

**TWEETING “FIRE” IN A CROWDED
THEATER:
DISTINGUISHING BETWEEN ADVOCACY
AND INCITEMENT IN THE SOCIAL MEDIA
WORLD**

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INTRODUCTION

In August of 2011, London was burning. In one suburb, wracked by a slew of violent riots, alerts dinged simultaneously on 400 individuals' phones, computers, and email accounts. Break a few windows, throw a few Molotov cocktails—let's take over downtown and loot it all, the Facebook invitation said. Riots and violence overtook the British capitol—the mobs of looters communicating extensively by Twitter, Facebook, and BlackBerry Messenger.

Three months later, in State College, Pennsylvania, news of the Jerry Sandusky molestation scandal sent hordes of angry Penn State students streaming through the town. Immediately, the tweets began to appear: “Meet outside apartment;” “Riot = Epic. Police < Students;” “[S]hit it gonna burn in state college #riot;” “#burnthistcity pics to come.”¹ This is the age of social media, digital communication, and instantly conveyed conversation. Although technology has brought about indescribable change in the manner and method of modern-day discourse, resultant and similar changes in the analysis of legal-protection-afforded, contentious speech have yet to occur.

In terms of direct, immediate, and effective means of communication, few innovations have had such a revolutionary effect as the Internet. With the advent of Web 2.0 platforms,²

¹ Tweets sent by users @thekidbill, @lebronDIVAjames, @AlyssaMcCulla, and @CoCo_Sheesho on November 9th, 2011, following a press conference by Pennsylvania State University announcing that long-term football coach Joe Paterno was being fired for failing to exercise due care in reporting a child sex-abuse scandal centered around assistant football coach Jerry Sandusky (a copy of all tweets is on file with the author).

² Web 2.0 refers to internet sites and platforms that allow users of those sites to actively participate, as opposed to Web 1.0, in which the platform is a strictly one-sided

ordinary individuals gained the ability to exchange thoughts and ideas, as well as to interact with one another freely without an intermediary limiting their contact.³

The widespread appeal of this technological development is evident in the sheer numbers of individuals who exchange ideas through social media. Facebook has over 800 million active users, more than half of whom use Facebook daily.⁴ Twitter⁵ has over 100 million individuals who actively use their service, and as of September 2011, publish over 230 million tweets daily.⁶ As Secretary of State Hillary Clinton said in 2010:

The spread of information networks is forming a new nervous system for our planet. When something happens . . . the rest of us learn about it in real time—from real people. And we can respond in real time as well.

. . . There are more ways to spread more ideas to more people than at any moment in history.⁷

One of the pitfalls of mass communication's availability on such an unrestricted and largely unedited scale is the fact that distasteful, disagreeable, and even violent or dangerous posts are published just as easily as their more stimulating and likeable counterparts.

As the popular mode for communication today, social media has therefore become the preferred medium for individuals

content provider to the users. Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145, 146 (2012).

³ See Russell L. Weaver, *Brandenburg and Incitement in a Digital Era*, 80 MISS. L.J. 1263, 1263 (2011); see also Joseph, *supra* note 2, at 146-47.

⁴ *Facebook Statistics* (Nov. 27, 2011, 6:53 PM), <http://newsroom.fb.com/Key-Facts>. The average Facebook user has 130 friends. *Id.*

⁵ Twitter allows users to share text-based content of up to 140 characters ("tweets") and also allows them to post hyperlinks to websites, links to photographs, and video recordings. "A user's tweets are immediately visible to 'followers' [However,] a person can follow any other person[,] . . . [so] a Twitter user may know very few of his or her followers." Joseph, *supra* note 2, at 148 (noting that "followers" are those individuals or groups who subscribe to one's Twitter micro-blog feed).

⁶ Bianca Bosker, *Twitter Finally Shares Key Stats: 40 Percent of Active Users are Lurkers*, HUFFINGTON POST (Sept. 8, 2011, 2:51 PM), http://www.huffingtonpost.com/2011/09/08/twitter-stats_n_954121.html.

⁷ Hillary Rodham Clinton, Sec'y of State, *Remarks on Internet Freedom* (Jan. 21, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

exercising their rights to free speech. Traditionally one of the most valued, fundamental tenets of a democratic society, the guarantee to free speech has long been an ardently protected right. An equally long-standing principle is the fact that in certain instances and specific circumstances, in order to preserve order and government within a democratic society, speech occurs that requires restriction due to its content and context.⁸ Finding the balance between preserving the sanctity of speech and promoting the ideals of stable government is not a simple task. That quandary is made even more difficult when examined in the context of many social media posts.

This Comment seeks to resolve the dilemma of speech restrictions as pertains to social-media-based speech. First, this Comment will describe the origins and development of speech-proscription tests in both the United States and the United Kingdom. Next, this Comment seeks to discuss the ways in which those tests have been applied in recent jurisprudence. Finally, this Comment will analyze the restriction tests in the context of social media posts and offer an opinion on why such tests need to be narrowly tailored with regard to social media so that speech is not unnecessarily limited. This Comment argues that courts and lawmakers should weigh the balance of a variety of factors, including the political and social context of the speech, the speaker's influence or position, and the size and specificity of the audience in order to determine when technologically promulgated speech deserves protection and when it does not.

I. A TEST TO VALIDATE SPEECH RESTRICTIONS: *SCHENCK* AND "CLEAR AND PRESENT DANGER"

A. Schenck: *Creating a Test*

The progression to a Supreme Court-defined restriction test was a circuitous one. The first manifestation of such a test appeared in the 1919 Supreme Court decision *Schenck v. United States*.⁹ Schenck printed and distributed 15,000 leaflets that

⁸ See, e.g., EUROPEAN CONVENTION ON HUMAN RIGHTS Nov. 4, 1950, art. 10.2 [hereinafter ECHR], available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf.

⁹ 249 U.S. 47 (1919).

“intimated that conscription was despoti[c]” and urged draftees to resist conscription into United States forces during World War I.¹⁰ Schenck was convicted for violating the Espionage Act, for a conspiracy to commit an offense against the United States, and for an unlawful use of the mails.¹¹

Schenck asserted that the speech contained in the pamphlets was protected by the First Amendment; Justice Holmes, writing for the majority, recognized that “in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights,” but added that context played a significant role in determining the acceptability of contentious speech.¹² Famously, Justice Holmes continued on to say that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”¹³ The Court held that speech may only be restricted when “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.”¹⁴ Justice Holmes qualified this clear and present danger test by stating that the question is “[one] of proximity and degree,” meaning that in times of conflict

¹⁰ *Id.* at 49-51. The publications were made through the Socialist Party. *Id.* at 49. Schenck, the general secretary for the American Socialist Party, personally attended to the printing of the leaflets, which also encouraged draftees to “Assert [their] Rights,” and told them, “If you do not assert and support your rights [to oppose the draft], you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain.” *Id.* at 51 (internal quotation marks omitted).

¹¹ *Id.* at 48-49. Schenck’s alleged violations under the Espionage Act were “causing and attempting to cause insubordination . . . in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States.” *Id.* The second two charges were based on his use of the United States Postal Service to send out the pamphlets, deemed “matter declared to be non-mailable.” *Id.* at 49.

¹² *Id.* at 52.

¹³ *Id.*

¹⁴ *Id.* (emphasis added). Justice Holmes noted that “[o]f course 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.” *Id.* at 51.

or tension in the nation, speech could justifiably be restricted that could not be censored during peaceful times.¹⁵

The clear and present danger test is a very broad, abstract standard to which proposed restrictions could easily be tailored. Especially amid the social tensions running rampant in post-war, anti-Communist America at the time of the *Schenck* decision, the application of the clear and present danger test resulted in numerous affirmed convictions against speech whose potential dangers were only tenuously clear and present at best.¹⁶

B. Debs, Abrams, and Whitney: Applying the Clear and Present Danger Test

A mere week after handing down the decision in *Schenck*, the Supreme Court yet again addressed the question of when speech can justifiably be proscribed by the government. In *Debs v. United States*, Eugene Debs was charged with inciting insubordination and refusal of duty in members of the United States armed forces.¹⁷ In order to determine whether Debs's speech was

¹⁵ *Id.* at 52.

¹⁶ The speech restricted in *Schenck*, for example, had no sort of "clear" or "present" danger unless it was heeded by those who received the pamphlet in the mail. Only upon receiving the letter and subsequently acting would any sort of danger arise. Justice Holmes felt, however, that "[i]f the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime." *Id.* See Weaver, *supra* note 3, for a thorough analysis of the lack of clarity or presence in the dangers censured by the Court's decisions contemporary with *Schenck*.

¹⁷ *Debs v. United States*, 249 U.S. 211, 212 (1919). Debs presented a speech to a large, public audience. *Id.* Like *Schenck*, Debs was charged under the Espionage Act for "caus[ing] and incit[ing] and attempt[ing] to cause and incite insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States." *Id.* at 212. That same day, the Supreme Court upheld another speech restriction in *Frohwerk v. United States*, 249 U.S. 204 (1919). In *Frohwerk*, the defendants faced thirteen charges brought under the Espionage Act based on twelve different articles they published in a newspaper in 1917, denouncing the stationing of troops across Europe and denouncing the draft. *Id.* at 205-07. Referencing *Schenck*, Justice Holmes said that "we have decided . . . that a person may be convicted of a conspiracy to obstruct recruiting by words of persuasion," a statement which shows just how broadly the Court at that time viewed the clear and present danger standard. *Id.* at 206. Debs's speech focused on the growth and future of socialism, and encouraged the working class to rise up. *Debs*, 249 U.S. at 212-13. In response to the government's stance that he was encouraging servicemen to refuse their assigned duty, Debs famously stated to the jury, "I have been accused of obstructing the war. I admit it.

punishable, the jury was instructed “that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their natural tendency and reasonably probable effect to obstruct the [draft].”¹⁸ In upholding Debs’s conviction, Justice Holmes reasoned “that one purpose of the speech, whether incidental or not[,] . . . was to oppose not only war in general but this war, and that the opposition was so expressed that its natural and intended effect would be to obstruct recruiting.”¹⁹

Therefore, only a week post-*Schenck*, the clear and present danger test now included the “natural tendency and reasonably probable effect” of speech, which only further emphasized the excessive breadth of the clear and present danger test.²⁰ When read by itself, the phrase “clear and present danger” imposes some sort of time frame on the threat faced. By connecting clear and present danger with “natural tendency and reasonably probable effect,” however, the Court eliminated the temporal quality from the *Schenck* decision and essentially gave the government free rein in limiting speech, so long as they could provide an adequate justification for it.

Later that same year, however, the first hint of a shift in the Court’s approach to speech restriction surfaced in *Abrams v. United States*.²¹ In *Abrams*, five defendants, who labeled themselves rebels and anarchists, were convicted under the Espionage Act for their “disloyal, scurrilous and abusive language about the form of government of the United States.”²² Their published articles included a call to the working class: “Awake! Awake, you Workers of the World! REVOLUTIONISTS.”²³ The pamphlet also contained a vilification of President Wilson: “His . . . shameful, cowardly silence about the intervention in

Gentlemen, I abhor war. I would oppose the war if I stood alone.” *Id.* at 214 (internal quotation marks omitted).

¹⁸ *Id.* at 216.

¹⁹ *Id.* at 214-15.

²⁰ See Weaver, *supra* note 3, at 1268.

²¹ 250 U.S. 616 (1919).

²² *Id.* at 617 (internal quotation marks omitted).

²³ *Id.* at 619-20 (internal quotation marks omitted).

Russia reveals the hypocrisy of the plutocratic gang in Washington and vicinity.”²⁴

The majority opinion, written by Justice Clarke, upheld the convictions, stating that:

Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. . . . [T]he obvious effect of this appeal . . . would be to persuade persons of character such as those whom they regarded themselves as addressing, not to aid government loans and not to work in ammunition factories²⁵

Thus, the majority adhered to the same interpretation of clear and present danger as that espoused in *Debs*, allowing a speech restriction based on the natural tendency and reasonably probable effect of the words.

Justice Holmes, however, adopted a stance in *Abrams* quite different than his approach in *Schenck* and *Debs*. Dissenting, he argued that the natural tendency of speech alone was insufficient to warrant restriction.²⁶ Instead, he emphasized the need for the danger to be a pressing one, stating that “[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.”²⁷ Furthermore, he encouraged the majority to consider both the position of the speaker and the attentiveness of his audience: “Now nobody 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.”²⁸ Justice Holmes’s opinion marked

²⁴ *Id.* (internal quotation marks omitted). Collectively, the defendants published and distributed five thousand circulars, and two separate articles, denouncing the United States government. *Id.* They also called for a revolt of the working class, urging them to “spit in the face [of] the false, hypocritical, military propaganda which ha[d] fooled [them] so relentlessly.” *Id.* at 620.

²⁵ *Id.* at 621. Justice Clarke further stated that “[t]his is not an attempt to bring about a change of administration by candid discussion, for . . . the manifest purpose of such a publication was to create an attempt to defeat the war plans of the government of the United States.” *Id.* at 622.

²⁶ *Id.* at 628 (Holmes, J., dissenting).

²⁷ *Id.* (emphasis added).

²⁸ *Id.*

the first push towards an immediacy requirement in the restriction test and the first distinction between speech that constituted mere advocacy and speech that was incitement.

In his concurrence in *Whitney v. California*, Justice Brandeis espoused a similar approach, encouraging the inclusion of an immediacy requirement in the restriction test.²⁹ Regarding the felony for which Whitney was charged,³⁰ he stated that “[t]he mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or assembling with others for that purpose is given the dynamic quality of crime.”³¹ Justice Brandeis felt that criminalization of such a broad range of activity was excessive. His concurrence was in decision only, as he disagreed with the Court’s Fourteenth Amendment approach.³² The significance of his concurrence to First Amendment jurisprudence

²⁹ *Whitney v. California*, 274 U.S. 357, 372-73 (1927) (Brandeis, J., concurring). Charlotte Whitney was charged with violating the California Criminal Syndicalism Act, which stated that “[a]ny person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . [i]s guilty of a felony and punishable by imprisonment.” *Id.* at 359-60 (majority opinion) (internal quotation marks omitted). Whitney, the Credentials Committee Chairman of the Communist Labor Party of California (CLP), backed a CLP resolution that encouraged the overthrow of capitalist government. *Id.* at 364-65. She testified that “it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.” *Id.* at 366. Whitney challenged her conviction on Fourteenth Amendment grounds rather than First, saying that that the Syndicalism Act was repugnant to the Fourteenth Amendment. *Id.* The Court followed the State of California, noting that:

[T]he State has declared . . . 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 . . . involves such danger to the public peace . . . that these acts should be penalized in the exercise of its police power. That determination must be given great weight.

Id. at 371. Justice Brandeis agreed with the majority’s stance on her conviction but found himself “unable to assent to the suggestion in the opinion of the court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment.” *Id.* at 379 (Brandeis, J., concurring).

³⁰ See *supra* note 29 for a description of Whitney’s allegedly criminal activity.

³¹ *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

³² *Id.* at 379.

centered on the need to narrow the scope of the clear and present danger test as applied in *Debs* and *Abrams*.³³ He stated:

[E]ven advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.³⁴

Thus, between Justice Holmes's dissent in *Abrams* and Justice Brandeis's concurrence in *Whitney*, evidence of the shift in the Court's approach to speech restriction appeared. Despite the fact that both of those cases upheld a limitation on constitutional rights—like *Schenck* and *Debs*—the first steps were taken toward reworking the clear and present danger standard and requiring that speech be truly and immediately inciting in nature.

II. YATES, SCALES, AND NOTO: ADVOCACY AND MEMBERSHIP

Whitney presented an interesting problem to the punishment of adverse speech—that of questionable speech originating not from a specific individual but rather punishing an individual for the inflammatory speech of a group to which they belonged.³⁵

³³ *Id.* at 373.

[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil

Id.

³⁴ *Id.* at 376.

³⁵ *See supra* note 29. Whitney was convicted of advocating capitalist overthrow based on her position as chairman of the Credentials Committee of the Communist Labor Party of California and member of the Resolutions Committee of the same group,

During a peak in anti-Communist tension during the late 1950s and early 1960s, the Supreme Court issued a number of decisions regarding speech made by the Communist party.³⁶ Three of these cases—*Yates v. United States*,³⁷ *Noto v. United States*,³⁸ and *Scales v. United States*³⁹—addressed the issue of individual punishment for membership in a group promoting potentially inciting speech.⁴⁰ In each of those three cases, the defendants were prosecuted under the Smith Act, which provided:

(a) It shall be unlawful for any person—

(1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or . . .

. . .

(3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or

despite her testimony that she never intended any resolutions of the CLP to break any laws or be an instrument of terror or violence. *Whitney*, 274 U.S. at 366.

³⁶ An interesting early case, and one in which the restriction and conviction were upheld, was *Dennis v. United States*, 341 U.S. 494 (1951). In *Dennis*, twelve Communist party members were convicted of advocating the overthrow of the United States government. *Id.* at 495. Justice Vinson, writing for the Court, adhered to Judge Learned Hand's formula for determining appropriate restriction of speech, that is, that courts "must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Id.* at 510 (internal quotation marks omitted) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (1950)). The Court upheld the convictions, noting that "the [limiting] principles of the First Amendment" were applicable to the speech because it presented "grave and immediate danger to interests which the State may lawfully protect." *Id.* at 558-59.

³⁷ 354 U.S. 298 (1957).

³⁸ 367 U.S. 290 (1961).

³⁹ 367 U.S. 203 (1961).

⁴⁰ See *infra* Part VI. The juxtaposition of the rights to free speech and free assembly found in *Yates*, *Noto*, and *Scales* is especially relevant to the issue of speech issued through social media posts, as users of social media sites like Twitter and Facebook exemplify a blend of speech, assembly, and membership in their on-line activity.

affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.⁴¹

A. Yates

In *Yates*, fourteen defendants were convicted under the Smith Act for “organiz[ing], as the Communist Party of the United States, a society of persons who so advocate and teach, all with the intent of causing the overthrow of the Government by force and violence as speedily as circumstances would permit.”⁴² The Court, however, hearkened back to the push toward distinguishing between mere advocacy and incitement and the necessity for an immediacy requirement in its holding. It felt that the lower court erred in “regard[ing] as immaterial . . . any issue as to the *character* of the advocacy in terms of its capacity to stir listeners to forcible action.”⁴³ Additionally, the lower court stated that “all advocacy and teaching of forcible overthrow of Government was punishable ‘whether it is language of incitement or not.’”⁴⁴ The

⁴¹ Smith Act of 1948, 18 U.S.C. § 2385 (2006). The Smith Act was originally effective as of September 1, 1940; however, it was repealed and reenacted as 18 U.S.C. § 2385 as part of the recodification of 1948. 18 U.S.C. § 2385 (2006). The Smith Act also contained a section which referenced speech and publication:

(a) It shall be unlawful for any person—

. . .

(2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence . . .

Smith Act § 2(a)(2). Both the original Smith Act and § 2385 are referred to as “The Smith Act” in *Scales*, *Yates*, and *Noto*. See, e.g., *Yates*, 354 U.S. at 302.

⁴² *Id.* at 300.

⁴³ *Id.* at 315 (emphasis added). At trial, the jury received the following instruction:

The kind of advocacy and teaching which is charged and upon which your verdict must be reached is not merely a desirability but a necessity that the Government of the United States be overthrown and destroyed by force and violence and not merely a propriety but a duty to overthrow and destroy the Government of the United States by force and violence.

Id. at 313 n.18 (internal quotation marks omitted). The Court determined that, regardless of the defendants’ conviction that the government should be overthrown and destroyed, the likeliness of those beliefs to result in imminent action warranted consideration. *Id.* at 314-15.

⁴⁴ *Id.* at 317 n.21.

Supreme Court's opinion focused heavily on the distinction between advocating a doctrine and advocacy attempting to promulgate lawless action.⁴⁵ The Court, adopting the imminence requirements from the end of the *Schenck* era, decided that the Smith Act "was aimed at the advocacy and teaching of concrete action for the forcible overthrow of the Government, and not of principles divorced from action."⁴⁶ It held that, while the goal at issue might be a forcible overthrow of the government, such advocacy was too remote of a threat to justify a limitation on the freedom of speech.⁴⁷ This emphasis on concrete action was further underscored and clarified in the Court's rulings in *Scales* and *Noto*.

B. *Scales and Noto*

Decided four years after *Yates*, the *Scales* and *Noto* decisions were issued on the same day, but to different outcomes. Importantly, the difference between the results of *Scales* and *Noto* was due to the factual differences between the two cases, rather than an indication of a return to the muddled and unclear test from the *Schenck* era.⁴⁸

In the original trial against *Scales*, the jury was instructed to find him guilty if two things were true: (1) that "the Communist Party advocated the violent overthrow of the Government, in the

⁴⁵ *Id.* at 312-27.

⁴⁶ *Id.* at 319-20.

⁴⁷ *Id.* at 326-27 ("We recognize that distinctions between advocacy or teaching of abstract doctrines, with evil intent, and that which is directed to stirring people to action, are often subtle and difficult to grasp, for . . . '[e]very idea is an incitement.' But the very subtlety of these distinctions require[s] the most clear and explicit instructions with reference to them Vague references to 'revolutionary' or 'militant' action of an unspecified character . . . might . . . be given too great weight by the jury in the absence of more precise instructions." (quoting *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (citation omitted))).

⁴⁸ See *Scales v. United States*, 367 U.S. 203, 205-06 (1961); *Noto v. United States*, 367 U.S. 290, 291 (1961). Although both *Scales* and *Noto* were originally convicted under the membership clause of the Smith Act, the distinction in the Court's rulings hinged on the closeness of the defendants' association with the Communist party, the extent of their knowledge about the party's intended illegal action, and the lawless intent they displayed. See *Scales*, 367 U.S. at 205-06; *Noto*, 367 U.S. at 291. As pertains to *Scales*, see *infra* notes 52-53 and accompanying text for the Court's justification for upholding his conviction. With regards to *Noto*, see *infra* notes 53-55 and accompanying text for the Court's reasoning behind reversing his conviction.

sense of present advocacy of action,” and (2) that Scales was “an active member of the Party, and not merely a nominal, passive, inactive or purely technical member, with knowledge of the Party’s illegal advocacy.”⁴⁹ Ultimately, the Court determined that, because he was an active member of the Communist Party, Scales was more likely to have concrete knowledge and advocate the immediate implementation of the Party’s admitted goal of an overthrow of the capitalist government in the United States.⁵⁰ It stated that active, highly engaged membership, “when it constitutes a purposeful form of complicity” in a group’s unlawful and unprotected speech, was just as limitable on the individual level as it was at the group level.⁵¹

Because Scales espoused and encouraged the Party’s goals of overthrowing the government, his conviction of violating the Smith Act and the restriction of his rights of assembly and speech was upheld.⁵² Interestingly, the Court referenced *Schenck* in addressing Scales’s constitutional challenge, saying that the “membership clause [of the Smith Act] . . . does not cut deeper into the freedom of association than is necessary to deal with ‘the substantive evils that Congress has a right to prevent.’”⁵³ In the *Noto* case, the Court stated that the evidence merely demonstrated that “the Party was preparing the way for a situation in which future acts of sabotage might be facilitated,” and the prosecution failed to demonstrate any proof that such acts of sabotage were presently advocated.⁵⁴ The Court added, “[I]t is *present* advocacy, and not an intent to advocate in the future . . . , which is an element of the crime under the membership clause.”⁵⁵

⁴⁹ *Scales*, 367 U.S. at 220 (internal quotation marks omitted). The main controversy in the Court’s discussion was over the element of active membership. *Id.* at 221.

⁵⁰ *Id.* at 222-25.

⁵¹ *Id.* at 229.

⁵² *Id.* at 230.

⁵³ *Id.* at 229 (quoting *Schenck v. United States*, 249 U.S. 47, 52 (1919)). The Court also noted that both sides of the case agreed that the clear and present danger test established in *Schenck* applied to the membership clause of the Smith Act at issue in the *Scales* case. *Id.* at 230 n.21.

⁵⁴ *Noto v. United States*, 367 U.S. 290, 298 (1961).

⁵⁵ *Id.* *Noto* was decided immediately following the Court’s holding in *Scales*; importantly, the Court overtly stated that its stance on the constitutional issues surrounding the Smith Act’s membership clause remained the same. *Id.* at 291. The

Thus, just as it pointed out in *Scales*, the Court again drew a correlation between membership and free speech, and the restriction tests which are applicable to both those rights. This connection between the rights to free speech and free association, and the significance of the fact that they can be restricted equally and by the same standard, has serious implications to the group-mentality setting that is so pervasive throughout the social media world.

The shift towards the implementation of an imminence requirement in the restriction tests for speech and membership, first evidenced in *Abrams* and *Whitney*, gained momentum in the membership-clause cases of the late 1950s and early 1960s. The need to modify the clear and present danger test to ensure that only justifiable and necessary restrictions were being imposed on free speech and free assembly came to a head in the seminal case, *Brandenburg v. Ohio*.⁵⁶

III. *BRANDENBURG*: ADDING THE ELEMENT OF IMMEDIACY

Brandenburg was the first time since *Schenck* that the Supreme Court made a concrete amendment to the clear and present danger test. In the half century since the *Brandenburg* decision, technology has changed so drastically that it would be unrecognizable to the 1969 Court. In light of that, it is particularly significant that *Brandenburg* also marks the last time that the speech restriction test in the United States was updated or changed.⁵⁷

Brandenburg, a Ku Klux Klan leader convicted under the Ohio Criminal Syndicalism Act for advocating and inciting to

Court further clarified 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.” *Id.* at 297-98.

⁵⁶ 395 U.S. 444 (1969) (per curiam).

⁵⁷ See David G. Barnum, *The Clear and Present Danger Test in Anglo-American and European Law*, 7 SAN DIEGO INT’L L.J. 263, 278-80 (2006) (“*Brandenburg* represented the culmination of fifty years of Supreme Court consideration of the constitutional status of advocacy of unlawful action. . . . [I]nherent in the concept of ‘incitement’ is the requirement that speech cannot be punished unless it is likely to incite *immediate* unlawful action. . . . [N]either *Brandenburg* nor any other Supreme Court decision [since] has delved very deeply into the question of what kinds of messages should qualify as punishable ‘incitement.’”).

lawlessness,⁵⁸ invited a reporter to attend and film a Ku Klux Klan rally near Cincinnati.⁵⁹ In the resulting film, twelve hooded figures, some armed, were visible; the Klan members burned a cross on the film, and then Brandenburg gave a speech.⁶⁰ The contentious portion of Brandenburg's speech was a threat of "revengeance" against the United States government for "suppress[ing] the white, Caucasian race"—a threat that quite clearly fit under the purview of the Ohio Criminal Syndicalism statute as advocating the propriety of crime to accomplish political reform and associating with a group whose intent was to do the same.⁶¹ The issue in the case, therefore, was whether the Ohio Criminal Syndicalism statute "fail[ed] to draw th[e] distinction" between abstract teaching and active preparation for lawlessness, and therefore "impermissibly intrude[d] upon the freedoms guaranteed by the First . . . Amendment."⁶²

Ultimately, the Court decided that the Ohio statute was too broad and unfairly punished people for mere advocacy.⁶³ The new standard it adopted qualified *Schenck's* clear and present danger

⁵⁸ *Brandenburg*, 395 U.S. at 444-45. The Ohio Criminal Syndicalism statute made it illegal 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" and additionally criminalized "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* (citing OHIO REV. CODE ANN. § 2923.13 (1919)) (internal quotation marks omitted). It is significant to note that the connection between the rights to free speech and free assembly is yet again emphasized in the Court's decision.

⁵⁹ *Id.* at 445.

⁶⁰ *Id.* at 445-46. The speech said:

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. . . . We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] 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.

Id. at 446.

⁶¹ See *supra* note 58 for the text of the Ohio Criminal Syndicalism statute.

⁶² *Brandenburg*, 395 U.S. at 448.

⁶³ *Id.* The Court further noted that "[n]either the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime." *Id.*

test, holding that the difference between mere advocacy and “incitement to imminent lawless action” needed to be distinguished—only speech that was clearly incitement to imminent lawless action could justifiably be restricted.⁶⁴ The new restriction test was two pronged: The government cannot “forbid or proscribe advocacy of the use of force or of law violation except [1] where such advocacy is directed to inciting or producing imminent lawless action and [2] is likely to incite or produce such action.”⁶⁵ In his concurrence, Justice Douglas asserted that:

The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.

. . . .

. . . The quality of advocacy turns on the depth of the conviction; and government has no power to invade that sanctuary of belief⁶⁶

Thus, fifty years after the decision in *Schenck*, the Supreme Court finally “confin[ed] government to the punishment of ‘direct incitement’” and instituted the immediacy requirement that it had been building toward for decades.⁶⁷ Not only did the revised test include a clarified temporal aspect, but it further narrowed the *clearness* element of the clear and present danger test, saying that the imminent, lawless acts must be likely results of the contested speech.⁶⁸ Despite the fact that the *Brandenburg* decision significantly tailored the clear and present danger test, it was not flawless. The Court failed to provide a clear definition of what, precisely, incitement is.⁶⁹ Although certain cases since *Brandenburg* have held certain action to be, or not to be, punishable incitement, a concrete definition has yet to be solidified—a jurisprudential gap which stands to have serious implications in the new technology-driven world of Web 2.0.

⁶⁴ *Id.* at 449.

⁶⁵ *Id.* at 447.

⁶⁶ *Id.* at 456-57 (Douglas, J., concurring).

⁶⁷ Barnum, *supra* note 57, at 279.

⁶⁸ *Brandenburg*, 395 U.S. at 447.

⁶⁹ Barnum, *supra* note 57, at 279.

IV. SINCE *BRANDENBURG*: “IMMINENT LAWLESS ACTION” IN PRACTICE

The two prong test of imminent and likely lawless action, while static in definition since the *Brandenburg* decision, has been applied in a few key cases⁷⁰ and has also been briefly discussed in the context of internet speech,⁷¹ albeit in a Web 1.0 platform.⁷² Additionally, despite the fact that the Supreme Court has not addressed the clear and present danger test in the context of modern, Internet-based speech, the decisions of various other courts demonstrate the possible ways in which the test can be interpreted in an Internet context.

A. *Hess v. Indiana*

The most notable Supreme Court case since *Brandenburg* is *Hess v. Indiana*, in which the defendant’s speech was restricted as obscene and having “a tendency to lead to violence.”⁷³ While on campus at Indiana University, Hess participated in an antiwar demonstration along with roughly 150 other individuals.⁷⁴ A number of the demonstrators moved into a street where they blocked traffic and refused to acknowledge the police officers instructing them to clear the roadway.⁷⁵ As a sheriff passed by, Hess shouted, “We’ll take the fucking street later.”⁷⁶ Although witnesses testified that Hess did not appear to be actively encouraging the crowd to retake the street, Hess was arrested and tried under Indiana’s disorderly conduct statute.⁷⁷

⁷⁰ *E.g.*, *Hess v. Indiana*, 414 U.S. 105 (1973) (per curiam); *McCoy v. Stewart*, 282 F.3d 626 (9th Cir. 2002).

⁷¹ *E.g.*, *United States v. White*, 638 F. Supp. 2d 935 (N.D. Ill. 2009), *rev’d and remanded*, 610 F.3d 956 (7th Cir. 2010).

⁷² *See supra* note 2 and accompanying text.

⁷³ *Hess*, 414 U.S. at 105-09 (internal quotation marks omitted) (quoting *Hess v. State*, 297 N.E.2d 413, 415 (1973)).

⁷⁴ *Id.* at 106.

⁷⁵ *Id.*

⁷⁶ *Id.* at 107 (internal quotation marks omitted).

⁷⁷ *Id.* As Hess’s statements were not punishable as obscenity or fighting words, or as a personal insult to the police officer, “[t]he Indiana Supreme Court placed primary reliance on the trial court’s finding that Hess’ statement ‘was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action.’” *Id.* at 108 (quoting *Hess*, 297 N.E.2d at 415).

The Supreme Court, reversing the decision against Hess, stated that Hess's statement could not be labeled as "advocating, in the normal sense, any action. And since there was no . . . rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State."⁷⁸ Thus, only four years after the *Brandenburg* decision, the imminent standard was reemphasized—Hess's statements could only constitute a possible future threat to lawless action, and, therefore, his speech was protected under the First Amendment. This emphasis on the immediate quality of the lawless action is important in considering today's social media world, where speech is conveyed through the Internet. In order to be protected, speech must pertain to future action—but no court has stated precisely how far in the future that action must be. With social media posts, there is a certain unavoidable delay between the speaker posting his words and his audience reading and acting on them, thereby making the imminence question all the more important.

B. *McCoy v. Stewart*

Although the Supreme Court has not handed down another *Hess*-like decision, the imminent lawless action test has been applied by various district courts since the *Hess* ruling. In 2001 came *McCoy v. Stewart*,⁷⁹ a case that centered around the potential of speech issued in a social setting to incite lawlessness—a fundamental issue with regards to posts made on social media sites. McCoy, a former gang member, offered advice on running a gang to members of the Traviesos, a gang out of Arizona.⁸⁰ The State provided evidence of at least two separate social occasions where McCoy offered advice to the gang—once at a barbeque at a Traviesos member's home and again at a party at a separate member's residence.⁸¹

⁷⁸ *Id.* at 108-09.

⁷⁹ 282 F.3d 626 (9th Cir. 2002).

⁸⁰ *Id.* at 628. McCoy was a former member of a California street gang called "Toonerville." *Id.* The Traviesos also referred to themselves as the "Bratz" on certain separate occasions, *id.*; for the purposes of this Comment they will consistently be called the Traviesos.

⁸¹ *Id.*

McCoy gave the Traviesos very general advice, telling them to “court-out girls in a less violent manner at some time in the future” and to “tag up the neighborhood to let their presence be known.”⁸² At trial, he argued that, at most, his speech “advocated lawlessness at some indefinite future time,” reemphasizing the imminence element of the *Brandenburg* test.⁸³ The court of appeals asserted that “[u]nder *Brandenburg* timing is crucial, because speech must incite imminent lawless action to be constitutionally proscribable.”⁸⁴ It further noted that “[i]f McCoy’s speech truly was mere abstract advocacy of violence and lawlessness, then, his conviction involved an unreasonable application of Supreme Court precedent.”⁸⁵

Ultimately, the court of appeals focused on the casual social environment where McCoy made his statements, stating that “[t]he circumstances of McCoy’s speech—interspersed at a barbeque and a social party, while [Traviesos] members were drinking, chatting and listening to music—made it unlikely anyone would act on it imminently.”⁸⁶ The abstract nature of McCoy’s advice, and the context in which he gave it, rendered his conviction unconstitutional—his ideas were mere advocacy of possible future behavior and, as such, were protected.⁸⁷ The fact that it was unlikely for McCoy’s audience—hearing his statements in a relaxed, social environment—to take imminent action based off his speech is highly pertinent to the social media question where, typically, the given audience is not an angry mob on the street but rather an individual sitting staidly in front of a computer.

C. United States v. White

The level of attentiveness and excitability of a computer-based audience was addressed recently in the case of *United*

⁸² *Id.* at 632.

⁸³ *Id.*

⁸⁴ *Id.* at 631.

⁸⁵ *Id.*

⁸⁶ *Id.* at 631-32.

⁸⁷ *Id.* at 632.

States v. White.⁸⁸ In 2003, white supremacist Matthew Hale was convicted by a jury of soliciting the murder of a federal judge.⁸⁹ William White, also a white supremacist, started and operated the white supremacist-oriented website Overthrow.com.⁹⁰ On September 11, 2008, White posted an article on Overthrow.com condemning the conviction of Matthew Hale and proclaiming, “*Gay Jewish Anti-Racist Led Jury*.”⁹¹ Under that headline, White posted a picture of the jury foreman, Mark Hoffman.⁹² White captioned the photo:

Gay Jewish anti-racist Mark P Hoffmann [sic] was a juror who played a key role in convicting Hale. Born August 24, 1964, he lives at 6915 HAMILTON # A CHICAGO, IL 60645 with his gay black lover and his cat “homeboy”. His phone number is (773)274-1215, cell phone is (773)426-5676 and his office is (847) 491-3783.⁹³

⁸⁸ See generally *United States v. White (White I)*, 638 F. Supp. 2d 935 (N.D. Ill. 2009). In the original district court trial, Judge Lynn Adelman dismissed the indictment for failing to allege a solicitation and as contrary to the First Amendment. *Id.* at 944-45. The Seventh Circuit reversed and remanded the case, deeming that a jury was entitled to consider the context of the posts, not merely their content. *United States v. White*, 610 F.3d 956, 962 (7th Cir. 2010). On remand, Judge Adelman granted White’s motion for judgment of acquittal, holding that speech was protected by the First Amendment because the posts on the website neither solicited nor overtly encouraged violence. *United States v. White (White II)*, 779 F. Supp. 2d 775 (N.D. Ill. 2011).

⁸⁹ *White I*, 638 F. Supp. 2d at 937 (citing *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006)).

⁹⁰ *Id.* The website has since been shut down and is no longer viewable.

⁹¹ *White II*, 779 F. Supp. 2d at 777.

⁹² *Id.* Hoffman is a gay, white male with an African American partner. *Id.* In his appeal, Matthew Hale alleged that his lawyer erred in failing to strike Hoffman from the jury pool. *Id.*

⁹³ *Id.* The photo and accompanying caption was also posted in the blog section of Overthrow.com, in addition to the homepage itself. *Id.* In the article discussing Hale’s appeal, White also stated:

[A] gay Jewish Assistant Dean at Northwestern University, Mark P Hoffmann [sic], who has a gay black lover and ties to professional anti-racist groups, and who also personally knew a Northwestern University basketball coach killed by Ben Smith, a follower of Hale, was allowed to sit on his jury without challenge and played a leading role in inciting both the conviction and the harsh sentence that followed.

Id. at 783.

White was charged with soliciting violence against Hoffman based on his role in convicting Matthew Hale.⁹⁴ Hoffman testified that, after his information was posted, he immediately began receiving phone calls to his home and cell numbers which all contained “really upsetting things,” but that none of the texts or phone calls “threatened his life; none said ‘I’m coming to get you;’ and none were even directed towards him.”⁹⁵ The judge decided that White’s posts were protected under the First Amendment, stating that “vehement, scathing, and offensive criticism of others, including individuals involved in the criminal justice system, such as Juror Hoffman” is speech that “is ‘protected unless both the intent of the speaker and the tendency of his words was to produce or incite an imminent lawless act, one likely to occur.’”⁹⁶

Despite the fact that the posts were very detailed, and that a violent-minded member of the audience could likely have used information from the post to harm Hoffman, nothing specific about the posts themselves were intended to incite imminent lawless action; therefore, they constituted protected, if distasteful, speech.⁹⁷

Between *Hess*, *McCoy*, and *White*, the two-prong standard adopted in *Brandenburg*—incitement to imminent lawless action and likelihood of such action occurring—was strengthened. The imminence factor, somewhat ambiguous in the wake of *Brandenburg*, was clarified and condensed into a narrow requirement of near-instantaneous action, and the *White* decision narrowed the definition of incitement, holding that merely

⁹⁴ *Id.* at 777-78. White was charged under 18 U.S.C. § 373(a), which states that:

Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another . . . and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall be imprisoned.

Id. at 778 (quoting 18 U.S.C. § 373(a) (2006)).

⁹⁵ *Id.* at 782.

⁹⁶ *Id.* at 803 (quoting *United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985)).

⁹⁷ *Id.* at 803-04 (“[T]his highly protective standard applies to the type of speech at issue here—internet communications disclosing personal information about others—even when that speech may tend to alarm or intimidate the persons so identified or expose them to unwanted attention from others.” (citing *White I*, 638 F. Supp. 2d 935, 952-58 (N.D. Ill. 2009))).

providing information does not qualify as incitement without a direct call to lawlessness.

The clarification of the *Brandenburg* test is undeniably helpful, especially in the context of a Web 1.0 site like Overthrow.com. A framework has yet to be established, however, which allows courts to address one of the central, novel facets of Web 2.0 communication: The fact that it so easily transcends national boundaries. The ways in which one nation's domestic law addresses the rights and privileges to expression and speech can vary drastically from another nation's. This truth is evident even in the differences between the United States and the United Kingdom, despite their mutual common-law origins. Examining the similarities and differences between these two nations' approaches to speech restriction provides insight into how speech limitations on an international scale may be addressed.

V. FREE SPEECH IN THE UNITED KINGDOM

Unlike the United States, Britain does not guarantee its citizens fundamental rights, such as the right to free expression, in a written constitution.⁹⁸ The only guarantee to free speech enjoyed by British citizens is the protection of statements made by members of Parliament during official proceedings.⁹⁹ The fact that citizens have no written promise of free speech, however, does not necessarily mean that they are denied that right—despite a lack of constitutional embodiments of fundamental privileges, citizens historically had the opportunity to pursue legislative recourse for righting violations of their rights.¹⁰⁰

⁹⁸ Brett V. Kenney, *The British Media Ban: The Difference Between Terrorist-Related Speech and Terrorist Acts*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245, 257 (1992). The British Constitution, rather than being a cohesive and tangible document, is an amalgamation of common law rules, long-held social practices, and legislative enactments. *Id.* at 256.

⁹⁹ Bill of Rights, 1689, 1 W. & M., c. 1, §23 (Eng.). Prior to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the only explicit mention of a freedom of speech came in the 1689 Bill of Rights, which held: "[T]he said Lords Spiritual and Temporal and Commons . . . for the vindicating and asserting their ancient rights and liberties declare . . . [t]hat the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." *Id.*

¹⁰⁰ See RODNEY BRAZIER, CONSTITUTIONAL REFORM: RESHAPING THE BRITISH POLITICAL SYSTEM 125-26 (3d ed. 2008) ("[I]n England, matters have always been very

Additionally, in 1950, the United Kingdom ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention or ECHR).¹⁰¹ Under Article 10 of the ECHR, all citizens are guaranteed a right to free expression, regardless of the content of their beliefs and ideals.¹⁰² Despite contracting to the ECHR, states were not obligated to incorporate the Convention into their domestic law, and the Convention's provisions were unenforceable in English courts.¹⁰³ Additionally, Article 10(2) of the ECHR provided signatory governments with a framework for justifiable speech restriction which, read on its face, is quite broad. It states:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.¹⁰⁴

different—precise, legal remedies . . . [exist] through which the citizen can secure his or her freedoms, but without any general statement of rights . . . [M]ost civil rights have been secured in the United Kingdom by legislation, and not by the courts.”)

¹⁰¹ The Convention is also commonly referred to as the European Convention on Human Rights. “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” ECHR Nov. 4, 1950, art. 1, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf.

¹⁰² *Id.* art. 10(1). The full text of Article 10(1) states: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” *Id.*

¹⁰³ COLIN TURPIN, *BRITISH GOVERNMENT AND THE CONSTITUTION* 111 (Robert Stevens, William Twining & Christopher McCrudden eds., 3d ed. 1995). Despite the fact that the British government opted against making the ECHR part of its domestic law, individuals did have the right to appeal any alleged violations of the Convention to the European Court of Human Rights. *Id.*

¹⁰⁴ ECHR Nov. 4, 1950, art. 10.2, *available at* http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf.

Thus, any restriction “prescribed by law” and “necessary to a democratic society” could be justified.¹⁰⁵ Between the option not to incorporate the Convention into existing domestic law and the breadth of allowable restrictions under Article 10(2), it initially appears as though the ardent guarantees of Article 10(1) are far less concrete than they initially seemed. However, from 1950 through 1997, the European Court of Human Rights defended British citizens’ fundamental rights in fifty cases, and the legislature, while not adopting the Convention outright, frequently remedied any infringements on rights.¹⁰⁶ The gap between Articles 10(1) and 10(2), and the persuasive effect the Convention had on English courts, resulted in a surprisingly broad and rather convoluted speech restriction test in the United Kingdom.

VI. RESTRICTIONS IN THE FACE OF A “PRESSING SOCIAL NEED”: THE UNITED KINGDOM AND PROSCRIBED SPEECH

A. *Handyside v. United Kingdom: Establishing the Standard*

On October 29, 1971, Richard Handyside was convicted by the Inner London Quarter Sessions of violating the Obscene Publications Act of 1959/1964.¹⁰⁷ In 1970, Handyside purchased the English rights to a book entitled *The Little Red Schoolbook*.¹⁰⁸ The book was framed as a reference book, intended for an audience between twelve to eighteen years old, and included “chapters on the following subjects: Education, Learning, Teachers, Pupils and The System.”¹⁰⁹

¹⁰⁵ *Id.*

¹⁰⁶ BRAZIER, *supra* note 100, at 126.

¹⁰⁷ *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (set. A) at 5 (1976). After the conviction was handed down, Handyside did not make a further appeal to the Court of Appeal because he agreed that the judgment against him was a proper application of English law as it was written. *Id.* He instead brought his claim to the European Court of Human Rights, as he believed the law itself was contrary to the rights guaranteed by Article 10(1). *Id.* at 13.

¹⁰⁸ *Id.* at 3. The book was originally written and published in Danish by Søren Hansen and Jesper Jensen in 1969. *Id.*

¹⁰⁹ *Id.* at 6, 19.

The allegedly obscene portion of the book was in the “Pupils” chapter, in the twenty-six page subsection entitled “Sex,”¹¹⁰ which contained eighteen subheadings, respectively titled: “Masturbation, Orgasm, Intercourse and petting, Contraceptives, Wet dreams, Menstruation, Child-molesters or ‘dirty old men’, Pornography, Impotence, Homosexuality, Normal and abnormal, Find out more, Venereal diseases, Abortion, Legal and illegal abortion, Remember, Methods of abortion, [and] Addresses for help and advice on sexual matters.”¹¹¹ Due to the obvious sensitivity of the book’s intended audience, as well as the graphic and suggestive nature of much of the book’s “advice,” the British court held it to be in violation of the Obscene Publications Act and confiscated the English copies of the book.¹¹²

Handyside appealed to the European Commission of Human Rights, alleging a violation of his Article 10 rights; the Commission eventually referred her case to the European Court of Human Rights.¹¹³ The Court recognized that Handyside’s alleged offense fell under the purview of the Obscene Publications Act and was therefore prescribed by law—satisfying the first requirement for a justifiable speech restriction.¹¹⁴ The relevant part of the Court’s deliberation occurred in its discussion of the extent of the

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* The advice contained in the book told school children:

Maybe you smoke pot or go to bed with your boyfriend or girlfriend—and don’t tell your parents or teachers, either because you don’t dare to or just because you want to keep it secret.

Don’t feel ashamed or guilty about doing things you really want to do and think are right just because your parents or teachers might disapprove.

Id. at 11. Additionally, it contained passages such as the following:

Porn is a harmless pleasure if it isn’t taken seriously and believed to be real life. Anybody who mistakes it for reality will be greatly disappointed.=xt

But it’s quite possible that you may get some good ideas from it and you may find something which looks interesting and that you haven’t tried before.

Id.

¹¹² *Id.* at 12. “The court concluded in the light of the whole of the book that this book or this article on sex or this section or chapter on pupils . . . does tend to deprave and corrupt a significant number, significant proportion, of the children likely to read it.” *Id.* (internal quotation marks omitted).

¹¹³ *Id.* at 1, 13.

¹¹⁴ *Id.* at 16.

second requirement, “necessary in a democratic society.”¹¹⁵ It agreed that the Obscene Publication Act had a legitimate aim, which was to protect the morals of a democratic society; yet it struggled in determining an appropriate definition of the adjective “necessary” in Article 10(2).¹¹⁶ Ultimately, it determined that in order for a restriction to be justifiable by the government, the proscription must benefit a “pressing social need” that is a necessary facet of a democratic society.¹¹⁷ The extent of this pressing social need test, and the highly significant fact that it *includes*, but is not limited to, the clear and present danger test, was highlighted two years after *Handyside* in *Arrowsmith v. United Kingdom*.¹¹⁸

B. Arrowsmith: Applying a Pressing Social Need

Factually, the *Arrowsmith* case is quite similar to *Schenck*. In 1974, Pat Arrowsmith was convicted under the Incitement to Disaffection Act for distributing “leaflets to troops stationed at an army camp endeavoring to seduce them from their duty or allegiance in relation to service in Northern Ireland.”¹¹⁹ The closing paragraph of the leaflet stated ardently: “WE WHO ARE DISTRIBUTING THIS FACT-SHEET TO YOU HOPE THAT, BY ONE MEANS OR ANOTHER, YOU WILL AVOID TAKING PART IN THE KILLING IN NORTHERN IRELAND.”¹²⁰ In upholding

¹¹⁵ *Id.* (internal quotation marks omitted) (citing ECHR Nov. 4, 1950, art. 10.2, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf).

¹¹⁶ *Id.* at 16-17.

¹¹⁷ *Id.* at 18. Importantly, the Court left much of the determining power in the hands of the government itself, saying, “Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ . . .” *Id.*

¹¹⁸ App. No. 7050/75, 3 Eur. H.R. Rep. 218 (1978).

¹¹⁹ *Id.* ¶ 2. Arrowsmith was convicted by the Central Criminal Court in London and sentenced to eighteen months in prison; the conviction was confirmed by the Court of Appeal. *Id.* ¶¶ 15, 16. The pamphlet contained a letter from a former British soldier who went absent without leave (AWOL) and subsequently sought asylum in Sweden rather than accepting a posting in Northern Ireland. *Id.* ¶ 12. It also contained information on how soldiers could go AWOL, the various countries and regions that offered British soldiers asylum relating to refusing a post in Northern Ireland, as well as the phone numbers and addresses of social and legal contacts in those various areas. *Id.*

¹²⁰ *Id.* ¶ 12.

Arrowsmith's conviction, the Court of Appeal focused not only on the content of her speech, but also its context and, like in *Handyside*, the impressionability of her audience:

This leaflet is the clearest incitement to mutiny and to desertion. As such, it is a most mischievous document. It is not only mischievous but it is wicked. This court is not concerned in any way with the political background against which this leaflet was distributed. What it is concerned with is the likely effects on young soldiers aged 18, 19 or 20, some of whom may be immature emotionally and of limited political understanding. . . . For mature women like this appellant to go round military establishments distributing leaflets of this kind amounts to a bad case of seducing soldiers from both duty and their allegiance.¹²¹

In her appeal to the European Commission of Human Rights, Arrowsmith alleged that the interference with her Article 10 rights was unjustified.¹²² The Commission agreed with the United Kingdom that the potential desertion of soldiers does pose a threat to national security, one of the listed exceptions under Article 10(2).¹²³ Interestingly, the Commission also directly referenced the *Schenck* decision because Arrowsmith argued that the European Commission of Human Rights should adopt the clear and present danger test as the universal standard for speech restrictions.¹²⁴ While the Commission addressed the concept of clear and present danger in conjunction with the pressing social need standard, it ultimately decided that “[t]he notion ‘necessary’ implies a ‘pressing social need’ which may *include* the clear and present danger test and must be assessed in the light of the circumstances of a given case.”¹²⁵ Because national security is necessary to a democratic government, and because the presence and loyalty of troops is a pressing social need directly tied to that

¹²¹ *Id.* ¶ 16.

¹²² *Id.* ¶ 78.

¹²³ *Id.* ¶ 85. See also ECHR Nov. 4, 1950, art. 10.2, available at http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf.

¹²⁴ *Arrowsmith*, 3 Eur. H.R. Rep. ¶ 95.

¹²⁵ *Id.* (emphasis added).

necessity, the European Commission of Human Rights upheld Arrowsmith's conviction.¹²⁶

C. Since Arrowsmith: Developing the Pressing Social Need Test

Just as *Hess*, *McCoy*, and *White* elucidated the imminent lawless action standard established in *Brandenburg*, the pressing social need test from *Handyside* and *Arrowsmith* and the viability of restrictions imposed on speech by the British government have subsequently been addressed in both case law and legislative enactments.

In 1986, Parliament enacted the Public Order Act of 1986, which "abolish[ed] the common law offences of riot, rout, unlawful assembly and affray . . . [and] create[d] new offences relating to public order."¹²⁷ One of the new offenses created was essentially the crime of incitement, entitled "Fear or provocation of violence."

(1) A person is guilty of an offence if he—

(a) uses towards another person threatening, abusive or insulting words or behaviour, or

(b) distributes or displays to another person any writing, sign or other visible representation which is threatening, abusive or insulting,

with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person, or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.¹²⁸

Contrary to the sweeping coverage of the pressing social need test, this Act establishes a two-prong, *Brandenburg*-like standard, which requires both immediate unlawful violence and likeliness. Following the Public Order Act, Parliament passed the Human Rights Act in 1998, which intended to "give further effect to rights and freedoms guaranteed under the European Convention on

¹²⁶ *Id.* ¶ 94.

¹²⁷ Public Order Act, 1986, c. 64 (Eng.).

¹²⁸ *Id.* § 4(1).

Human Rights,” and effectively amalgamated the Convention into England’s domestic law.¹²⁹ Parliament guaranteed that the right to free expression, embodied in Article 10 of the Convention, was to be given “particular regard” by the British court systems, and should not lightly be infringed upon.¹³⁰ Furthermore, Parliament incorporated the text of Articles 2 through 18 into the Act verbatim, making the Convention a concrete part of British law.¹³¹

In the wake of these legislative changes came *Percy v. D.P.P.*,¹³² a case addressing flag denigration—an element of speech that had been protected in the United States since 1989 yet remained proscribed in the United Kingdom until 2001.¹³³ Percy was displeased with American military practices, specifically the Star Wars National Missile Defense System.¹³⁴ In order to protest those practices, she placed a stripe across the stars on the American flag, laid the flag in front of a vehicle, and stood on it.¹³⁵ Brought up on charges of violating the Public Order Act of 1986, Percy claimed her speech was protected under Article 10 and under the Human Rights Act of 1998.¹³⁶

She was convicted of the charged offense, as the district judge held that a pressing social need existed to prevent the denigration of the United States flag as an object of veneration and symbolic importance.¹³⁷ Percy appealed her conviction to the Queen’s Bench, which addressed her conviction on the issue as to whether or not her speech, albeit “gratuitously offensive or insulting,” was protected as the free expression of an opinion.¹³⁸ Mrs. Justice Hallett, writing for the Queen’s Bench, held that both in form and substance, the right to free expression needs to be protected, even that expression that is insulting or offensive to others.¹³⁹

¹²⁹ Human Rights Act, 1998, c. 42 (Eng.).

¹³⁰ *Id.* § 12.

¹³¹ *Id.* at sch. 1, pt. 1.

¹³² [2001] EWHC (Admin) 1125 (Eng.). Ms. Percy had a long history of protesting American military policy through the medium of flag denigration, and had been prosecuted and imprisoned previously for her anti-U.S. policy statements. *Id.* ¶ 2.

¹³³ See *Texas v. Johnson*, 491 U.S. 397 (1989).

¹³⁴ *Percy*, EWHC 1125 ¶2.

¹³⁵ *Id.*

¹³⁶ *Id.* ¶¶ 1, 3.

¹³⁷ *Id.* ¶¶ 2-3, 5.

¹³⁸ *Id.* ¶¶ 16-34.

¹³⁹ *Id.* ¶ 27.

In light of the Public Order Act and the Human Rights Act, along with decisions like *Percy*, which uphold the right to free expression and limit the pressing social need standard, the United Kingdom's test for speech restrictions by the mid-2000s began to look quite similar to the two-prong *Brandenburg* test with the emphasis placed on immediacy and likeliness. These two elements are incredibly significant in the world of social media posts, where imminence and likeliness are both somewhat diminished given the greater separation, both physical and psychological, between the speaker and their audience.

VII. PROVOCATION OR PALAVER: SOCIAL MEDIA AND PROSCRIBABLE SPEECH

Since its advent, social media has had a novel role in insurgent violence, unrest, and disorder. In 2011, Twitter was used to spread "revolutionary fervor" and overthrow dictatorships in authoritarian nations like Tunisia, Libya, and Egypt.¹⁴⁰ In the past fifteen years, governments disrupted or stopped entirely access to digital networks on 606 separate occasions.¹⁴¹ Although about half of those instances occurred in authoritarian regime states,¹⁴² such an Orwellian restriction on a medium of speech is not limited to non-democratic states.

In 2011 alone, in the United States, an entire digital network was shut down in San Francisco in order to prevent a peaceful protest,¹⁴³ and a mandatory curfew was imposed in Philadelphia following a string of social-media-organized, violent flash mobs.¹⁴⁴

¹⁴⁰ Joseph, *supra* note 2, at 145-46. Professor Joseph's article discusses, in-depth, the role of social media in furthering revolutions throughout the Arab world. See generally *id.*

¹⁴¹ Philip N. Howard et al., *The Dictators' Digital Dilemma: When Do States Disconnect Their Digital Networks?*, ISSUES TECH. INNOVATION (Ctr. for Tech. Innovation at Brookings Inst., Washington, D.C.), Oct. 2011, at 1, 4, http://www.brookings.edu/~media/research/files/papers/2011/10/dictators%20digital%20network/10_dictators_digital_network.pdf.

¹⁴² *Id.*

¹⁴³ *Statement on Temporary Wireless Service Interruption in Select BART Stations on Aug. 11*, BAY AREA RAPID TRANSIT (Aug. 12, 2011), <http://www.bart.gov/news/articles/2011/news20110812.aspx>.

¹⁴⁴ CNN Wire Staff, *Philly Mayor: 'No Excuses' for Flash Mob Attacks*, CNN JUST. (Aug. 9, 2011), http://articles.cnn.com/2011-08-09/justice/pennsylvania.curfew_1_flash-mob-curfew-mayor-michael-nutter?_s=PM:CRIME.

Additionally, the city of Cleveland, Ohio, proposed legislation that sought to criminalize “improper use of social media to violate ordinances on disorderly conduct, public intoxication and unlawful congregation by promoting illegal flash mob activity.”¹⁴⁵ In the widespread London-area riots in August 2011, social media was such a widely used means for spreading disorder, allowing criminals to unite and evade authorities, that Home Secretary Theresa May and Prime Minister David Cameron met several times with executives from Twitter, Facebook, and Blackberry to discuss implementing a social media ban for all individuals convicted of using those sources to engage in unlawful activity.¹⁴⁶ The widespread tensions and minutely short fuses London-wide made potential rioters and looters susceptible to even the most general calls to lawlessness. Accordingly, the British government sought from those companies a way to shut off access to those sites entirely during “times of civil unrest.”¹⁴⁷

At what point does a call to violence or disorder, therefore, meet the United States’ and United Kingdom’s standard of imminent, likely lawless action? When is an audience primed for action? When is a speaker sufficiently powerful or persuasive enough to actually incite a digital audience? In an address to the United Nations, the United States Department of Justice stated that:

Because [the *Brandenburg* test] requires proof of both an intent and a likelihood that the speech will incite imminent unlawful action, there has never been a case in which the mere publication of written materials was found to be a punishable incitement offense. . . .

¹⁴⁵ Floyd Abrams, Op-Ed., *Flash Mob Violence and the Constitution*, WALL ST. J., Sept. 7, 2011, at A13 (internal quotation marks omitted).

¹⁴⁶ Press Association, *Troublemakers Face Social Media Ban*, HUFFINGTON POST UK (Nov. 7, 2011, 15:42), http://www.huffingtonpost.co.uk/2011/11/07/troublemakers-face-social_n_1079646.html.

¹⁴⁷ Josh Halliday, *Facebook and Twitter to Oppose Calls for Social Media Blocks During Riots*, GUARDIAN (Aug. 24, 2011), <http://www.guardian.co.uk/media/2011/aug/24/uk-riots-facebook-twitter-blackberry>.

As a result, the vast majority of [speech] found on the Internet today . . . lacks the potential for imminent incitement required under the *Brandenburg* exception.¹⁴⁸

Although neither nation's courts have made such a determination yet, there have been examples on both sides of the Atlantic of individuals arrested for incitement due to the content of their tweets, Facebook posts, and other social media-based communication.

A. The United States: Elliot Madison, Tweeting Anarchy

On September 24, 2009, Pennsylvania State Police arrested Elliot Madison in his Pittsburgh motel room for enabling a non-permitted march during the G-20 Summit in Pittsburgh, Pennsylvania.¹⁴⁹ According to the arresting officers' affidavit, Madison was "making use of one or several Twitter accounts to provide information to intended participants in the non-permitted September 24, 2009 march."¹⁵⁰ On his Twitter account, Madison posted information regarding where protestors could congregate for various marches, the location of police forces attempting to break up the non-permitted marches, and a section on "knowing your rights."¹⁵¹

One week after the initial search of his hotel room, members of the Joint Terrorism Task Force (JTTF) entered the home Madison shared with six other "like-minded political anarchists" and searched it for sixteen hours.¹⁵² Their justification for

¹⁴⁸ COMPUTER CRIME AND INTELLECTUAL PROPERTY SECTION, U.S. DEPT. OF JUSTICE, LEGAL ASPECTS OF GOVERNMENT SPONSORED PROHIBITIONS AGAINST RACIST PROPAGANDA ON THE INTERNET: THE U.S. PERSPECTIVE, PRESENTED AT HATE SPEECH AND THE INTERNET, BEFORE THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (Nov. 1997) (emphasis omitted), available at <http://ncsi-net.ncsi.iisc.ernet.in/cyberspace/law/responsibility/cybercrime/www.usdoj.gov/criminal/cybercrime/racismun.htm>.

¹⁴⁹ Hopey's & Kravitsky's Aff. at 13-14, available at http://friendsoftortuga.files.wordpress.com/2010/03/aff_of_prob_cause.pdf [hereinafter *Affidavit*].

¹⁵⁰ *Id.* at 15.

¹⁵¹ *Twitter Crackdown: NYC Activist Arrested for Using Social Networking Site during G-20 Protest in Pittsburgh*, DEMOCRACY NOW! (Oct. 6, 2009), http://www.democracynow.org/2009/10/6/twitter_crackdown_nyc_activist_arrested_for [hereinafter *Twitter Crackdown*].

¹⁵² *In re Application of Madison*, 687 F. Supp. 2d 103, 106-07 (E.D.N.Y. 2009).

searching the home arose from the Federal Anti-Riot Statute, which makes it a crime for anyone to use “any facility of interstate or foreign commerce . . . to organize, promote, encourage, participate in, or carry on a riot.”¹⁵³

Despite the fact that the information Madison conveyed was all legally accessible to the public at large, it was his Twitter activity at the G-20 summit that resulted in his initial arrest on state charges and the corresponding federal investigation under the Anti-Riot Statute. It does not appear as though his actions satisfy the *Brandenburg* standard for a few key reasons. The first of these is that the posts lack the requisite imminence. Rather than speaking to a mob on the verge of lawlessness, he was merely posting information on a website that his audience could access once published.¹⁵⁴ Madison himself did not even know the majority of his audience, stating, “Anybody could join. It was a public [account]. We don’t know who joined. It wasn’t important. And anybody could send information to the group, and it would be sent out to everybody.”¹⁵⁵ Although the context—the G-20 Summit—was a heated one, and despite the fact that his audience was relatively targeted, Madison was speaking to a small group to which he was relatively anonymous or impersonal. Contrary to the lofty allegations in the arrest affidavits, the chance of actual “imminent lawless action” arising from his tweets was a relatively small one.

It took his audience time to access his postings, contemplate the information, and then make a conscious decision to act in a certain way with respect to his postings before any illegal activity could occur. Additionally, the police admitted to knowing of his intent to post such material to Twitter days in advance and even monitored all of Madison’s Twitter accounts using a “publicly available software download known as Tweetdeck.”¹⁵⁶ The relative anonymity of Madison’s audience inherently meant that Madison was unaware as to their physical location. Given that anyone anywhere in the world could have accessed his Twitter information, the likeliness element of the *Brandenburg* test is also

¹⁵³ 18 U.S.C. § 2101(a) (1996).

¹⁵⁴ See *Twitter Crackdown*, *supra* note 151.

¹⁵⁵ *Id.*

¹⁵⁶ *Affidavit*, *supra* note 149, at 15.

deficient. Although this element may have been satisfied if Madison was tweeting only to G-20 protestors poised to act illegally, he was not doing so. He noted that the “lieutenant detective of operations . . . [,] CNN . . . [,] a whole variety of journalists, *New York Times* journalists,” and empathetic, like-minded individuals around the globe were all tuned in to his tweets—and all of those groups were hardly likely to be incited to illegality based solely off of his postings.¹⁵⁷

B. The United Kingdom: Facebook and the London Riots

A similar lack of audience response, and shortage of any incitement whatsoever, occurred in the cases of Jordan Blackshaw and Perry Sutcliffe-Keenan in the United Kingdom.¹⁵⁸ On August 8, 2011, amidst the chaos of the London riots, Blackshaw created a public event on Facebook called “Smash down in Northwick Town,” slated to start at a local McDonald’s at 1:00 p.m. on August 9th.¹⁵⁹ The Facebook friends he invited to the event, rather than being inspired to violence and rioting, alerted the police and posted on the event’s page that they were upset with and disgusted by Blackshaw’s apparent intent to further the rioting and looting.¹⁶⁰ The police posted on the event page, warning of both their intended presence at the stated location and of the consequences to anyone who went along with Blackshaw’s plan.¹⁶¹ Ultimately, despite the fact that no violence resulted from Blackshaw’s Facebook event, he was arrested and pled guilty to “encouraging or assisting offences believing that one or more of them would be committed,” and was sentenced to four years in prison.¹⁶²

Sutcliffe-Keenan’s situation was similar—he constructed a Facebook group, rather than an event, entitled “The Warrington Riots.”¹⁶³ Despite the fact that he sent invitations to over 400 individuals on Facebook, no one arrived at the designated place

¹⁵⁷ *Twitter Crackdown*, *supra* note 151.

¹⁵⁸ *See generally* R v. Blackshaw, [2011] EWCA (Crim) 2312 (Eng.).

¹⁵⁹ *Id.* ¶ 55.

¹⁶⁰ *Id.* ¶ 56.

¹⁶¹ *Id.*

¹⁶² *Id.* ¶¶ 54, 56.

¹⁶³ *See id.* ¶ 60.

and time of the proposed riots.¹⁶⁴ Just as in the case of Blackshaw, the police in Sutcliffe-Keenan's case were alerted to the Facebook page well in advance of the planned activity, shut it down, and warned all invitees of the legal repercussions of their involvement in any further rioting.¹⁶⁵ Again, just like Blackshaw, Sutcliffe-Keenan pled guilty to incitement and was sentenced to four years in prison.¹⁶⁶

Rather than resulting in uncontrollable, riotous lawless action, these Facebook posts instead appeared to be effective and preventative tools for the authorities. In both cases, the police were able to access the information ahead of time, advise invitees against participating, and head off all illegality well before it occurred. Irrespective of the fact that preventing rioting and looting is definitely a pressing social need, these Facebook posts by Blackshaw and Sutcliffe-Keenan hardly meet the requirements laid out in the Public Order Act. Firstly, they made the pages days in advance of their proposed rioting and looting, thereby eliminating the immediacy element of the test. Additionally, any lawless result from these posts is hardly likely—when police warn the entire audience of the legal ramifications of participating in the planned actions, it is highly improbable that the majority of them will ignore the authorities' warning and attempt to engage in rampant illegality in spite of the admonition.

In the cases of Madison, Blackshaw, and Sutcliffe-Keenan, the lines between speech, expression, assembly, and association begin to blur due to the medium of social media. All of Madison's followers had to make the conscious decision to follow his Twitter account, and any of the protestors he enabled decided of their own volition, and in the context of the group aspect of Twitter, to act on his posts. In the cases of Blackshaw and Sutcliffe-Keenan, their Facebook friends all had the option of joining the group page or selecting to attend the event—a clear example of speech melded with association and assembly. Regardless of the specific rights implicated by these varying involvements with social media, it appears as though the restrictions on the speech contravened the

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

proscription tests espoused by both national governments involved.

VIII. CREATING THE NEW TEST

A fifty-year-old test for determining whether speech is entitled to legal protection has a limited practical applicability in today's world. For the modern speaker, and the modern audience, the very concept of "pressing" or "imminent" has dramatically changed due to the advent of new technology. A next-evening broadcast or a next-morning newspaper is no longer a venue for immediate communication. Instead, audiences the world over can now read or hear a speaker's thoughts and exhortations as soon as they click "play."

Due to the shrinking concept of immediacy in the digital era, the United Kingdom's "pressing social need" and the United States' "threat of imminent lawless action" now require fresh consideration. This Comment proposes that, in construing the test for the present day, there are four factors which need to be considered and balanced. If the overall balance of the factors indicates that violence and lawlessness is a more than likely effect of the speech, it is censurable. Conversely, should the factors show that the speech is unable or unlikely to result in illegal action, it should receive *Brandenburg*-style protection irrespective of its nature. The factors which this Comment suggests analyzing are:

- (1) The political or social context of the speech;
- (2) The influence or authority of the speaker relative to their audience;
- (3) The size of the audience; and
- (4) The specificity of the audience (that is, whether the audience was targeted or general, with relation to the speaker).

An examination of these four factors lends itself to the determination of whether distasteful speech is protectable or censurable.

A. Context

The context in which potentially restricted speech is issued is highly important in determining the likelihood of lawlessness arising from such speech. As the events in London, State College, Pittsburgh, or the Arab Spring nations indicate, social media posts made during a time of sociopolitical tension or strife are significantly more likely to inspire action, legal or illegal, than statements made during a time of social vacuum. The huge significance of the speech's context is precisely why London officials remain in talks with social media companies to completely shut the networks down during times of "civil unrest."¹⁶⁷

Once that first theoretical Molotov cocktail is flung through a store window, the potential audience is already primed and ready. A college student tweeting "meet on Main Street and take back our town" will garner a far more significant response during a time of cultural strain than he would if that tweet was sent out at 2:00 a.m. on a Tuesday night to 114 sleeping followers.

When looking at the general atmosphere and context in which the speech was issued, it is also significant to address the content of the speech relative to the context in which it is made. In order to capture the attention and direct the action of the potential audience, the speaker must be making statements pertinent to the current social scene. Non sequiturs and contextually unrelated posts are less likely to incite any action on behalf of the audience than speech that is directly related to the instant setting. Context alone, however, is insufficient to truly determine the persuasive, inciting effect of modern "speech."

B. The Speaker

Another element of the speech worth addressing is the role of the speaker with regard to his or her audience. A prominent white supremacist, like William White, encouraging fellow white supremacists to harm or harass a gay jury foreman occupies a place of significantly more authority to his audience than if the same exhortations were made by an anonymous African American. Similarly, if a hugely popular band is playing in Los

¹⁶⁷ See Halliday, *supra* note 147.

Angeles, and the lead singer tweets, "Let's go out and burn this city!" he is far more likely to induce action and illegality than if one of his unknown, yet die-hard fans tweeted the same thing.

The *Brandenburg* test developed from a series of public speeches, video broadcasts, and political debates. In all of those arenas, the speaker was inherently a person who commanded an audience—it was not anonymous or reserved individuals who captured the camera or fanned the embers of unrest into flame, but rather eloquent and visible individuals who, by their very act of speaking, ensured that they had a raptly attentive audience.

Conversely, the various social media platforms today allow anyone, regardless of status or notoriety, to publish his or her speech on the same scale and at the same rate. The modern-day Eugene Debs is only afforded the same Facebook template as all 800,000,000 other users. Unless the speaker has established a way to connect with—and has placed himself in a position of influence with—his audience beyond the confines of a "typical" social media platform, the influential power of his words will be limited.

C. The Audience's Size

Should the speaker effectively create a position of power or authority over his audience, the size of that audience must next be considered. If the speaker is a high school student who has started a "Riot Club" page on Facebook that only has four members, he is significantly less likely to move his audience to action than the leader of a country or political party or a famous celebrity. A smaller audience is not immediately dispositive of the potential for lawless action, of course, but when weighed against the cumulative balance of the other factors, the smaller audience will typically be a less-effective, less-active, and therefore less-censurable one.

D. The Audience's Nature

Lastly, this Comment encourages that the nature of the audience be analyzed when determining the restrictability of an individual's speech. The nature of the audience is closely tied to the position of the speaker with regard to his audience. If a

speaker is an established anarchist, any calls to action he makes would have far more effect when directed specifically at Twitter followers or Facebook friends he knows to have similar views, as opposed to a general tweet or Facebook post made in a non-descript and subtler way.

Targeted audiences who all have similar characteristics—and therefore similar triggers—are innately more likely to be stirred to action than general groups of relatively-anonymous digital acquaintances.

Between these four factors, it is possible to take the *Brandenburg* and *Arrowsmith* standards and conform them to speech made in the modern era. At a time when the Internet allows for instantaneous transmission of thoughts and ideas over huge geographic, cultural, and social gaps, an analysis of the context of speech, the position of the speaker, and the size and nature of the audience allows the true persuasive potential of speech to be calculated. At the time when the *Brandenburg* and *Arrowsmith* tests first appeared, a speaker was inherently performing for a targeted, captive audience with a similar approach to the contemporaneous social context. By breaking the tests down from their over-broad, current embodiments and focusing on more narrowly construed elements, the propensity of digital speech to rise beyond the confines of legal protection is infinitely more ascertainable.

CONCLUSION

“Planning to meet is not illegal. Criminal conduct is.”¹⁶⁸ Social media is a truly powerful innovation that places all users on the same level, allowing them equal ease of access in publishing their thoughts and ideas. It is undeniable and inevitable that not all of that speech and expression will be pleasant or tolerable to all who view it, but it is a long-standing tenet of democracy that even distasteful views and opinions deserve a measure of protection. Undoubtedly, there will be instances in which speech, for the benefit and security of a democratic society, needs to be limited. While the two-prong tests requiring both immediacy and likelihood were sufficient for testing the justice of restrictions prior

¹⁶⁸ Abrams, *supra* note 145.

to the advent of social media, those tests are not entirely applicable to posts made on Web 2.0 platforms because our concepts of imminence and likelihood are in a state of flux.

In order to better and more fairly balance the right to free speech with the protection of democratic ideals and public safety, the restriction tests need to increase the specificity of their elements. Mere imminence is insufficient. The attentiveness, attitude, and proximity of the audience need to be taken into consideration, as does the persuasiveness of the speaker. The vast majority of Twitter and Facebook accounts will not belong to a Eugene Debs, capable of spurring a great number of dedicated, like-minded followers to action, but rather will be like a Jordan Blackshaw, someone who, despite their efforts to the contrary, is incapable of inciting anyone to any sort of lawlessness.

Similarly, the ability of law enforcement to notice, track, and prevent certain illegalities through the use of social media is an important element not previously considered. In Pittsburgh during the G-20 Summit, in London throughout the string of riots in the summer of 2011, in San Francisco prior to the BART network shutdown—in all these instances, police were actively monitoring Facebook and Twitter accounts and, in a great number of cases, were able to head off any violence or disorder well before it began.

The right to free speech is a vitally important one that should not be infringed upon except in the most necessary of instances. Popular social media sites are public and open and they still allow users to promulgate their personal and individualized beliefs—a right that is inherent to the successful functioning of any proclaimed democracy. Before restricting these most personal of rights, governments should ensure that they have a clear and suitable test for determining the necessity of proscription and should similarly guarantee that they will not restrict speech except as a last resort.

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