

BRANDENBURG AND INCITEMENT IN A DIGITAL ERA

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The Internet has revolutionized communication by making it possible for ordinary people to directly communicate with each other. Prior to its invention, many people were forced to use much more primitive communications methods (e.g., giving speeches or distributing printed circulars). While more sophisticated communications technologies (e.g., newspapers, radio and television stations) were available, most of those technologies were subject to “gatekeepers” (e.g., editors, reporters, producers) who controlled access to the technology, and who could limit the ability of ordinary individuals to mass communicate.¹ In order to access these technologies, individuals must first convince the gatekeepers that their ideas are worthy of dissemination. The Internet, coupled with the development of personal computers, has largely freed people from the constraints of gatekeepers, and allowed them to directly communicate with each other. The political and social consequences of this newfound freedom have transformed communication. Using devices like e-mail, listservs, websites and blogs, not to mention Twitter and Facebook, private individuals now have the capacity to directly communicate with each other on a broad scale.² Individually, as well as through organizations like MoveOn.org and the Tea party, people are using the Internet to communicate much more broadly, and are beginning to reshape society and the political process.³

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¹ See RUSSELL L. WEAVER, FROM GUTENBURG TO THE INTERNET: FREE SPEECH, ADVANCING TECHNOLOGY AND THE IMPLICATIONS FOR DEMOCRACY (forthcoming 2011).

² See *id.*

³ See *id.*

The same factors that create the Internet's dynamic political and social potential—easy access and the decline of traditional gatekeepers—create the potential for great mischief. Indeed, the Internet has permitted criminals to go high tech in the sense that they can use the Internet to distribute child pornography,⁴ engage in sexual predation and child abuse,⁵ and perpetuate fraudulent schemes. The Internet has also been used by extremist groups to propagate hate speech,⁶ and Holocaust denial,⁷ and is used by Internet gambling businesses (which, while perhaps legal, can produce significant adverse social consequences).

Of particular concern, given the events of 9/11 and other recent terrorist incidents, is that the Internet has provided a forum for terrorists, as well as other individuals who wish to advocate for various types of illegal conduct. There have been numerous high-profile examples in recent years. These include the Pennsylvania woman (nicknamed “Jihad Jane” by the media) who was indicted for plotting over the Internet to engage in terrorism,⁸ a self-proclaimed pedophile who constructed a website advocating on behalf of pedophilia,⁹ and a white su-

⁴ See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down portions of the Child Pornography Prevention Act of 1996 that prohibited “virtual” child pornography); *New York v. Ferber*, 458 U.S. 747 (1982) (upholding a New York criminal statute that prohibited individuals from knowingly promoting sexual performances by children under the age of sixteen years old).

⁵ See Trymaine Lee, *Bill Would Bar Sex Offenders From Facebook and MySpace*, N.Y. TIMES, Jan. 30, 2008, at B4.

⁶ See Russell L. Weaver, Nicolas Delpierre & Laurence Boissier, *Holocaust Denial and Governmentally Declared “Truth”: French and American Perspectives*, 41 TEX. TECH. L. REV. 495 (2009).

⁷ See RICHARD E. HARWOOD, DID SIX MILLION REALLY DIE? TRUTH AT LAST EXPOSED (2d ed. 1974), available at <http://www.ihr.org/books/harwood/dsmrd01.html>; see also Raffi Berg, *The Fight Against Holocaust Denial*, BBC NEWS, Apr. 14, 2005, <http://news.bbc.co.uk/2/hi/europe/4436275.stm>.

⁸ See Dina Temple-Raston, *All Things Considered: Terror Suspect Jihad Jane’s Unlikely Journey*, Nat’l Public Radio (Mar. 10, 2010), <http://www.npr.org/templates/story/story.php?storyId=124537466>.

⁹ See *Mothers Fight Back Against Pedophile’s Web Site*, ABC NEWS, July 30, 2007, <http://abcnews.go.com/print?id=3426796> (“McClellan has operated detailed Web sites rating the best public places to watch young children at play and posting photos he’s taken at events. He even rated locations based on how many little girls, or LGs as he call [sic] them, are there.”).

premacist who web-posted a poem describing the murder of a black President.¹⁰

Because of the potential for mischief, there have been increasing calls for Internet regulation. However, decisions about whether to regulate can present society with difficult issues, involving conflicting societal values. Particular problems are presented by speech that advocates illegality of one sort or another. For nearly half a century, the United States Supreme Court struggled to find the appropriate balance between free speech and the criminalization of “subversive advocacy.” In its landmark decision in *Brandenburg v. Ohio*,¹¹ the Court struck the balance by holding that subversive advocacy cannot be prosecuted absent proof that it is “directed to inciting or producing imminent lawless action and that it is likely to incite or produce such action.”¹²

Although *Brandenburg* has now been settled law for nearly half a century, legitimate questions might be raised about whether the Court’s approach to subversive advocacy can or should change in light of the Internet and the war on terrorism. Most of the subversive advocacy cases involve individuals who used relatively more primitive speech technologies such as speeches¹³ or the distribution of printed circulars.¹⁴ These technologies were relatively less likely to reach large numbers of people, and therefore were less likely to have broad societal impact. It is unclear whether the *Brandenburg* formulation makes sense in a cyber environment.

This brief article does several things. First, it discusses United States Supreme Court decisions (and dissents) that led the Court to its holding in *Brandenburg*. Second, it discusses the *Brandenburg* decision itself, and the *Brandenburg* test. Finally, since *Brandenburg* was rendered in light of very dif-

¹⁰ See Lauren Streib, *Poetic Justice: Kentucky Man Arrested for Threatening President with 16-Line Poem*, BUS. INSIDER (Feb. 20, 2010, 12:03 PM), <http://www.businessinsider.com/poetic-justice-kentucky-man-arrested-for-threatening-president-with-16-line-poem-2010-2>.

¹¹ 395 U.S. 444 (1969).

¹² *Id.* at 447.

¹³ *Id.* at 444-45 (speech at a Ku Klux Klan rally).

¹⁴ See *Schenck v. United States*, 249 U.S. 47 (1919).

ferent communications technologies, the article raises questions about whether *Brandenburg* can or should remain the prevailing test for dealing with incitement to illegality in an Internet era.

I. THE LONG AND TORTUOUS ROAD TO *BRANDENBURG*

The United States Supreme Court's path to *Brandenburg* was neither easy nor direct. In many early cases, decided during or in the aftermath of World War I, the Court struggled to find the proper balance between the governmental interest in prohibiting subversive advocacy, and the societal interest in free speech. In those decisions, the Court consistently recognized that the government has a compelling interest in protecting itself against violent overthrow, and that it could therefore criminalize advocacy of overthrow. In the early decisions, the Court also paid lip service to the fundamental right of individuals to engage in political dissent, and it acknowledged that the dividing line between criminal conduct and free speech was not always precise.¹⁵

Many of the early subversive advocacy cases were decided in the wake of the Bolshevik Revolution, following the abdication of the Russian Czar, and the ensuing "Red Scare." In this extraordinary environment, when many feared that Communism might sweep the world, the Court tended to sustain criminal convictions while applying a "clear and present danger" test. The requirement of a clear and present danger was more theoretical than real since the Court did not make any meaningful inquiry into whether the danger was either "clear" or "present."

¹⁵ An influential lower court decision was rendered in *Masses Pub. Co. v. Patten*, 244 F. 535, 540, 542 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (1917), in which Judge Learned Hand distinguished speech that advocated "violation of the law" from expression that "arouse[d] a seditious disposition." Although the decision was reversed on appeal, Judge Hand's distinction between "incitement" and "advocacy" was ultimately accepted as the dividing line between protected and unprotected speech. *Id.* at 540. In Judge Hand's view, the necessary inquiry is "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F.2d 201, 212 (1950).

*Schenck v. United States*¹⁶ is illustrative of the early decisions. In that case, the Court sustained criminal convictions for violations of the Espionage Act which prohibited efforts to cause insubordination in the military, as well as attempts to obstruct enlistment in the military services. The indictment was based on the fact that defendants printed and distributed a circular urging men to resist the draft during World War I. The circular compared the draft to slavery, suggested that “a conscript is little better than a convict,” and stated that “conscription [is] despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few.”¹⁷ In sustaining the indictment without any proof of immediacy or danger, the Court concluded that “the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.”¹⁸ While the Court recognized that the circular might have been permitted in ordinary times, the Court emphasized that “the character of every act depends upon the circumstances in which it is done,”¹⁹ and held that the question 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.”²⁰ Analyzing the issue in terms of “proximity and degree,” the Court noted that “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”²¹ The Court concluded that “we perceive no ground for saying that success alone warrants making the act a crime.”²²

¹⁶ 249 U.S. 47 (1919).

¹⁷ *Id.* at 50-51.

¹⁸ *Id.* at 51.

¹⁹ *Id.* at 52.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

During this period, the Court also upheld other convictions when (as in *Schenk*) the danger was neither very “clear” nor terribly “present.”²³ For example, in *Debs v. United States*,²⁴ the Court upheld the conviction of a Socialist presidential candidate (Eugene Debs) for a campaign speech that he delivered in Canton, Ohio, in 1918. Debs’s speech, “Socialism, Its Growth, and a Prophecy of Its Ultimate Success,” paid tribute to “loyal comrades” who had been prosecuted for resisting the draft;²⁵ issued a prophecy regarding the “success of the international Socialist crusade;” and went on to state that: “I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone.”²⁶ Finally, he endorsed the Socialist Party platform, which declared the war to be a crime, and urged “continuous, active, and public opposition to the war, through demonstrations, mass petitions, and all other means within our power.”²⁷ Like *Schenck*, Debs was convicted under the Espionage Act for attempting to obstruct the draft and attempting to incite insubordination in the military forces. The jury was instructed that the defendant’s conviction was justified if his words had a “natural tendency and reasonably probable effect” of impeding the conscription of

²³ For example, the Court decided *Frohwerk v. United States*, 249 U.S. 204 (1919), which involved a newspaper publisher who printed several articles criticizing World War I, praising the German nation, and blaming the war on Wall Street. In affirming Frohwerk’s conviction, Justice Holmes emphasized that the country was at war, and concluded that:

[W]e must take the case on the record as it is, and on that record it is impossible to say that it might not have been found that the circulation of the paper was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.

Id. at 209.

²⁴ 249 U.S. 211 (1919).

²⁵ Debs went on to allege that:

[T]he master class has always declared the war and the subject class has always fought the battles—that the subject class has had nothing to gain and all to lose, including their lives; that the working class, who furnish the corpses, have never yet had a voice in declaring war and never yet had a voice in declaring peace.

Id. at 213-14.

²⁶ *Id.* at 214.

²⁷ *Id.* at 216.

soldiers.²⁸ Even though World War I was over by the time the case came before the Court, the conviction was upheld and Debs ultimately served thirty-two months in a federal prison.

The seeds of the Court's modern approach to unlawful advocacy were sown in *Abrams v. United States*²⁹ in Justice Holmes's dissent from the majority's decision to uphold the convictions of several self-described Russian-born "anarchists," "revolutionaries," and "socialists" for violating the Espionage Act.³⁰ Defendants distributed circulars that made various allegations. One circular, entitled "The Hypocrisy of the United States and her Allies," chastised President Wilson, denounced capitalism, and called on workers to "awake" and "rise;" the signers referred to themselves as "revolutionists."³¹ The second article, written in Yiddish, was entitled "Workers—Wake Up." After referring to "his Majesty, Mr. Wilson, and the rest of the gang, dogs of all colors!," the circulars described capitalism as the enemy of workers, called on armament workers to "strike" and "fight," and were signed by defendants who referred to themselves as "the rebels."³² In sustaining the convictions, the

²⁸ *Id.*

²⁹ 250 U.S. 616 (1919).

³⁰ *Id.* at 617-18.

³¹ *Id.* at 619. The article referred to President Wilson's inaction:

His shameful, cowardly silence about the intervention [of U.S. troops] in Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity He [the President] is too much of a coward to come out openly and say: 'We capitalistic nations cannot afford to have a proletarian republic in Russia.' . . . The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM. . . . [It concludes] Awake! Awake, you Workers of the World! REVOLUTIONISTS.

Id. at 620

³² *Id.* at 620. The circular went on to state that:

"Workers, Russian emigrants, you who had the least belief in the honesty of *our* government, must now throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help, to the prosecution of the war. With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. *Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia and are fighting for freedom.* . . . America and her Allies have be-

Court emphasized that the “obvious effect” of the circulars would be to persuade people “not to aid government loans and not to work in ammunition factories,” and that the purpose was to defeat the war plans “by bringing upon the country the paralysis of a general [strike],” “to throw the country into a state of revolution, [and] thereby” frustrate the war effort.³³ The Court went on to emphasize that the circulars involved the publishing of “disloyal, scurrilous and abusive language about the form of government,” using language “intended to bring the form of government” into “contempt, scorn, contumely and disrepute.”³⁴ The Court concluded that defendants used this language intending “to incite, provoke, and encourage resistance” to the United States in the war, as well as to “urge, incite, and advocate curtailment of production of things” like ordnance and ammunition “necessary and essential to the prosecution of the war.”³⁵ As in *Schenk*, there was no evidence suggesting that any readers of the circulars took any action in response to the circulars.

Holmes’s dissent implored the Court to chart a new course. While he admitted that the circulars urged ammunition factory workers to strike, he argued that there was no evidence that defendants distributed the circulars “with intent by such curtailment to cripple or hinder the United States in the prosecution of the war.”³⁶ He regarded the circulars as the equivalent

trayed [the Workers]. Their robberish aims are clear to all men. The destruction of the Russian Revolution, that is the politics of the march to Russia. *Workers, our reply to the barbaric intervention has to be a general strike! An open challenge* only will let the government know that not only the Russian Worker fights for freedom, but also *here in America lives the spirit of Revolution*. . . . Do not let the government scare you with their wild punishment in prisons, hanging and shooting. We must not and will not betray the splendid fighters of Russia. *Workers, up to fight*. . . . Woe unto those who will be in the way of progress. Let solidarity live!” It is signed, “The Rebels.”

Id. at 621-22.

³³ *Id.* at 621-23.

³⁴ *Id.* at 617.

³⁵ *Id.*

³⁶ *Id.* at 626 (Holmes, J., dissenting).

of political rhetoric protected by the First Amendment,³⁷ and he urged the Court to impose the requirement of immediacy:

But as against dangers peculiar to war, . . . [i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. . . . [N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.³⁸

He then articulated his “marketplace of ideas” metaphor, and suggested that ideas should only be prohibited when they have the potential to cause immediate harm:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent [T]he 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, and that truth is the only ground upon which their wishes safely can be carried out. That at any

³⁷ *Id.*

A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime [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. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

Id. at 627-28.

³⁸ *Id.* at 628.

rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. . . . [W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . 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. I wholly disagree with the argument . . . that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no law abridging the freedom of speech." Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here³⁹

He argued that the circulars amounted to nothing more than political rhetoric, and thus should not have given rise to prosecution.⁴⁰

Following *Abrams*, Justices Holmes continued to dissent in similar cases, and was joined by Justice Brandeis in many of those dissents. A number of subsequent cases dealt with the crime of "criminal syndicalism" or "criminal anarchy" which prohibited individuals from advocating the violent overthrow of the government. In these cases, the Court confronted many of the same tensions that it confronted in the *Schenck* case. In other words, the Court was forced to decide whether defendants could be convicted without proof of an imminent threat to the government based solely on their belief or advocacy of a

³⁹ *Id.* at 630-31.

⁴⁰ *Id.* at 628.

[T]he only object of the paper is to help Russia and stop American intervention there against the popular government—not to impede the United States in the war that it was carrying on. . . . In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them.

Id. at 629.

violent overthrow of the government. The Court upheld convictions in decisions like *Gitlow v. United States*,⁴¹ and *Whitney v. California*.⁴² Although there was some movement towards Holmes's approach during this period,⁴³ the Court also upheld

⁴¹ In *Gitlow v. United States*, 268 U.S. 652, 655 (1925), defendant was convicted of criminal anarchy based on his writings, in particular "The Left Wing Manifesto" and "The Revolutionary Age." In upholding the conviction, the Court emphasized that the statute prohibits only "language advocating, advising or teaching the overthrow of organized government by unlawful means. These words imply urging to action." *Id.* at 664-65. The Court noted that The Manifesto attempted to foment mass strikes and includes a call to action." *Id.* at 665. In rejecting defendant's free speech claims, the Court concluded that speech advocating the overthrow of the government by force, violence and unlawful means "are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power." *Id.* at 668. Unconcerned about the imminency of the harm, the Court struck a precautionary note: "a single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration," and the state "cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction." *Id.* at 669. Justice Holmes, joined by Justice Brandeis, dissented, arguing that the convictions should have been reversed on free speech grounds. Since every idea could be regarded as an incitement, he argued that government could not interfere unless the risk of harm was imminent. *Id.* at 672-73 (Holmes, J., dissenting).

⁴² *Whitney v. California*, 274 U.S. 357 (1927), involved a prosecution under a state "criminal syndicalism" statute of defendant who was a member and organizer of the Communist Labor Party of America whose declared purpose was "to create a unified revolutionary working class movement in America, organizing the workers as a class, in a revolutionary class struggle to conquer the capitalist state, for the overthrow of capitalist rule, the conquest of political power and the establishment of a working class government, the Dictatorship of the Proletariat." *Id.* at 363-64. There was no evidence suggesting that she had tried to overthrow the government. The Court held that:

[T]he State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight.

Id. at 371. The Court viewed the statute as prohibiting conduct in "the nature of a criminal conspiracy," and noted that "such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals." *Id.* at 372.

⁴³ For example, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court held that expressive freedom could not be abridged without an incitement to violence and crime.

convictions of individuals based solely on their membership in the Communist Party of the United States of America (on the theory that it advocated the violent overthrow of the government).⁴⁴ However, during the 1950s, there were suggestions that the Court's approach to subversive advocacy was in transition. *Yates v. United States*⁴⁵ is illustrative of this development, but there were other similar decisions at that time.⁴⁶

Likewise, in *Herndon v. Lowrey*, 301 U.S. 242 (1937), the Court found that speech could not be punished merely because it had a dangerous tendency.

⁴⁴ See *Dennis v. United States*, 341 U.S. 494 (1951). In that case, defendants were prosecuted under the Smith Act for organizing the Communist Party of the United States of America because it teaches and advocates the overthrow and destruction of the Government of the United States by force and violence, and they knowingly and willfully advocated and taught "the duty and necessity of overthrowing and destroying the Government of the United States by force and violence." *Id.* at 497. A plurality of the Court held that government need not "wait until the *putsch* is about to be executed," and inquired only "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 509-10. The Court refused to inquire into the "the probability of success, or the immediacy of a successful attempt," but concluded that the government may intervene if it "is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit." *Id.* at 509. The Court inquired only whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510. "It is the existence of the conspiracy which creates the danger. If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added." *Id.* at 511.

⁴⁵ 354 U.S. 298 (1957). In *Yates*, the Court reinterpreted *Dennis* to require proof of the "advocacy to action" requirement that Justices Douglas and Black had urged on the Court in their *Dennis* dissents. *Id.* at 319-22. In *Yates*, Communist Party leaders were convicted of conspiracy and sentenced to five years in prison. *Id.* at 302. The Court reversed and ordered a retrial, viewing the Smith Act as focused on the "advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action." *Id.* at 319-20.

⁴⁶ Four years after *Yates*, in two companion cases, the Court applied the *Yates* standard to reinterpret *Dennis* as applied to the "membership" provision of the Smith Act. In *Noto v. United States*, 367 U.S. 290 (1961), the Court held that the evidence was insufficient to show:

some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.

Id. at 298. In *Scales v. United States*, 367 U.S. 203 (1961), the Court approved a jury instruction that required proof that the defendant was an "active" member of the

II. THE *BRANDENBURG* DECISION

In *Brandenburg v. Ohio*,⁴⁷ Justice Holmes's argument for an immediacy requirement finally prevailed. The case arose during a period of anti-Vietnam War protests, as well as a period of unrest regarding racial issues. *Brandenburg* involved a Ku Klux Klan leader who was convicted under Ohio's Criminal Syndicalism statute, which made it a crime to "advocat[e] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" or to "voluntarily assembl[e] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."⁴⁸ He was sentenced to one to ten years' imprisonment and fined \$1,000 for his activities during a Ku Klux Klan "rally" held at a farm in Hamilton County. Videotapes of the rally revealed a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood that was worn by the speaker in the films. The film also showed twelve hooded figures, some of whom carried firearms, who were gathered around a large wooden cross, which they burned. Although most of the words uttered during the rally were incomprehensible, the video included remarks that were derogatory of Negroes and Jews. Other scenes showed Brandenburg, in Klan regalia, giving a speech,⁴⁹ and also showed six hooded fig-

Communist Party, and not merely that he was "a nominal, passive, inactive or purely technical," and it also sought proof that he intended "to bring about violent overthrow 'as speedily as circumstances would permit.'" *Id.* at 219.

⁴⁷ 395 U.S. 444 (1969).

⁴⁸ *Id.* at 444-45 (quoting OHIO REV. CODE ANN. §2923.13).

⁴⁹ *Id.* He stated:

This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.

ures, including Brandenburg, who gave a speech that was very similar to the other speech, but which included the following statement: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."⁵⁰ Although some of the figures at the rally carried weapons, Brandenburg did not.

Despite Brandenburg's inflammatory statements and the violent history of the KKK, the Court overturned Brandenburg's conviction. The Court held that the mere fact that a speaker advocates violent methods for the achievement of political and economic change does not involve "such danger to the security of the State that the State may outlaw it."⁵¹ The Court then articulated the two-prong *Brandenburg* test:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.⁵²

The Court noted that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."⁵³ Since the Ohio statute failed to draw this distinction, the Court concluded that it "impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments," and "sweeps within its condemnation speech which our Constitution has immunized from governmental control."⁵⁴ In other words, the statute failed to adequately distinguish between "mere advocacy" and "incitement to imminent lawless action."⁵⁵

Justice Douglas concurred, arguing that using the "clear and present danger" to "crush what Brandeis called '[t]he fundamental right of free men to strive for better conditions

Id. at 446.

⁵⁰ *Id.* at 447.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 448 (citation omitted).

⁵⁴ *Id.*

⁵⁵ *Id.* at 448-49.

through new legislation and new institutions' by argument and discourse even in time of war" was dangerous.⁵⁶ He concluded, quoting Justice Holmes's dissent in *Gitlow*:

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. . . . Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us it had no chance of starting a present conflagration.⁵⁷

The requirement of imminence has been reaffirmed in other decisions.⁵⁸

III. *BRANDENBURG* IN THE CYBER-VILLAGE

How should *Brandenburg* apply to Internet communications? As noted, the Internet has transformed the nature of communication by allowing ordinary individuals to freely communicate their ideas. Although illegal advocacy can still be presented in speeches (as in *Debs* and *Brandenburg*) or printed circulars (as in *Schenck*), it can be more easily and widely disseminated through the Internet. Indeed, using modern technologies, it is extremely easy to circulate subversive advocacy through Internet websites, blogs, e-mails or listservs.

Should this "ease of access" affect the Court's analysis? *Brandenburg* was formulated to apply to a speaker who was trying to whip a crowd into a frenzy. In that context, society might have a legitimate basis for restraining a speaker who

⁵⁶ *Id.* at 452 (citation omitted).

⁵⁷ *Id.*

⁵⁸ For example, in *Hess v. Indiana*, 414 U.S. 105 (1973), the Justices disagreed about whether the alleged harm was imminent, but a plurality voted to reverse Hess's conviction for disorderly conduct. During an anti-war demonstration at Indiana University, protestors blocked access to a public street. *Id.* at 106. As police began to clear the street, Hess was arrested for saying "fuck" to a police officer, and he uttered either "We'll take the fucking street later," or "We'll take the fucking street again." *Id.* at 107. The plurality concluded that, "At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess's speech." *Id.* at 108.

intends to incite imminent lawless conduct, and who is in the process of doing so at that very moment. By restraining the speaker, society might hope that discourse would prevail, and that grievances might be resolved through speech or through ordinary political processes. By contrast, at first glance, it may not seem obvious that the *Brandenburg* test can be meaningfully applied to communications posted on the Internet. For example, consider Eugene Debs's campaign speech or Schenck's circular, and assume that they are posted on an Internet website (or sent through the Internet via e-mails or listservs) rather than delivered at a campaign rally or communicated through the distribution of printed circulars. One might argue that neither the modern Debs nor the modern Schenck intended to incite *imminent* lawless conduct. The requirement of imminence suggests a higher level of immediacy, and it is not clear that many Internet publications are *likely* to cause *imminent* lawless conduct. Internet publications have led to violence (e.g., the posting of the Danish cartoons⁵⁹), but often the reaction is usually more delayed. As a result, if *Brandenburg* is strictly applied, one might suspect that it would be difficult to prosecute the modern Debs or Schenck.

However, analysis of Internet issues might not be as obvious as would initially appear. By using the Internet, the modern Debs and Schenck have much greater ability to reach and influence sympathetic or interested individuals. When Eugene Debs and Schenck spoke during the early part of the last century, communications possibilities were far more circumscribed. While Debs could speak at a campaign rally, or Schenck could hand out printed circulars, their ability to reach a wider audience was limited by the nature of their medium. Of course, both Debs and Schenck could have tried to resort to more "modern" technologies such as radio or television. However, unless they owned newspapers, printing presses, or radio and television stations, they would have been forced to go through gatekeepers (e.g., the owners or program directors of

⁵⁹ See Craig S. Smith & Ian Fisher, *Temperatures Rise Over Cartoons Mocking Muhammad*, N. Y. TIMES, Feb. 3, 2006, at A3.

the newspapers, printing presses, or stations) in order to access those technologies. Since both of their views would have been controversial for the time, and potentially inflammatory, it is not clear that the gatekeepers would have allowed them to access radio, television or newspapers to propagate their views.

The Internet completely redefines the ability of the modern-day Debs and Schenck to communicate their ideas to potential followers. If they wish to circulate their ideas through newspapers, radio or television, they are still subject to gatekeepers who can thwart or limit their attempts to communicate. However, there is nothing to prevent the modern Debs or Schenck from ignoring traditional media altogether and circulating their ideas over the Internet. Through that medium, they have many communications forms available to them (e.g., websites, blogs, Twitter, Facebook), and they can quickly and efficiently transmit their ideas around the country, as well as around the world. Moreover, they can do so at relatively little cost.

The Internet also provides the modern-day Debs and Schenck with the ability to efficiently contact like-minded individuals. Indeed, one of the distinguishing features of the Internet is that it allows individuals (whether they are interested in anarchy or opposition to war, or for that matter, to old cars or whatever) the ability to virtually “congregate” and virtually “communicate.” As a result, the potential threat to society is much greater. It is one thing when anarchists, Ku Klux Klan members, (American) Nazi party members, or white supremacists meet in small dingy basements or distribute circulars. It is quite another thing when they use the Internet to quickly and easily transmit their ideas to those of similar bent. Moreover, since the Internet enhances the ability of individuals to meet like-minded people, it likewise enhances their potential to engage in conspiracies, including potentially broad conspiracies.

At the same time, the Internet makes it easier for law enforcement officials to track subversive advocates and extremist groups. When someone posts information on a blog or website, it is often available for the entire world to access and view. As a result, enforcement personnel may have the ability to observe what anarchists, terrorists, white supremacists, or others are

saying, and to track their movements. Likewise, enforcement personnel have greater capacity to intervene when individuals cross the line from advocacy to conspiracy and action. Indeed, enforcement personnel can surreptitiously infiltrate terrorist groups and other potentially dangerous organizations using anonymous handles. As a result, it is not clear that the Internet requires any alteration in the *Brandenburg* formulation.

Of course, courts have always retained the right to prosecute individuals who engage in criminal conspiracies or who solicit others to commit crimes, but there has always been some discomfort between the crimes of solicitation and conspiracy law and the First Amendment. Under the crime of conspiracy, individuals can be prosecuted for conspiring to commit a criminal act, and of course the crime necessarily involves some form of speech in the sense that the conspirators agree (either explicitly or by their conduct) to commit a crime.⁶⁰ Under the crime of solicitation, an individual can be prosecuted for soliciting another to commit a criminal act, and speech can also be involved in the sense that the crime is solicited.⁶¹ In the early subversive advocacy cases (e.g., *Schenck*), many of the prosecutions were for crimes that involved conspiracy or the equivalent of solicitation. However, the speech was not in the nature of conspiracy, and could more appropriately be characterized as political rhetoric, inflammatory rhetoric, perhaps, but political

⁶⁰ Under the Model Penal Code's conspiracy provision, MODEL PENAL CODE §5.03, a conspiracy is defined as follows:

A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he: (a) agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

⁶¹ Under the Model Penal Code's solicitation provision, MODEL PENAL CODE §5.02, the crime is defined as follows:

A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

rhetoric nonetheless. In the early cases, as previously discussed, courts had difficulty determining when the line between political rhetoric and criminal action had been crossed.

IV. APPLICATION OF *BRANDENBURG* TO MODERN CYBER CONTEXTS

While there will be many contexts in which the *Brandenburg* criteria shield speech from prosecution, there will also be situations when prosecution is appropriate. The ability of Internet users to reach large numbers of like-minded people creates the possibility of stimulating mass or nearly instantaneous action. For example, in Philadelphia, there have been examples of Internet-organized gatherings of people that are coordinated through social networking sites.⁶² Although these events began as a form of performance art, or even involved such silly things as pillow fights, the events have sometimes evolved into violence.⁶³ As a result, one can argue that the *Brandenburg* test might be satisfied for some of these Internet-organized gatherings. For example, suppose that a modern-day Schenck issues an Internet call for “all able-bodied men and women” to convene on the Army induction center (assuming, as well, that there is a draft), and calls on them to use “any and all means” to obstruct entry into the center. If there is reason to believe that this call to action will produce an immediate response from a group of people, then it might be said that Schenck intended to incite imminent lawless conduct, and that his Internet communication was likely to produce such conduct.

However, application of the *Brandenburg* test may make prosecution more problematic in some other cases. For example, some Internet pedophilia cases will be subject to prosecution, such as when an individual tries to arrange to have sex with a child through the Internet. Under such circumstances, a prosecution for solicitation and (possibly) conspiracy may be entirely appropriate. Other cases are not so easy to resolve. For

⁶² See Ian Urbina, *Mobs are Born as Word Grows by Text Message*, N.Y. TIMES, Mar. 25, 2010, at A1.

⁶³ *Id.*

example, there has been much debate about the pedophile (Jack McClellan) who explicitly discusses and encourages pedophilia on his website, and refers to his interest in little girls.⁶⁴ Despite public outrage over the content, First Amendment scholars have expressed doubts about whether the website can be banned.⁶⁵ Obviously, society can try to deal with individuals like McClellan through private means (e.g., in McClellan's case, his Internet service provider decided to close down his website).⁶⁶ In addition, to the extent that someone like McClellan poses a real threat to children, a judge can enter appropriate orders, or the police can intervene. In McClellan's case, a judge entered an order prohibiting him from coming close to certain areas where children gather.⁶⁷ As a result, by resorting to the Internet, McClellan alerted the community (both parents and law enforcement officials) to his presence, allowed them to take appropriate action, and encouraged them to be more vigilant. In the final analysis, there is some value to *encouraging* rather than *discouraging* such disclosures so that society can be more vigilant regarding folks like McClellan.⁶⁸

The same is true of the actual *Schenck* case when it is shifted to the Internet—if we transport Schenck from World War I into the modern era, and assume that he is propagating his ideas over the Internet. Of course, we must also assume that the country is at war and that there is a military draft. If Schenck makes the same arguments that he made during World War I (that young people should resist the draft), it can be argued that his language is really more in the nature of rhetoric and argument, and one might raise questions about whether the rhetoric is likely to provoke an immediate re-

⁶⁴ See *supra* note 9 and accompanying text.

⁶⁵ See *id.*

⁶⁶ See Debra Meyers, *Pedophile Jack McClellan Leaving California*, DIGITAL J., Aug. 27, 2007, <http://www.digitaljournal.com/article/221125>.

⁶⁷ See Beth Barrett, *Judge Imposes 30-Foot Buffer; Pedophile Ordered to Avoid Kids' Spots*, DAILY NEWS, Aug. 25, 2007, at N1.

⁶⁸ On the same theory, there is some benefit to allowing the KKK, American Nazis, and other extremist groups to hold public marches. Do we really want them meeting in dingy basements out of public view? If they enter the public domain, they make their identities known, and it becomes easier for law enforcement personnel to track them.

sponse. Certainly, absent a response to the rhetoric, there is no conspiracy in the sense that there is no evidence that anyone actually agreed with him to resist the draft or that the rhetoric had any effect whatsoever. Although Schenck might be able to use the Internet to reach more people than he did through his circulars, and he might be able to reach more people that are prepared to take action, it is not necessarily clear that anyone will take any action. Of course, if folks do respond and Schenck conspires or is complicit in illegal action, law enforcement intervention might be more appropriate. Moreover, as with pedophile McClellan, the Internet makes it easier for the police to watch and observe Schenck's movements, and to intervene when Schenck crosses the line from political discourse to conspiracy or action.

A bit more disturbing example (even, perhaps, more than the McClellan case) is the case of Johnny Logan Spencer, Jr., a white supremacist who was criminally indicted for publishing a poem on the Internet entitled "The Sniper."⁶⁹ The poem, which he placed on a neo-Nazi website, refers to the assassination of a black president, and contains the words "DIE negro DIE."⁷⁰

⁶⁹ See *supra* note 10.

⁷⁰ *Id.* The poem reads as follows:

THE SNIPER

As the tyrant enters his cross hairs the breath he takes is deep
 His focus is square on the target as he begins to release
 A patriot for his people he knows this shot will cost his life
 But for his race and their existence it is a small sacrifice

The bullet that he has chambered is one of the purest pride
 And the inspiration on the casing reads DIE negro DIE
 He breathes out as he pulls the trigger releasing all his hate
 And a smile appears upon his face as he seals that monkey's fate

The bullet screams toward its mark bringing with it death
 And where there was once a face there is nothing left
 Two blood covered agents stare in horror and dismay
 Looking down toward the ground where their president now lay

Now the screams of one old negro broad pierces thru [sic] the air
 Setting off panic from every eyewitness that was there
 And among all the confusion the hero calmly slips away
 Laughing for he knows there will be another negro holiday

Spencer used the moniker “Pain1488” which some claim refers to white nationalism and also pays homage to Hitler.⁷¹ Spencer was charged with threatening the life of the President, a crime that carries a penalty of up to five years in prison and a \$250,000 fine.⁷²

Although *Brandenburg* does not require the presence of a call to action by the defendant, it is worthwhile to note that none was made by Spencer. The poem is purely descriptive. Moreover, it is not clear that one can say that Spencer’s poem is likely to incite imminent lawless conduct. There was no evidence of any response to the poem when the poem was first posted on the Internet in 2008,⁷³ and there is no evidence that any actions were taken in response to it.⁷⁴ Moreover, the evidence suggests that Spencer himself did not even own a gun.⁷⁵ So, the poem might be regarded as nothing more than “political hyperbole” rather than a direct call to break out the pitch forks and torches (or more accurately, the assassin’s weapons). If *Brandenburg* is strictly applied, there is probably very little chance of convicting Spencer for posting his poem “The Sniper” on the Internet.

Of course, in the subversive advocacy cases, context matters. On the government’s behalf, one must remember that President Obama is the first black President. When one considers the history of racial tensions in the United States, including the Ku Klux Klan’s attacks on blacks in the old South,⁷⁶ the threat might seem more credible and imminent. It is also important to emphasize that the poem was posted on a white supremacist website, and one might expect some sympathy

By Johnny Spencer

Criminal Compl. at 1-2, *United States v. Spencer*, No. 3:10-mj-00054-DW (W.D. Ky. Feb. 17, 2010) (Affidavit of Secret Service Agent Stephan M. Pazienza); see also Brett Barrouquere, *Ky. Man Charged with Threatening Obama in Web Poem*, ASSOCIATED PRESS, Feb. 20, 2010.

⁷¹ See Barrouquere, *supra* note 70.

⁷² See *supra* note 10.

⁷³ See Criminal Compl., *supra* note 70, at 1-2.

⁷⁴ See Barrouquere, *supra* note 70.

⁷⁵ *Id.*

⁷⁶ See *Virginia v. Black*, 538 U.S. 343 (2003).

among Spencer's audience for his sentiments, and the possibility that the poem will motivate some readers to violence. The difficulty, as noted, is that the poem was originally posted on the website in 2008, and there is no evidence that it prompted any violence during the intervening years. If the poem was going to serve as a catalyst for violence, one would have expected violence (or attempted violence) in the long period between the original posting and Spencer's arrest.

It is also difficult to charge Spencer with conspiracy or solicitation. There is no evidence that Spencer conspired with anyone to kill, harm or threaten the President. In addition, the poem does not seem to involve solicitation. Spencer simply lays out a story, albeit a very troubling scenario, and does not exhort anyone to do anything. Sure, the poem may plant ideas in the heads of some white supremacists, but it is hardly an attempt to solicit others to assassinate the President.

As a result, if Spencer is going to be convicted, it must be under the criminal statute that makes it a crime to make true threats against the President of the United States.⁷⁷ Even though this statute criminalizes speech, the statute has been upheld given the nation's compelling interest in protecting the life of the President.⁷⁸ Indeed, in the Spencer case, the government is relying directly on that doctrine.⁷⁹ The difficulty is that the government must show that the defendant actually made a "true threat" as opposed to engaging in political rhetoric. In

⁷⁷ 18 U.S.C. §871(a) provides:

Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of, to kidnap, or to inflict bodily harm upon the President of the United States, the President-elect, the Vice President or other officer next in the order of succession to the office of President of the United States, or the Vice President-elect, or knowingly and willfully otherwise makes any such threat against the President, President-elect, Vice President or other officer next in the order of succession to the office of President, or Vice President-elect, shall be fined under this title or imprisoned not more than five years, or both.

⁷⁸ See *Black*, 538 U.S. 343.

⁷⁹ See Barrouquere, *supra* note 70 (Assistant U.S. Attorney Phillip Chance, the prosecutor in the case, stated, "This is a threat by an individual against an individual because of who he is He is the president and he is black.").

Watts v. United States,⁸⁰ the Court overturned Robert Watts's conviction under the statute for an incident that occurred in 1966 during a public rally on the grounds of the Washington Monument. During the rally, participants divided into small discussion groups and Watts joined a group that was focused on the issue of police brutality. During the discussion, Watts made the following statements (which were overheard by an investigator for the Army Counter Intelligence Corps):

And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.⁸¹

In reversing Watts's conviction, the Court concluded that the statute on which the conviction was based was valid, because the country has an "overwhelming" interest in protecting the life of the President, as well as in protecting him against threats of physical violence. The Court, however, distinguished between "threats" and "constitutionally protected speech."⁸² The Court dismissed Watts's comments as nothing more than "political hyperbole,"⁸³ and went on to note that the "language of the political arena [is] often vituperative, abusive, and inexact." The Court dismissed Watts's statements as nothing more than "a kind of very crude offensive method of stating a political opposition to the President."⁸⁴ In subsequent cases, the lower federal courts have tried to draw a line between "true threats" and political hyperbole,⁸⁵ not always successfully.⁸⁶ As

⁸⁰ 394 U.S. 705 (1969).

⁸¹ *Id.* at 706.

⁸² *Id.* at 707-08.

⁸³ *Id.* at 708.

⁸⁴ *Id.* The Court also cited and relied on its holding in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), for the proposition that the language must be interpreted "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

⁸⁵ See *United States v. Pinkston*, 338 F. App'x 801 (11th Cir. 2009) (upholding Pinkston's conviction for threatening to murder the President).

a result, it is not clear that Spencer made a “true threat” against the life of President Obama.

CONCLUSION

In developing the *Brandenburg* approach to subversive advocacy, the United States Supreme Court took a long and tortuous path that lasted for more than half a century. In a series of decisions rendered during the first half of the twentieth century, the Court struggled to find a suitable balance between political rhetoric and criminal acts, and often did not succeed in striking an appropriate balance. For example, a presidential candidate was sentenced to prison for rhetoric that he used in a campaign speech. Other individuals were convicted for speech that did not amount to conspiracy or solicitation, and did not seem to have any discernible effect on potential listeners. Individuals were also sentenced to prison for membership in political organizations (albeit organizations with more extremist views). *Brandenburg* took the Court in a very different direction and placed a premium on immediacy. A defendant could not be convicted of subversive advocacy unless it could be shown that he intended to incite imminent lawless conduct, and that his speech was likely to incite imminent lawless conduct.

Since *Brandenburg* was developed during a period when most subversive advocacy was delivered through speeches or printed circulars, the imminency requirement may have made more sense as applied to those methods of communication. Society has a legitimate concern in preventing a speaker from whipping a crowd into a lawless frenzy. The Internet is quite different because, even though that technology provides for instantaneous communication, it rarely stimulates immediate mob action. Of course, the Internet does allow an individual to communicate more broadly, and to reach more like-minded people. As a result, there is a risk that Internet communications will stimulate more discussions of illegal activity, and

⁸⁶ See *United States v. Lincoln*, 403 F.3d 703 (9th Cir. 2005) (reversing Lincoln’s conviction for allegedly making a “true threat” against President Bush).

therefore perhaps lead to a higher level of violence and subversive activity. Indeed, as the Philadelphia text-messaging example suggests, it may be possible for Internet-based communications to produce immediate lawless action. As a result, even under *Brandenburg*, prosecution may be appropriate. At the same time, the Internet allows for enhanced law enforcement surveillance of communications, and therefore may give the government greater capacity to observe and intervene.

Because the Internet allows individuals to freely cross international borders, an international response to the problems of the Internet would be desirable. Indeed, since the Internet allows individuals to transmit their messages so freely across international borders, an international response might be the only truly effective way to regulate the Internet. At the same time, because different societies approach legal issues from such different perspectives, it is sometimes difficult to find common ground. Or, to put it another way, formulating an international response to the Internet is difficult because fundamental societal values are at stake, and there is little agreement between countries about how to resolve the tension between competing values. For example, even though countries like France and Germany prohibit Holocaust denial, the United States does not (and probably cannot) impose criminal restrictions on Holocaust denials because of the First Amendment to the United States Constitution's guarantee of free speech.⁸⁷ As a result, it may be difficult or impossible to formulate a comprehensive treaty dealing with Internet regulation of subversive advocacy. The best that can be done is to identify issues on which common ground can be found, and jointly attack those issues.

⁸⁷ *See id.*