only nonviolent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing."). For another critique of the Court's reasoning, *see* Wadie E. Said, Humanitarian Law Project *and the Supreme Court's Construction of Terrorism*, 2011 B.Y.U. L. REV. 1455 (2011).

Congress is free to regulate speech that coordinates with designated "foreign terrorist organizations" and their goals in a way that provides "material support."[32] By providing training, instruction, and teaching to designated foreign terrorist groups, the Humanitarian Law Project sought to promote the lawful, non-violent activities of groups through speech prohibited by the material support statute. On Professor Tsesis' account, it is logical to conclude that "prohibiting individuals and groups from advancing the causes of terrorists is compelling,"[33] which is true to the extent that the speech related *means* by which an individual advances the cause consists of providing "training, expert advice or assistance" that includes "instruction or teaching designed to impart a specific skill."[34] But the harm that Congress was empowered to avoid in the majority's view in *Humanitarian Law Project* was "that providing material support to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization."[35] Despite the plaintiff's claims to support only the non-violent, humanitarian activities and goals of the designated organizations, the Court reasoned that Congress and the executive could conclude that such support lends inappropriate legitimacy to such organizations, frees other resources to pursue violent activities, and strains foreign relations.

By contrast, the Court made clear that Congress is not empowered to proscribe independent speech by individuals "even if the Government were to show that such speech benefits foreign terrorist organizations."[36] Independent speech that benefits or furthers a foreign terrorist organization's aims, under the Court's reasoning, remains protected speech, despite the deference the Court grants the Government in protecting national security.[37] With this distinction in place, speech made in coordination with a foreign terrorist organization that provides "training," "expert advice," or "service" can be proscribed. But under *Humanitarian Law Project*, the expressive activities of independent speakers, even if they advocate on behalf of the designated foreign terrorist organization's interests, cannot be prohibited. On the one hand, this distinction between coordinated and independent speech does nothing to address other justifications for proscribing speech supportive of terrorism. For example, when individuals engage in

32. 561 U.S. at 38–39.

33. Tsesis, *supra* note 5, at 673.

34. 18 U.S.C. § 2339A(a).

35. *Humanitarian Law Project*, 561 U.S. at 36.

36. *Id.* at 39.

37. *Id.* at 36 (identifying "the sensitive interests in national security and foreign affairs at stake" as a basis for deference to the political branches).

speech that becomes one element in a conspiracy to commit acts of terrorism, constitutes a true threat, or incites others to commit group violence, then such speech is not protected whether it is independent or not. On the other hand, this distinction undermines the rationale for extending prohibitions on terrorist speech beyond existing categories of material support. For non-material speech supportive of a terrorist organization's aims that does not fit one of these other narrowly drawn categories would receive full First Amendment protection. The current material-support framework already defines the outer boundaries of acceptable speech regulation.

With these three doctrinal guideposts and a description of the ways that European democracies regulate speech constituting "public provocations," Professor Tsesis concludes that we need a law that provides for "regulation of propaganda to incite terrorism, the intentional dissemination of serious expressions of violence directed at particular individuals or groups, and the solicitation or provision of assistance to designated terrorist organizations."[38] Regarding propaganda, he argues, that "[a]n imminently inciting posting is one that is highly probable to result in terrorist conduct. For example, where a person prods another on social media . . . to begin without delay a politically motivated attack."[39] If restricted to speech that is likely to incite such action, then, he thinks, abstract speech remains protected. Regarding material support, he claims that liability should be limited to persons who "aid terrorist groups, post materials on the internet, recruit others . . . or forward terrorist materials."[40]

The upshot of Professor Tsesis' proposal is that, despite the seriousness of the threats that organized terrorism pose to democratic societies, the case for going very far beyond the existing legal frameworks is weak, given the strength of the free speech tradition's limits on proscribing speech that is not causally and temporally proximate to the unlawful action. An open society must remain tolerant of "dangerous postings" based on the belief that unfettered and open dialogue is better than the risk of censorship. One of the lessons one might reasonably draw from the *Brandenburg* line of cases is that American constitutionalism is generally skeptical of the attempt to categorize speech as dangerous in order to regulate it.

38. Tsesis, *supra* note 5, at 686.
39. *Id.* at 688.
40. *Id.* at 689.

II. CONCEPTUALIZING SPEECH

Any attempt to route around First Amendment speech protections to justify restrictions on speech must begin with a specific description of the speech to be regulated. Apart from a vague conception that "terrorist speech" is dangerous speech, it is difficult to know precisely what speech Professor Tsesis' proposal seeks to ban. To identify the relevant speech, a policy maker must also have a clear picture of the problem to be solved.

What is the problem, precisely? Is it the existence of "[s]upport for terrorism on the internet," or perhaps the "recruitment, indoctrination, and training" for which terrorist organizations make use of the internet?[41] More narrowly, the problem might be "terrorist incitement" through social media.[42] Similarly, it might be that terrorists "threaten, enlist, defame and call for brutal actions" via internet media.[43] Sometimes the goal is presented as "restricting terrorist incitement or propaganda"[44] to prevent "indoctrinations intended to recruit listeners to commit violent offenses."[45] Sometimes the concern is less the conjunction of incitement with propaganda, and more the simple "dissemination of propaganda," or even the expression of "terrorist propaganda"—each of which may or may not include "[h]ighly dangerous menacing dogmas" that constitute "radical propaganda."[46] Still on other occasions in Professor Tsesis' argument, the core concern is speech that is "threatening" or involves the "proliferation of menacing, indoctrinating, and organizing terrorist posts."[47] Finally, the worry could be about something seemingly very different: the need to empower government to "hold criminally accountable the creators, instigators, and facilitators of cyber terror."[48] How such facilitation relates to "the intentional dissemination of serious expressions of violence"[49] or "imminently inciting posting[s]"[50] on social media is left unanswered.

Each of these varying descriptions of the problem might reflect the concern that acts of terrorism are often perpetrated by individuals

41. *Id.* at 653.
42. *Id.* at 654, 657.
43. *Id.* at 656.
44. Tsesis, *supra* note 5, at 664.
45. *Id.* at 666.
46. *Id.* at 695.
47. *Id.* at 687.
48. *Id.* at 691.
49. *Id.* at 686.
50. Tsesis, *supra* note 5, at 688.

who are influenced by content conveyed via the internet. Actions follow ideas and beliefs. Perpetrators of terrorism, such as the Tsarnaev brothers who exploded bombs during the Boston Marathon,[51] may have been motivated in part, or at least encouraged in their endeavors, by content they accessed on the internet. Because content that motivates and encourages crimes of terrorism exists, a policy maker might have reason to seek to eliminate, or at least dis-incentivize the dissemination of, such content. Beyond the general description of the problem, indoctrination into ideas is a very different issue from spreading propaganda—even "radical" propaganda—which in turn is different from organizing social media postings. Moreover, beyond the fact that information, opinions, and social media content can play a causal role in affirming or reinforcing beliefs, the real problem is the perpetration of violent acts, not merely the circulation of communicative content, even if one appends the adjective "terrorist" in front of "speech."

If the goal is to provide legal means for reducing the reach of particular kinds of speech that terrorist organizations (or individuals engaged in the plotting of terrorist acts) can perform, then policy makers must precisely define what speech to excise from the public sphere. However, any proscription must comply with Supreme Court doctrine outlining permissible regulations on free speech—such as speech that qualifies as "incitement" based upon its content and context. And in this way, speech that qualifies as "incitement" can be, and is, proscribed by U.S. law,[52] but what might rise only to the level of propaganda remains protected. If "terrorist speech" means the speech of persons who are members of State Department designated terrorist organizations, or if it also includes the speech of individuals who may plot and perpetrate a terrorist act, then much of that speech will be protected, though some may be proscribed. As we have seen, speech that is aimed at providing material support for terrorism is unprotected given compelling government interests, but independent speech that might advance the goals of a designated foreign terrorist organization is not. Material support includes both the content of the speech and the manner in which it is expressed.

The difficulty is in drawing lines in a way that proscribes all and only that speech forming "no essential part of the exposition of ideas"[53]

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51. *See, e.g.*, Scott Wilson, Greg Miller, & Sari Horwitz, *Boston Bombing Suspect Cites U.S. Wars as Motivation, Officials Say*, WASH. POST, April 23, 2013.

52. Statutory protections exist against acts of genocide and the incitement to engage in such acts. 18 U.S.C. § 1091(c) (proscribing conduct that "directly and publicly incites another to violate" the basic prohibition of genocide as defined in subsection (a) of the statue).

53. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

and that does not empower government with tools to suppress dissent.[54] A central First Amendment principle is that speech must be granted ample "breathing space"[55] in order to uphold the commitment to "uninhibited, robust, and wide-open"[56] public debate. The very articulation of the problem is difficult, not simply because Professor Tsesis fails to provide any clear specifications of the speech to be proscribed, but because the conceptual tools that might make it possible to excise all and only "terrorist" related speech run into the problem of either proscribing or chilling protected political speech.

Turning to a concrete example, any attempt to proscribe "terrorist speech" using the model of the United Kingdom, which might serve as a useful comparison, would be impermissible under the First Amendment. The U.K. Terrorism Act of 2006 prohibits the expression of "a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or [other] offences."[57] In addition, a person who "distributes or circulates a terrorist publication" can be punished.[58] Moreover, a statement that could be construed as "glorification" of terrorism would count as "encouragement."[59] Such an approach to criminalizing "terrorist speech" might be one model for criminalizing "menacing dogmas" or "radical propaganda" that might constitute "encouragement," but would violate the First Amendment of the U.S. Constitution. Not only are the U.K. statutory provisions too vague and overbroad for purposes of U.S. free speech doctrine—"glorification," for example, is a vague term—but they also proscribe speech that merely advocates violence or "dangerous ideas," without creating sufficient danger of bringing them about.[60]

At a more abstract level, to conceptualize speech as "terrorist speech" depends on prior factual judgments subject to political contestation and articulated against the background of First

54. Protecting dissent has an important role to play in First Amendment jurisprudence. *See* CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003).

55. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

56. *Id.* at 272.

57. The Terrorism Act 2006, ch. 11, (Eng.).

58. *Id.*

59. *Id.*

60. During an earlier period, the First Amendment would have asked whether such speech created a "clear and present danger" of bringing about illegal action, *see* Gitlow v. New York, 268 U.S. 652 (1925), latter modified by an "imminent lawless action" standard in Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). The U.K. prohibition is too broad to survive either of these standards.

Amendment doctrine.[61] The question whether a particular kind of speech is sufficiently "dangerous" to warrant censorship is subject to political and interpretive arguments that always risk drawing a line in a way that harms the very political system it aims to protect. It invites more searching investigations into speakers' communicative content rather than their intentions combined with overt acts. Having once defined forbidden "terrorist speech" in a particular political context, policy makers might respond to a future terrorist attack by seeking to apply the prohibition to broader categories of speech. No doubt, courts can check prosecutorial zeal, but the mere pursuit of broader categories of speech, apart from ultimate judicial determinations, can chill otherwise protected expressive activity. Moreover, in the wake of a future attack, executive officials will claim national security necessity, and there is no guarantee that courts will serve as an effective check against the zealous application of "terrorist speech" to broader categories of speech expressive of dissent and dissatisfaction.[62] That, at least, is one lesson from the series of cases from *Schenk* and *Debs* during the first World War to *Dennis* during the Cold War that eventually lead to *Brandenburg* in 1969. Courts have been more willing to defer to executive claims to punish speech when the public danger is more salient and more likely to impose constitutional constraints as the perceived threat recedes. Given the indefiniteness in the conceptualization of "terrorist speech," it would be more prudent to forestall a future cycle of zealous prosecution and subsequent rights reassertions by resisting the temptation to proscribe "terrorist speech" in the first place. Instead, policy makers should focus on addressing overt acts made in pursuit of terrorist objectives.

In sum, prohibiting "terrorist speech" requires unattainable precision in both conceptualization and statutory construction. The Supreme Court's struggle with obscenity provides a useful analogy. Although obscenity is no part of the exposition of ideas, the Court all but abandoned the attempt to specify precisely what constitutes obscenity in practice.[63] Because "terrorist speech" may often be intertwined with political and religious expression, conceptualizing and applying prohibitions will be made all the more difficult. Moreover, when conceptualizations are imprecise, the task of separating political advocacy from genuine incitement grants a tool to executive officials ready-made for over use and abuse.

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61. *See* Frederick Schauer, *The Boundaries of the First Amendment: A Case Study in Constitutional Salience*, 117 HARV. L. REV. 1765 (2005).

62. *See* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK (2006).

63. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).

III. THE PROBLEM WITH DANGEROUS IDEAS

Given these cautionary considerations, advocating for additional regulations aimed at suppressing an amorphous conception of "terrorist speech" itself constitutes a dangerous idea.

Is "terrorist speech" the new communist menace? In *Dennis*, the Supreme Court considered speech said to be criminal by virtue of its advocacy. The Court conducted a cost-benefit analysis to conclude that the gravity of the global communist threat during the Cold War warranted deference to the asserted security interests of the state.[64] Using the "clear and present danger" test, the *Dennis* Court found that preventative action is warranted when a group aims to overthrow the government and is "attempting to indoctrinate its members and to commit them to a course" of action designed to bring about a violent end.[65] A person who "knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States,"[66] in conjunction with a group sharing a similar goal, poses some danger—particularly where the goal is the violent overthrow of government.

The difference between the Cold War communist and the (post)modern terrorist requires some parsing when considering a basis on which the "clear and present danger" of harm from terrorist speech could justify a longer temporal horizon for government censorship and punishment. One difference is the degree of potential harm that might follow from the two different kinds of threats. A global communist conspiracy constituted an existential threat to the U.S. government. By contrast, as harmful as the murderous aims of terrorist plots might be, they do not constitute a threat to the sovereign existence of U.S. constitutional government.[67] Another key difference is the development of more robust free speech protections in the aftermath of *Dennis*. Consider the Court's abandonment of its more deferential stance—overturning convictions for lesser Communist Party officials in *Yates v. United States*[68] because the advocacy in question was "too remote from concrete action to be regarded as the kind of indoctrination preparatory to action" that could constitute proscribable speech.[69] With the Supreme Court's turn to protecting and facilitating robust public debate in cases

64. Dennis v. United States, 341 U.S. 494 (1951). *See also* ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 128–29 (2007).

65. *Dennis*, 341 U.S. at 509.

66. The Smith Act, 18 U.S.C. § 2385.

67. *See* ACKERMAN, *supra* note 62, at 13–77.

68. 354 U.S. 298 (1957).

69. *Id.* at 321–22.

like *New York Times v. Sullivan* and *Brandenburg*, a core First Amendment concern is that by criminalizing advocacy alone, we risk inhibiting the exposition of ideas. Even if some ideas can be conceptualized as "menacing," the theory of the First Amendment imbedded in *Brandenburg* and reaffirmed in *Whitcomb*[70] but first articulated in Justice Holmes' dissent in *Gitlow v. New York* is that "[e]very idea is an incitement."[71] Moreover, every idea "offers itself for belief,"[72] and in turn, belief can lead to action.

These bulwarks of the American free speech tradition are built in part out of conceptions of free speech values that protect democratic self-determination,[73] autonomy,[74] cultural democracy,[75] or simply dissent.[76] While each of these free speech theories might favor different outcomes in particular cases, they share a common concern for protecting "robust, uninhibited, wide-open" speech, which is threatened when advocacy becomes prohibited. While these kinds of free speech values do not endorse the content of speech that glorifies terrorist attacks, neither do they readily justify its criminal exclusion—for a primary aim of free speech doctrine is to provide both the breathing room and the cultural conditions for alternative ideas to win out by choice rather than compulsion.[77] If doctrine unreflectively accommodates the countervailing value of security as a justification for excising speech that spreads dangerous propaganda or menacing dogmas, then the problem is that security might always be improved on a claim of national necessity.[78] But the burden must remain on those seeking censorship to justify the specific security gains to be achieved against the specific free speech values the First Amendment protects. Otherwise, constitutional review becomes a way of vindicating prior political conceptions of speech designated dangerous.

Those seeking to improve security by regulating speech might hasten to object to what seems in this essay a far too high-minded consideration for speech that justifies killing civilians. After all, they

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70. Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974); Brandenburg v. Ohio, 395 U.S. 444 (1969).

71. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

72. *Id.*

73. *See, e.g.*, OWEN FISS, THE IRONY OF FREE SPEECH (1996); Robert C. Post, *Participatory Democracy as a Theory of Free Speech*, 97 VA. L. REV. 477 (2011).

74. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

75. *See* Balkin, *supra* note 3, at 3.

76. *See, e.g.*, Thomas P. Crocker, *Displacing Dissent: The Role of Place in First Amendment Jurisprudence*, 75 FORDHAM L. REV. 2587 (2007).

77. As the Court has explained: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989).

78. *See generally*, Thomas P. Crocker, *Who Decides on Liberty?*, 44 CONN. L. REV. 1511 (2012).

might object, the real harm is the loss of security caused by terrorist speech aiming to indoctrinate and recruit. But beyond the issue of conceptualizing the problem to be addressed and the speech to be prohibited, there is the practical problem of what good such regulations might do.

Suppose that under a suitably refined statute, a person could be prosecuted for posting to a social media site her approval of an Anwar al-Awlaki video exhorting the desirability and urgency of killing civilians in furtherance of Jihad. Would making a criminal out of such a social media speaker render the underlying video inaccessible? The answer is clearly no, though it might marginally decrease its circulation. Rather, its most immediate effect would be to give government officials far greater power to censor expressive activity even if it were disconnected from any intent to further specific terrorist acts. But is expressing admiration for such views by a social media speaker indicative of an intent to carry out violent acts? It is hard to see how, though posting such material—apart from the possibility of violating an internet provider's terms of service—might warrant greater scrutiny of the speaker given the National Security Agency's known access to social media content.[79] Protections against "guilt by association" are meant to prevent the punishment of speech based on membership or proclivity absent evidence of specific intent to engage in illegal actions.[80] If the goal is to make the internet unavailable to terrorist organizations themselves, then given the criminal nature of their underlying endeavor (e.g., conspiring to engage in acts of terrorism), it is also difficult to see how criminalizing their members' speech adds any new additional deterrent or counterterrorism tool. By requiring speech regulations to cohere with underlying free speech values, one goal is to avoid chilling even marginal political speech in the name of criminalizing putatively dangerous speech.

Perhaps the real issue, then, is justifying an approach that inevitably leads to a revision of section 230 of the Communications Decency Act, which provides legal protection for social media websites and other providers of internet platforms and content.[81] The logic might be to make a broad category of terrorist speech illegal, and then argue that such a law is toothless unless providers of internet services can be

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79. *See, e.g.*, Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, THE GUARDIAN, June 7, 2013 ("The National Security Agency has obtained direct access to the systems of Google, Facebook, Apple and other US internet giants . . . .").

80. *See, e.g.*, Scales v. United States, 367 U.S. 203, 228–30 (1961).

81. 47 U.S.C. § 230 ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

forced to take down content on pain of criminal liability. Such an approach would have profound reverberations for the integrity of internet services as fora for expressive activities of all kinds—personal and political. But if this is the ultimate logic of Professor Tsesis' proposal, he still needs to justify the initial step of criminalizing "terrorist speech" without running afoul of both First Amendment doctrine, and importantly, constitutionally protected free speech values. It matters to these values not simply that fora for public discussion, such as social media, remain open and uninhibited by state censorship, but that both the outcome and process of debate "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[82]

If contributing to public debate and seeking to have a voice in the formation of public opinion were seen as First Amendment values that do not include "terrorist speech" under some suitable categorization, then prioritizing security need not entail free speech loss. On this view, it is appropriate to balance security and liberty, and during periods in which there are sustained threats from terrorism, adjustments to that balance in the direction of greater security are warranted.[83] This logic provides a justification for criminalizing non-violent "terrorist speech" to the extent that it poses a security threat that outweighs any residual value it retains as political expression. Such logic focused on the content of speech, however, does not account for deliberative values that exist independently of the specific content of speech. The process of deliberation within the "market place of ideas" is a bulwark against enforced conformity and a protection for the legitimacy of outcomes obtained free from official interference.[84]

But what if Congress were able to ban all and only that speech which is both accurately characterized as "terrorist speech" and is truly dangerous? What if as a result, we could create a system of participatory self-government that provides just the right mix of information to yield optimal democratic decisions? Posit the existence of a knowable "optimality" that can be judged from a perspective

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82. Red Lion Broad. v. FCC, 395 U.S. 367, 390 (1969).

83. *See* POSNER & VERMEULE, *supra* note 67, at 26–30; RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 9 (2006) ("In times of danger, the weight of concerns for public safety increases relative to that of liberty concerns, and civil liberties are narrowed.")

84. On the dangers of enforced conformity, see West Virginia v. Barnette, 319 U.S. 624, 642 (1943) (" If there is any fixed star in our constitutional constellation, it is that no official, high or pretty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."); *see also*, Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech,* 27 CONST. COMMENTARY 283, 283 (2011) (arguing that "[w]e should understand freedom of speech as, centrally, protecting freedom of thought.").

external to the system, taking into account the mixture of desires, preferences, and problems individuals prioritize. Judged from the perspective of the "optimal" result, would it be permissible to excise from public discourse any and all speech that fails to contribute to the optimal result? To make the claim a bit more pressing, posit that failure to excise such speech would not only lead to suboptimal results, but would also lead to positive, even grave, harms. When terrorist speech is included, it is not simply the case that we end up in a non-Pareto optimal position. What makes the non-optimality discernible is both an increased risk of actual physical harm to some number of individuals and the likely eventuality that some number will suffer death and physical harm from terrorist actions in part because of this speech. So, a democratic polity's failure to take action to excise the offending speech will lead to harms of a kind that—if avoided—would produce a more optimal outcome. Why not construe the First Amendment to allow such speech to be excised from the public sphere?

Not only is proscribing speech on the basis of its content not precise in the manner imagined, but democratic process and legitimacy are values protected by the First Amendment, regardless of the efficiency of the outcome. Government efforts to achieve Pareto optimality by criminalizing content it claims constitutes "terrorist speech" undermine these values. Perhaps this problem is even more accentuated by the fact that social media is a new fora for democratic exchange—the future shape and impact of which has yet to be seen.[85] When Congress attempted to regulate the content of internet communication under the Communications Decency Act or the Child Online Protection Act, the Supreme Court was not sympathetic to premature and imprecise attempts.[86] The tension between the conditions of democratic legitimacy and the ever-present temptation to excise "dangerous ideas," should caution against pursuing greater security by regulating speech. But, all too often—and it seems to be the case with an attempt to regulate terrorist speech on social media—there is a substantial risk of conceptualizing what is to be proscribed in terms too readily amenable to expansion and with goals too imprecisely conceived.

Post-September eleventh counterterrorism policy has challenged a number of constitutional protections and prior statutory

85. The new role of social media is before the Court in State v. Packingham, 748 S.E.2d 146, 149 (N.C. Ct. App. 2013), *rev'd*, 777 S.E.2d 738 (N.C. 2015), *cert. granted*, 137 S. Ct. 368 (2016).

86. See Reno v. ACLU, 521 U.S. 844 (1997) (holding unconstitutional two provisions that sought to prohibit indecent or patently offensive content on the internet viewable by minors); Ashcroft v. ACLU, 542 U.S. 656 (2004) (holding unconstitutional provisions of the Child Online Protection Act).

frameworks by expanding executive power. For example, surveillance practices have tested the outer limits of Fourth Amendment protections while exceeding initial statutory limits provided by Congress under the Foreign Intelligence Surveillance Act.[87] In secret processes, executive officials have engaged in practices that surpass legal frameworks, only to later seek Congressional authorization with modifications to protect constitutional rights.

One area that has been challenged less is the First Amendment. The USA Patriot Act's amended material support statute is the significant exception, but even there, the Court in *Humanitarian Law Project* deferred to executive claims, putatively applying strict scrutiny in allowing restrictions on coordinated speech while preserving protections for independent speech.[88] But future events could find a receptive presidential administration ready to expand internet speech restrictions, even perhaps going so far as "closing that internet up in some way" as President Donald Trump warned.[89] The attitude executive officials take toward free speech values might be an even more worrisome indicator of a willingness to abide by First Amendment constraints on counterterrorism policy. As a candidate, President Trump followed up his suggestion about "closing up" the internet by considering the objection that "[s]omebody will say, 'Oh freedom of speech, freedom of speech.' These are foolish people."[90]

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87. The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, § 101, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801–11 (2000)). Under President Bush, the National Security Agency embarked on a widespread "Terrorist Surveillance Program." *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1. It was later justified on grounds of national security. *See* U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President, p. 3 (Jan. 19, 2006) ("The primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emergencies. Intelligence gathering is a necessary function that enables the President to carry out that authority."); *see also*, Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of NSA*, NY TIMES, July 6, 2013, at A1 (Using the "special needs" "concept more broadly, the FISA judges have ruled that the N.S.A.'s collection and examination of Americans' communications data to track possible terrorists does not run afoul of the Fourth Amendment, the officials said.").

88. *See* Holder v. Humanitarian Law Project, 561 U.S. 1 (2010) (holding that the material support prohibition could constitutionally apply to "speech under the direction of, or in coordination with foreign groups."); *see also* Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16 (2012).

89. David Goldman, *Donald Trump wants to 'close up' the Internet*, CNN (DEC. 8, 2015), http://money.cnn.com/2015/12/08/technology/donald-trump-internet/index.html [https://perma.cc/Z6PH-PVCJ].

90. *Id.* Although it might be tempting to disregard such candidate statements as campaign rhetoric, a pattern has emerged in the initial weeks of the Trump Administration of executive officials attempting to conform policy to Tweets or similar statements. *See* David Sanger, et al., *Turmoil at the National Security Council, From the Top Down*, NY TIMES, Feb. 13, 2017, at A1 ("Three weeks into the Trump administration, council staff members get up in the morning, read President Trump's Twitter posts and struggle to make policy to fit them.").

Increased internet regulation as a counterterrorism policy consists of three elements: statutory authorization, judicial deference to executive security concerns, and a general constitutional sentiment that discounts the value of free speech. Statutory authorization can further empower a disregard for constitutional values that give priority to free expression and democratic deliberation. Further, this approach illustrates a contrasting constitutional vision that might survive judicial review during a perceived emergency circumstance—where the need to defer to national security expertise is the most compelling. Currently, two of the elements for increased internet regulation potentially exist—an apparent constitutional vision that sees free speech values as "foolish," and judicial deference to the executive's national security claims about "evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."[91] The arguments for adding the missing statutory authorization, as well as expanding judicial deference to cover greater speech content, are factually deficient and theoretically dangerous.

In sum, despite the surface appeal of balancing security and liberty in a way that might justify new prohibitions on speech communicated via the internet, a closer examination reveals a danger to constitutional values in returning to a conception of the First Amendment that allows punishing advocacy, no matter the offensiveness of the content. Not only is there no indication that such prohibitions will in fact improve security, but there is also every indication that they would endanger core free speech values that rely on democratic deliberation rather than the power of government censorship to ensure political safety.

CONCLUSION

If Americans remain committed to a central First Amendment value in protecting a "marketplace of ideas,"[92] then they must follow where the ideas lead.[93] The American political system can make this bet, on the belief in the power of its ideas to win out in the marketplace without the need for the heavy hand of the censor to advance the cause.

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91. *Humanitarian Law Project*, 561 U.S. at 34.

92. *See, e.g.*, FCC v. Pacifica Foundation, 438 U.S. 726, 745–46 (1978). The idea of the neutral marketplace of ideas was first articulated by Justice Holmes writing in dissent in Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that "the ultimate good desired is better reached by free trade in ideas . . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . .").

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

No doubt terrorism will be a continuing threat in the Twenty-First Century.[94] The attraction for some individuals to carry out specific acts will be realized in part through access to dangerous ideas conveyed through internet communications. But if Congress were to counter threats of terrorism by criminalizing speech that does no more than advocate, then not only might it needlessly adopt a dangerous qualification to core First Amendment values, but it also seems clear that government "has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire,"[95] as Justice Scalia, writing for the Court in a different context in *R.A.V. v. St. Paul,* admonished. It would be an important constitutional achievement not to incite an assault on the First Amendment by appeal to inchoate fears of terrorist speech on social media. Instead, Americans can vindicate their free speech tradition by promoting vigorous debate and dissent in the new digital fora the internet creates.

94. *See, e.g.*, PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY (2008).

95. R.A.V. v. St. Paul, 505 U.S. 377, 396 (1992).