

# Praising the Enemy: Could the United States Criminalize the Glorification of Terror Under an Act Similar to the United Kingdom's Terrorism Act 2006?

Michael C. Shaughnessy\*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	924
II.	BACKGROUND.....	929
	A. <i>The British Government Responds to the Attacks</i> .....	929
	B. <i>The United Kingdom Terrorism Act 2006</i> .....	930
	1. Part 1: Offenses.....	930
	a. Section 1: Encouragement.....	931
	b. Section 2: Dissemination.....	933
	c. Section 17: Commission Abroad.....	933
	d. Defenses under Sections 1 and 2.....	934
	2. Part 2: Miscellaneous Provisions .....	934
	C. <i>The Terrorism Act in Parliament</i> .....	935
	D. <i>The Act in Use</i> .....	940
	E. <i>Hypothetical American Legislation and Application</i> .....	941
	1. Hypothetical Legislation: The Anti-Glorification of Terrorism Act.....	943
	2. Hypothetical Application: Speech and Sanction.....	944
III.	ANALYSIS UNDER CURRENT LAW .....	945
	A. <i>Application of Current Law: Brandenburg v. Ohio</i> .....	945
	B. <i>Application of the Brandenburg Test</i> .....	947
IV.	A LOOK TO THE PAST.....	949
	A. <i>Wartime Circumstances: Principles from World War I</i> ....	950
	1. Key Cases from the Era of World War I.....	951
	2. Application of the Principle .....	955
	a. A Nation at War .....	955

---

\* J.D. Candidate, The Dickinson School of Law of the Pennsylvania State University, 2009; B.A., History, Bowdoin College, 2002.

b.	Unique Precedent: <i>Debs v. United States</i> .....	957
c.	Summarizing the Lessons from World War I.....	959
B.	<i>An Unprecedented Threat: Principles from the Communist Era</i> .....	961
1.	Key Cases from the Communist Era.....	963
2.	Anxiety Over the Threat of Communism .....	966
a.	Deference to Legislative Determinations of the Threat.....	967
b.	Anxiety in the Language of the Supreme Court's Opinions .....	968
3.	Altering the Test to Meet New Threats.....	971
4.	Application of the Communist Era Principles .....	973
a.	Anxiety in the Terror Era .....	974
b.	Deference to Congress.....	976
c.	Alterations to Existing Standards—Moving Past <i>Brandenburg</i> .....	978
V.	CONCLUSION.....	980

## I. INTRODUCTION<sup>1</sup>

At 8:50 in the morning on July 7, in a subway car packed with morning commuters on their way to work in a major metropolitan city, a suicide bomber detonates the explosives concealed in his backpack. Across town on another subway car, commuters observe a young man fiddling with his backpack seconds before it explodes, ripping the car to shreds. An instant later, a third explosion rocks yet another subway train, stranding maimed and panicked passengers in between stations. Within two minutes, nearly forty people taking the morning trip to work have been killed and another 600 have been injured.

The subway system plunges into darkness and chaos, as the panicked survivors and wounded flee the scenes of the devastation. Emergency personnel receive reports of a disruption to the subway system caused by power surges or train derailments and evacuate nearly a quarter of a million passengers from the subway. Medical personnel on scene begin to tend to the wounded.

Many of those evacuated, unaware of what has caused the subway system to shut down, cram onto already packed buses to complete their morning commute. At 9:45 a.m., nearly an hour after the first

---

1. The narrative presented in the Introduction was largely developed from the BBC's detailed timeline of the July 7, 2005 attacks in London. BBC, Timeline of the 7 July Attacks, [http://news.bbc.co.uk/2/hi/uk\\_news/5032756.stm](http://news.bbc.co.uk/2/hi/uk_news/5032756.stm) (last visited November 15, 2008).

detonations, a fourth individual sets off a bomb on one of the crowded buses, killing himself and thirteen others, and wounding another 110 passengers and pedestrians near the bus.

About two hours after the last explosion, government officials begin to report the event as a terrorist attack. Shortly thereafter, a message appears on an al-Qaeda-linked website claiming responsibility for the events.

The city is not London—instead, it is New York, and the year is 2011. The events plunge America back into the all-too familiar feelings of confusion, fear, and desolation that reigned in the weeks and months after the attacks on September 11, 2001. The merciless assault on innocent commuters reminds the nation that we remain potential targets for terrorist assault, even as we move through the most routine activities of our daily lives. Moreover, the events suggest to many citizens that the actions to protect the country, taken by the government subsequent to the attacks of 2001, have failed.

Within the weeks that follow, investigators report that the bombers have been identified as American citizens, young men converted to a radical version of Islam. Public attention, directed by the media, turns to the predominantly Muslim communities in which these young men were raised to determine the source of their radical inclinations. Newspaper columnists and talk radio hosts begin to raise questions about the teaching of radical, fundamentalist preachers within some of these communities—preachers whose speeches may have made converts of the four young bombers.<sup>2</sup> Some commentators begin to proselytize to listeners about the need to shut these preachers of hate and violence down.<sup>3</sup>

Confronted with the renewed threat of terror, this time largely arising from domestic sources, how would the United States respond to demand for action from citizens, politicians, and talking heads on the airwaves? If we discovered radical preachers within our own nation,

---

2. Cf., e.g., *Muslim Converts: Islam's Makeover*, ECONOMIST, Sept. 23, 2006, at 17 (noting the response of some commentators to the report that three of the twenty-five plotters involved in a thwarted terrorist attack in the United Kingdom were converts to Islam); Mark Palmer, *The Deadly Peril of Allowing Muslim Ghettos to Flourish*, THE EXPRESS, Sept. 22, 2006, at 12 (discussing British Home Secretary John Reid's 2006 speech in Leyton, East London in which Reid argued that religious fanatics were brainwashing the children of residents and grooming them to commit terrorist acts); *Terrorism and Civil Liberties: Watch Your Mouth*, ECONOMIST, Aug. 13, 2005, at 20 (describing the classic narrative of converts to radical Islam).

3. Cf., e.g., Tony Parsons, *Speechless at Oaf's Vile Rant*, THE MIRROR, Sept. 25, 2006, at 25 ("How long do we have to listen to nutcases praising terrorists and threatening our destruction?").

individuals who preached a violent, twisted version of Islam<sup>4</sup> that arguably led young Americans to strap explosives to their backs and to murder their fellow citizens, would the government act to silence such speech? Could the government constitutionally do so?

The British government responded to the July 7, 2005 attacks with a number of measures designed to curb the threat posed by terrorism.<sup>5</sup> Among the measures the British Parliament passed was the Terrorism Act 2006,<sup>6</sup> which includes a provision specifically aimed at radical leaders whose language may incite others to commit acts of terrorism.<sup>7</sup> Specifically, the new law penalizes those whose speech glorifies terrorists or celebrates their acts.<sup>8</sup> Naturally, a law of this nature has raised serious concerns about restrictions on the freedom of speech.<sup>9</sup>

Freedom of speech in the United States is safeguarded by the First Amendment to the Constitution<sup>10</sup> and has long been recognized as one of our most important freedoms.<sup>11</sup> Justices of the Supreme Court have

---

4. It should be noted at this point, that I do not intend to single out Islam or its faithful as a religion inherently enmeshed with the principles and threat of terrorism. In fact, the threat posed by the violent religious fundamentalists of the future might easily come from any religious sect—one could easily substitute “televangelist” for “imam” in the hypothetical presented in this Comment. However, at the present time, public demands for government response to advocacy calling on listeners to commit acts of terror, at least in Britain, focus overwhelmingly on radical preachers at the outermost fringe of fundamentalist Islam. *See, e.g.,* Roya Nikkhah & Adam Lusher, *Police Accused of “Cowardly Failure” to Prosecute Militant*, THE SUNDAY TELEGRAPH (London), Sept. 24, 2006, at 2.

5. *See* Kenneth Lasson, *Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty*, 27 WHITTIER L. REV. 3, 25-26 (2005); Martha Minow, *Tolerance in an Age of Terror*, 16 S. CAL. INTERDISC. L.J. 453, 480-81 (2007); *Terrorism and Civil Liberties: Watch Your Mouth*, *supra* note 2.

6. Terrorism Act, 2006, c. 11, pts. 1-3 (Eng.).

7. *See* Souad Mekhennet & Dexter Filkins, *Violent Remarks: British Law Against Glorifying Terrorism Has Not Silenced Calls to Kill for Islam*, N.Y. TIMES, Aug. 21, 2006, § A, at 8 (“The law’s underlying assumption is that speeches and publications by Britain’s more extreme Islamists may play a role in leading disgruntled young men toward violence.”); *see also* Terrorism Act, 2006, c. 11, Explanatory Notes, Para 1, n.11 (Eng.); Christopher Caldwell, *Counterterrorism in the U.K.: After Londonistan*, N.Y. TIMES, June 25, 2006, § 6, at 42.

8. *See* Prime Minister Tony Blair, PM’s Press Conference (Aug. 5, 2005) (transcript available at <http://www.number10.gov.uk/output/Page8041.asp>).

9. *See, e.g.,* JUSTICE, DRAFT TERRORISM BILL PRELIMINARY BRIEFING 4 (Sept. 2005), <http://www.justice.org.uk/images/pdfs/draft%20terrorism%20bill%20prelim%20JUSTICE%20briefing%20sept%202005.pdf>.

10. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .”).

11. *See, e.g.,* *Patterson v. Colorado*, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting) (“[T]he privileges of free speech . . ., belonging to every citizen of the United States, constitute essential parts of every man’s liberty.”).

recognized its contribution to the American political system.<sup>12</sup> They have recognized its contribution to the protection and maintenance of all other freedoms.<sup>13</sup> But they have also frequently recognized that freedom of speech is not limitless.<sup>14</sup> In the words of Justice Brandeis, exercise of that right “is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.”<sup>15</sup> The Supreme Court has found the existence of such circumstances in times of war<sup>16</sup> and when faced with a threat perceived to be so dire that the language of incitement is inimical to the existence of the nation itself.<sup>17</sup> During these times, the Court has permitted government to sanction speech that has the potential to incite others to take lawless action or engage in violent revolution.<sup>18</sup>

This Comment poses the question of whether a speaker in America might be punished for speech glorifying terrorism, following a hypothetical attack on American soil and congressional response in the form of a statute like the United Kingdom’s Terrorism Act 2006. That is, if Congress passed legislation punishing speech glorifying terrorism and the government subsequently arrested a citizen for speech deeming a suicide bomber a “martyr,” how might the judiciary respond? I will assess the language, which arguably constitutes advocacy to commit

---

12. *See, e.g.,* *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (noting that the Framers “believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth”).

13. *See* *Dennis v. United States*, 341 U.S. 494, 580 (1951) (Jackson, J., dissenting) (“I have always believed that the First Amendment is the keystone of our Government, that the freedoms it guarantees provide the best insurance against destruction of all freedom.”).

14. *See, e.g.,* *Whitney*, 274 U.S. at 371 (recognizing that the Constitution does not confer an absolute right to speak whatever one may choose); *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring) (noting that the right of free speech is not absolute); *Schaefer v. United States*, 251 U.S. 466, 474 (1920) (“[F]ree speech is not an absolute right. . . .”); *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897) (noting that the guarantees and immunities embodied in the Bill of Rights “had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case”).

15. *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring). *But see* *Patterson*, 205 U.S. at 465 (Harlan, J., dissenting) (“The public welfare cannot override constitutional privileges. . . .”).

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

17. *See* *Dennis*, 341 U.S. at 509 (1951) (four-justice plurality) (“Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech.”). Judge Learned Hand noted that “[n]obody doubts that, when the leader of a mob already ripe for riot gives the word to start, his utterance is not protected by the Amendment.” *United States v. Dennis*, 183 F.2d 201, 207 (2d Cir. 1950).

18. *See, e.g.,* *Dennis*, 341 U.S. at 511 (noting the domestic and global circumstances presented by Communism); *Schenck*, 249 U.S. at 52-53 (noting wartime circumstances).

violent acts,<sup>19</sup> under the current test derived from *Brandenburg v. Ohio*.<sup>20</sup> However, I will also make a more in-depth examination of cases during World War I and the Red Scare eras, in recognition of the fact that the judiciary might look to precedent from these tumultuous times in United States history to determine which circumstances are so unique, so dire, that they permit the curtailment of the freedom of speech.

Part II of this Comment contains an explication of England's Terrorism Act 2006 and presents the hypothetical American legislation. Part II-A describes the British response to the terror attacks of July 7, 2005. Part II-B describes the resulting legislation, the Terrorism Act 2006. Part II-C examines parliamentary debate regarding the new legislation. Part II-D provides a brief examination of the British Act in use. Part II-E presents the hypothetical American legislation.

In Part III, I will analyze the hypothetical American act under the current state of First Amendment jurisprudence. Part III-A discusses the contemporary test for language that advocates violence or illegal conduct. Part III-B then applies the current law to the hypothetical at hand.

Part IV of the Comment looks to eras of American history where the Nation faced dangerous circumstances, arguably similar to those posed by terrorism. In this part, I analyze the hypothetical act and speech in light of the jurisprudential tests and attitudes that predominated at these times. Part IV-A assesses prominent Supreme Court cases pertaining to advocacy during World War I to determine the circumstances under which speech may be constrained. Part IV-A-1 analyzes principles arising from these cases, while Part IV-A-2 applies the principles to the hypothetical American act. Part IV-B analyzes major Supreme Court cases dealing with incitement during the Red Scare before and after World War II, and applies the lessons therein to the hypothetical. After analyzing significant cases arising during this era in Part IV-B-1, I will further dissect the principles derived from the cases, examining anxiety over the threat presented by Communism (Part IV-B-2) and alterations to the contemporary jurisprudential test to meet the new threat (Part IV-B-3). In Part IV-B-4, I apply these lessons to the hypothetical and the conditions presented by the threat of terrorism.

---

19. The words "advocacy," "incitement," and "encouragement" are used interchangeably to describe the type of speech discussed in this Comment. Generally, what is being advocated, incited, or encouraged is violence, illegal conduct, or, especially, the commission of terrorist acts.

20. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

## II. BACKGROUND

In this section of the Comment, I will discuss the United Kingdom's response to the terror attacks in London. Specific attention is devoted to the Terrorism Act 2006,<sup>21</sup> with a focus on Part 1 of the Act. Next, I analyze the debate that took place in Parliament during the passage of the Act. I will then briefly discuss the application of the Act following passage. Finally, I present hypothetical American legislation mirroring the glorification provision of the Terrorism Act 2006 as well as hypothetical application of this legislation to the statements of a radical preacher.

### A. *The British Government Responds to the Attacks*

In response to the July 7, 2005 bombings in London, the British government quickly sought to crack down on terrorism and its encouragement by radical religious leaders.<sup>22</sup> In an August 5 press conference, then-Prime Minister Tony Blair unveiled a twelve-point legislative agenda to deal with acts of terrorism and conduct which might encourage or promote future attacks.<sup>23</sup> Among the proposals were new speech-based grounds for deportation and exclusion,<sup>24</sup> as well as new anti-terrorism legislation, including the offense of condoning or glorifying terrorism.<sup>25</sup> Blair noted that while the tolerance and good nature of the British nation had "won the admiration of people and nations the world over," the situation was very different after the attacks.<sup>26</sup> The British people were proud of their tradition of tolerance, the Prime Minister argued, but he was "acutely aware" of a determination that the tradition "should not be abused by a small but fanatical minority."<sup>27</sup> In recognition of the events surrounding the 7/7 attacks, Mr. Blair felt that it was time to deal with those who incited or proselytized for extremism and acts of terror.<sup>28</sup>

Civil liberties organizations in Britain responded quickly with concerns about the amount of speech which might fall within the wide

---

21. Terrorism Act, 2006, c. 11 (Eng.).

22. See Lasson, *supra* note 5, at 25-26; Minow, *supra* note 5, at 480-81; *Terrorism and Civil Liberties: Watch Your Mouth*, *supra* note 2.

23. See generally Prime Minister Tony Blair, PM's Press Conference, *supra* note 8 (setting out the twelve-point agenda).

24. The proposed new grounds included "fostering hatred, advocating violence to further a person's beliefs, or justifying or validating such violence." *Id.*

25. *See id.*

26. *Id.*

27. *Id.*

28. *See id.*

swath of the proposed laws.<sup>29</sup> The comments of the Attorney General, Lord Goldsmith, did not ameliorate their concerns; he indicated that radical imams might even be charged with the ancient law of treason, a position from which he quickly retreated.<sup>30</sup> JUSTICE, a UK-based human rights and legal reform organization, noted that the scope of the proposed law criminalizing the glorification of terrorism was so broad that it might cover any reference to political violence against any government in the world—past, present, or future.<sup>31</sup> JUSTICE further expressed concern that, without an intent requirement, the provision would capture the speech of those who had no intent of glorifying terror, consequently posing “a serious threat to legitimate free expression.”<sup>32</sup>

The new offenses proposed by Mr. Blair’s government underwent a variety of changes through Parliamentary debate before the completed legislation emerged as the Terrorism Act 2006 in the spring of that year.<sup>33</sup> For a greater understanding of the issues raised by the legislation, this Comment will first present the Act as passed, and then discuss the objections that the legislation encountered during debate.

### *B. The United Kingdom Terrorism Act 2006*

The Terrorism Act 2006,<sup>34</sup> as passed by Parliament, is divided into two parts. In general, Part 1 of the Act sets out offenses, while Part 2 includes miscellaneous provisions.<sup>35</sup>

#### 1. Part 1: Offenses

Part 1 contains a variety of new offenses, amendments to existing offenses, and related provisions.<sup>36</sup> This Comment principally discusses the offense of Encouragement of Terrorism, which includes the glorification provision and is found in Part 1, section 1 of the Act.<sup>37</sup> However, Part 1 also sanctions a variety of other terrorism-related acts worthy of note. For example, Part 1 of the Act criminalizes preparation of terrorist acts, training for terrorism, and presence at a terrorist training camp.<sup>38</sup> Further, Part 1 prohibits making, possessing, or misusing

---

29. See, e.g., *Watch Your Mouth: Terrorism and Civil Liberties*, *supra* note 2.

30. See *id.*

31. JUSTICE, *supra* note 9, at 9.

32. *Id.* at 4.

33. See BBC News, *Q&A: Terrorism laws*, July 3, 2006, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/4715478.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/4715478.stm).

34. Terrorism Act, 2006, c. 11 (Eng.).

35. See Terrorism Act, 2006, c. 11, Explanatory Notes, Para 1, nn.11-12 (Eng.).

36. See *id.*

37. See Terrorism Act, 2006, c. 11, pt. 1, § 1 (Eng.).

38. See Terrorism Act §§ 5, 6, 8.

radioactive materials, or making terrorist threats related to nuclear facilities.<sup>39</sup> Part 1 also extends liability for several terrorism-related offenses to individuals outside the United Kingdom.<sup>40</sup>

a. Section 1: Encouragement

Several of the more sweeping and contested provisions of the Terrorism Act 2006 pertain to free expression issues arising under offenses included in Part 1.<sup>41</sup> The offense of Encouragement of Terrorism<sup>42</sup> is perhaps the most expansive, supplementing the common law offense of Incitement by extending liability to those who indirectly encourage or glorify the commission of a terrorist act.<sup>43</sup> The offense applies to a statement likely to be understood by members of the public who hear or read the speech as a “direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.”<sup>44</sup> The breadth of the offense is somewhat curtailed through the presence of the word “likely” and the inclusion of a mens rea requirement.<sup>45</sup> At the time of the statement,<sup>46</sup> an offender must intend for the hearer to be directly or indirectly encouraged to commit, prepare, or instigate an act, or be reckless as to whether the statement will have such an effect.<sup>47</sup> While the requirement of intent or recklessness appears to narrow the scope of the offense, the range of conduct constituting a crime is widened by subsection 3, which includes the glorification provision and greatly expands the amount of speech that is “likely to be understood” as encouraging terrorism.<sup>48</sup> Subsection 3 provides that

statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism . . . include every statement which (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and (b) is a statement from which

---

39. See Terrorism Act §§ 9-12.

40. See Terrorism Act § 17. It should be noted, however, that this provision only covers offenses under section 1 (Encouragement of Terrorism) where they relate to offenses also included in the Council of Europe Convention on the Prevention of Terrorism. See Terrorism Act, Explanatory Notes, Para 1, nn.82-83.

41. Terrorism Act, 2006, c. 11, pt. 1 (Eng.). The controversy of the new glorification offense contained within section 1 can be seen in the parliamentary debate discussed below. See discussion *infra* Part II.C.

42. See Terrorism Act § 1.

43. See Terrorism Act, Explanatory Notes, Para 1, nn.20, 24.

44. Terrorism Act § 1.

45. See Terrorism Act § 1(1), (2).

46. See Terrorism Act, Explanatory Notes, Para 1, n.23.

47. See Terrorism Act § 1(2)(b).

48. See Terrorism Act § 1(3).

those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.<sup>49</sup>

Section 20, which provides definitions for terms found in Part 1, indicates that “glorification” includes “any form of praise or celebration.”<sup>50</sup> Section 20 also states that “conduct that should be emulated in existing circumstances” includes speech referring to conduct that serves as an illustration of the type of acts that should be emulated.<sup>51</sup> Thus, the section’s guide to interpretation only leads to greater confusion.

The Home Office’s Explanatory Notes provide a modicum of explanation. The Notes submit the hypothetical that if a statement glorifying the July 7 attacks on the London Underground could reasonably be interpreted as seeking emulation of *any* severe disruption to the London transit network, the statement would fall under the offense.<sup>52</sup> This hypothetical suggests that a terrorist act need not specifically mirror the conduct glorified in speech to fall under the provision. Thus, a speaker might be charged for celebrating terrorist act *X* even if a listener interprets the statement as suggesting that he commit terrorist act *Y*. In fact, the Home Office indicates that the speech need not refer to a specific act of terrorism *at all* under subsection 5 (which provides guidance to subsections 1 through 3), nor does a listener need to understand it as referring to a specific act.<sup>53</sup> Accordingly, the offense appears to criminalize even a general statement, describing a hypothetical suicide bomber as a martyr, which a member of the audience might reasonably believe is an instruction for him or her to engage in the suicide bombing of some unspecified location at some unspecified point in time.<sup>54</sup>

Further complicating the offense, section 1 also indicates that glorification, or *any* statement or publication for that matter, need not

---

49. *Id.*

50. Terrorism Act § 20(2).

51. Terrorism Act § 20(7).

52. *See* Terrorism Act, 2006, c. 11, Explanatory Notes, Para 1, n.24 (Eng.) (emphasis added).

53. *See* Terrorism Act, Explanatory Notes, Para 1, n.26; *see also* Terrorism Act § 1(5)(a). Section 1(5)(a) states that “[i]t is irrelevant for the purposes of subsections (1) to (3) . . . whether anything mentioned in those subsections relates to the commission, preparation or instigation” of acts of terrorism in particular or generally. Terrorism Act § 1(5)(a). The Explanatory Notes clarify this language by asserting that “subsection (5) sets out that the statement, or how it is likely to be understood, need not relate to a specific act of terrorism. . . .” Terrorism Act, Explanatory Notes, Para 1, n.26.

54. *See* Christina C. Logan, Comment, *Liberty or Safety: Implications of the USA PATRIOT Act and the U.K.’s Anti-Terror Laws on Freedom of Expression and Free Exercise of Religion*, 37 SETON HALL L. REV. 863, 875, 888 (2007).

actually encourage or induce a listener to action to subject the glorifier to punishment.<sup>55</sup> Therefore, the very statement itself constitutes the offense, and no link is required between the speech and an act of violence.<sup>56</sup>

b. Section 2: Dissemination

Section 2 of the Terrorism Act proscribes the dissemination of terrorist publications,<sup>57</sup> defined as publications likely “to be understood . . . as a direct or indirect encouragement” to commit terrorist acts or to be useful in the perpetration or preparation of such acts.<sup>58</sup> Again, the legislation is expansive in its construction, including sanctions for publications which glorify terrorist acts, with no regard for whether the recipient is in fact encouraged or induced to commit an act of terrorism.<sup>59</sup> Dissemination of the prohibited material may occur via the Internet, but a notice provision enables a site operator to remove the material and thereby avoid the perception that he or she endorses the statement.<sup>60</sup>

c. Section 17: Commission Abroad

As mentioned above, the new or amended laws included in the Terrorism Act 2006 are applicable to persons speaking or publishing statements outside of the United Kingdom.<sup>61</sup> The breadth of the provision extending liability to acts outside the country is somewhat lessened by the fact that it applies only to statements that encourage commission, preparation, or instigation of a Convention offense.<sup>62</sup> While this limitation theoretically curtails the extraterritorial application of the Act to specific conduct or subject matter, it remains worth noting that the

---

55. See Terrorism Act § 1(5).

56. See Terrorism Act, Explanatory Notes, Para 1, n.26 (“[I]t is not necessary in order for the offense to be committed for an act of terrorism . . . actually to take place.”).

57. See Terrorism Act § 2.

58. See Terrorism Act § 2(3)(a), (b). The publication in question may be understood as encouragement not only by those to whom it is available, but also to those who *might* obtain it “as a consequence” of conduct constituting dissemination under subsection (2). See *id.*

59. See Terrorism Act § 2(4), (8).

60. See Terrorism Act §§ 3, 4. Under sections 3 and 4, a constable would serve the site operator with a notice decreeing the material to be “unlawfully terrorism-related,” after which the recipient would have two days to remove or alter the material. See Terrorism Act § 3(3).

61. See Terrorism Act, § 17; see also Minow, *supra* note 5, at 480-81.

62. See Terrorism Act § 17(2)(a). The Convention offenses, listed in the Schedule to the Act, include numerous areas of concern, including explosives, terrorist funds, and the hijacking of an airplane. See Terrorism Act, 2006, c. 11, sched. 1 (Eng.).

government may apply the anti-terrorism legislation to individuals, whether British citizens or not,<sup>63</sup> and whether those individuals are actually within the British realm or not.<sup>64</sup>

d. Defenses under Sections 1 and 2

Sections 1 and 2 of the Act provide a defense that would be particularly useful to the media.<sup>65</sup> If the government cannot prove that a defendant *intended* his statement to directly or indirectly encourage an act of terrorism, that defendant can raise the defense that the statement “neither expressed his views nor had his endorsement.”<sup>66</sup> A similar defense exists for the publication of terrorist material under section 2.<sup>67</sup> Thus, a news outlet may report on the statements or publications of a terrorist without fear of committing an offense.<sup>68</sup>

However, the defense found in section 1 only applies to cases where the government has failed to prove intent to encourage or induce the commission, preparation, or instigation of terrorist acts.<sup>69</sup> Similarly, the defense found in section 2 only applies where the government has failed to prove intent and where the material disseminated merely encourages terrorism, as opposed to material that would be useful for terrorist purposes.<sup>70</sup> Additionally, both defenses require that, “in all the circumstances,” the material in question did not express the views of the broadcaster.<sup>71</sup>

2. Part 2: Miscellaneous Provisions

Part 2 of the Act includes miscellaneous provisions relating to terrorism offenses, such as additional grounds for the government to ban an organization and the controversial extension of the period in which

---

63. See Terrorism Act § 17(3).

64. See Terrorism Act § 17(4). Subsection 4 specifies that certain offenses (listed in subsection 2 and including Encouragement) when “committed wholly or partly outside the United Kingdom” may be subject to proceedings anywhere *within* the United Kingdom, see Terrorism Act § 17(4)(a), and may be treated as having occurred within the United Kingdom “for all incidental purposes,” see Terrorism Act § 17(4)(b).

65. See Terrorism Act § 1(6); Terrorism Act § 2(9).

66. Terrorism Act § 1(6). The defense therefore appears to cover defendants who are *reckless* as to the effect of their statements.

67. See Terrorism Act § 2(9).

68. See Terrorism Act, 2006, c. 11, Explanatory Notes, Para 1, n.27 (Eng.).

69. See *id.*

70. See Terrorism Act, 2006, c. 11, Explanatory Notes, Para 1, n.36 (Eng.) (citing Terrorism Act § 2(9) and (2)(10)). Accordingly, it appears that the publication of material useful to the preparation of terrorist acts would be punishable regardless of whether or not the publisher endorsed it.

71. Terrorism Act §§ 1(6)(b), 2(9)(b).

the government may detain a terror suspect without charge.<sup>72</sup> Relevant to a discussion of free expression is the amendment of portions of the Terrorism Act 2000<sup>73</sup> (“TACT”) that outlaw organizations deemed to promote or encourage terrorism.<sup>74</sup> Under the Terrorism Act 2006, glorification of terrorism became an additional ground for the government to ban an organization under the TACT.<sup>75</sup> This amendment thereby increases the power of the Secretary of State to proscribe or ban an organization alleged by the government to be involved in terrorism under section 3 of the 2000 Act.<sup>76</sup> Consequently, individuals may be subject to liability for membership in, or support of, such an organization.<sup>77</sup>

### C. *The Terrorism Act in Parliament*

Not surprisingly, the Terrorism Act 2006 provoked a great deal of debate as it passed through Parliament.<sup>78</sup> Members of Parliament from all parties registered their opposition to, or concerns with, the Act;<sup>79</sup> most criticism was directed at two particular provisions.<sup>80</sup> Then-Prime Minister Blair endured his first defeat in the House of Commons in eight years over the first point of contention, the proposed ninety-day extension of the period during which police could hold terrorism suspects

---

72. See Terrorism Act, 2006, c. 11, pt. 2, §§ 21-35 (Eng.).

73. Terrorism Act, 2000, c. 11 (Eng.).

74. See Terrorism Act, 2006, c. 11, pt. 2, §§ 21, 22 (Eng.).

75. See Terrorism Act, 2006, c. 11, pt. 2, § 21 (Eng.).

76. See Terrorism Act, 2000, c. 11, pt. 2, § 3 (Eng.); see also BBC News, *Q&A: Terrorism laws*, *supra* note 33.

77. See Terrorism Act, 2006, c. 11, Explanatory Notes, Para 1, n.99 (Eng.); Terrorism Act 2000, c. 11, pt. 2, § 11 (Eng.) (membership); Terrorism Act 2000, c. 11, pt. 2, § 12 (Eng.) (support).

78. See, e.g., BBC News, *Q&A: Terrorism laws*, *supra* note 33 (noting that the new law “had a rocky ride in Parliament”); BBC News, *MPs Agree Terror Detention Limit*, July 10, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/6289020.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6289020.stm); *Blair Bashing: Labour’s Terror Rebellion*, *ECONOMIST*, Nov. 12, 2005, at 13. Under the British legislative system, most bills become acts following debate and passage by both the House of Commons and House of Lords. See BBC News, *Guide to Parliament: Law-making*, Oct. 11, 2007, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/6999683.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6999683.stm). At the “First Reading” of the bill, the legislation is published to the House of Commons. During the “Second Reading,” the legislation is debated by Members of Parliament. Following amendment by committee or by Parliament as a whole, the bill undergoes a final vote during the “Third Reading.” The House of Lords then addresses the bill through the same process. Final approval comes from the House of Commons, after which the legislation is sent to the Queen for “Royal Assent.” Following Crown approval, the bill becomes an act. See *id.*

79. See *Blair Bashing: Labour’s Terror Rebellion*, *supra* note 78; see also discussion *infra* Part II.C.

80. See BBC News, *Q&A: Terrorism laws*, *supra* note 33.

without charge.<sup>81</sup> After defeat in Parliament, where opposition leaders deemed the proposal reminiscent of conditions in Apartheid South Africa, the extension was reduced to twenty-eight days.<sup>82</sup> The second major source of contention, and most relevant to this Comment, was the addition of the glorification provision to the British laws.<sup>83</sup> A presentation of the speeches in opposition to this provision would be far too cumbersome and lengthy to include in this Comment. However, several general categories of opposition are worth noting, as they would surely replicate opposition to any similar proposed law in the United States.<sup>84</sup>

Perhaps the most common theme throughout the debate was concern over the broad expanse of the proposed law.<sup>85</sup> A great deal of discussion centered on the concern that statements in support of “freedom fighters” against oppressive regimes worldwide might be perceived as glorification of acts of terrorism.<sup>86</sup> Clive Betts, a member of Prime Minister Blair’s own Labour Party, indicated that his Muslim constituents felt criminalized by the legislation for voicing their support for “resistance to what they regard as the occupation of Palestine” or for “freedom fighters in Kashmir.”<sup>87</sup> Even more often, Members of Parliament (“MPs”) spoke of their own support for “freedom fighters” in their lifetimes, and demanded to know whether they too would have been swept up by the Act.<sup>88</sup> Tony Lloyd, also a member of the Labour Party, noted that “many of us here lived through periods in our political lives when we have not simply sought to explain but actively advocated the concept of armed force as a legitimate defence” against oppressive and

---

81. See *Blair Bashing: Labour’s Terror Rebellion*, *supra* note 78.

82. See *Repeat Offending: Labour and the Law*, *ECONOMIST*, Nov. 12, 2005, at 34; see also BBC News, *Q&A: Terrorism laws*, *supra* note 33.

83. See, e.g., 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 322, available at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo051026/debindx/51026-x.htm> (Secretary of State for the Home Department Charles Clarke, noting parliamentary members’ doubts about the glorification provision).

84. Generally, opposition to the law fell into the following categories: concerns over the expanse of the law, see, e.g., 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 348-50 (noting concerns that the term “glorification” and the provision itself were too broad); concerns that the law would impinge on the marketplace of ideas, see, e.g., 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 367 (noting that the right of free speech should remain unimpinged, even in the face of offensive statements); concerns that provisions of the law were simply too vague, see, e.g., 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 357 (noting that the proposed law was vague and would therefore infringe on freedom of speech).

85. See, e.g., BBC News, *Q&A: Terrorism laws*, *supra* note 33 (noting critics’ concerns that such laws could have even caught up supporters of Nelson Mandela during the era of Apartheid in South Africa).

86. See, e.g., 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 324.

87. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 338.

88. See, e.g., 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 364.

undemocratic regimes.<sup>89</sup> MPs from both parties cited their support for current resistance movements,<sup>90</sup> and asked if they themselves would fall under the overly broad glorification provision for expressing support for opposition forces in Burma,<sup>91</sup> Zimbabwe,<sup>92</sup> and Iran.<sup>93</sup> Other MPs questioned whether the glorification provision would be used to prosecute public figures such as American evangelical Pat Robertson,<sup>94</sup> the then-Taoiseach (Prime Minister) of Ireland Bertie Ahern,<sup>95</sup> or even Cherie Blair, wife of the British Prime Minister.<sup>96</sup> Especially during the Bill's second reading, MPs engaged in a great deal of debate, noting a national tradition of support for those who opposed oppressive regimes world-wide and seeking an assurance that the glorification provision would not criminalize "those who plead for decency and change in their societies," many of whom are initially "labeled as terrorists but later lauded as freedom fighters."<sup>97</sup>

Similar to the tradition of support for freedom fighters, several members noted their opposition in language echoing the "marketplace of ideas" espoused by Justices Holmes and Brandeis in American free speech jurisprudence.<sup>98</sup> Conservative Party MP Douglas Hogg stated that "the right of free speech should be safeguarded and fought for, even if it involves hearing things that one might find deeply offensive."<sup>99</sup> As an example, Hogg noted statements by Sinn Fein leader Gerry Adams

---

89. *Id.*

90. *See, e.g.*, 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 325. The number of Ministers asking whether they would be caught under the glorification provision prompted the acerbic remark by Home Secretary Charles Clarke that "[o]ne of the exciting revelations through the entire debate has been the transformation of a number of Conservatives into freedom fighters throughout the world, which is genuinely entertaining to some of us who have been involved in these matters in various ways over time." 439 PARL. DEB., H.C. (Pt. No. 63) (2005) 498-99.

91. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 337.

92. Douglas Hogg, Conservative MP, noted that since the Bill extends to overseas terrorism, it might criminalize those who spoke in support of movements "designed to displace by violent means the Administration in Burma or that of President Mugabe." 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 326.

93. Peter Kilfoyle, Labour MP, noted that every member of Parliament received "regular missives" from the National Council of Resistance of Iran, which commits acts of sabotage and violence in that nation. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 339.

94. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 330 (noting Robertson's advocating for the assassination of Hugo Chavez).

95. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 368 (noting plans for a parade in Dublin to celebrate the Easter Rising).

96. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 386-87 (noting Mrs. Blair's statement expressing some compassion for Palestinian suicide bombers).

97. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 324.

98. *See, e.g.*, *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 367.

99. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 367.

celebrating the “glorious volunteers” of the IRA.<sup>100</sup> Meanwhile, Labour MP Shahid Malik noted that during his election campaign he was plagued by negative speech from radical Muslim organizations and leaders whom the Act might silence. While he might have had an easier campaign without them, he felt that so long as “they refrain from overtly promoting violence, our battle with them must be one of ideas.”<sup>101</sup> Malik’s look to positive, truthful ideas to counter negative, false, or injurious viewpoints echoes Holmes’ explication of the marketplace of ideas in *Abrams v. United States*.<sup>102</sup>

A number of ministers, especially from the smaller opposition parties, registered their opposition to the vague language utilized in the Act.<sup>103</sup> Mark Oaten, speaking for the Liberal Democrats, indicated that his party found the glorification provision unacceptable due to a vagueness that would have the impact of curtailing speech.<sup>104</sup> So too, Elfyn Llwyd of the Plaid Cymru Party indicated that the law must be clear so that “those affected understand it and regulate their conduct according to the law.”<sup>105</sup>

The Labour Party sought to allay such fears by pointing to the glorification provision’s safeguards.<sup>106</sup> Home Secretary Charles Clarke explained that, given the seriousness of the offense and resulting punishment, two safeguards had been enacted: First, the person making the speech must have known, believed, or had reasonable grounds to believe that someone in the audience would likely perceive the speech as encouraging terrorism; second, prosecution would only be undertaken if the Director of Public Prosecutions (“DPP”) determined that an arrest was in the public interest.<sup>107</sup> Thus, a member of the government would not have unfettered power to prosecute every speaker whose views he or she opposed.

However, the cited safeguards did not impress some Members of Parliament.<sup>108</sup> Minister Oaten indicated that his Liberal Democratic Party was concerned that even with the knowledge requirement, the regulation would still be too dependent on the interpretations of third-

---

100. *Id.*

101. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 397.

102. *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas—. . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.”); *see also Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting) (arguing that every idea “offers itself for belief and if believed it is acted on unless some other belief outweighs it”).

103. *See, e.g.*, 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 357.

104. *Id.*

105. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 383.

106. *See, e.g.*, 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 335.

107. *Id.*

108. *See, e.g.*, 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 358.

party actors—namely, the audience members.<sup>109</sup> Ministers from all parties seemed less than satisfied with the second safeguard as well. Minister Hogg suggested that placing power in the hands of the DPP (or, in the case of overseas terrorists, the Attorney General) was not reassuring.<sup>110</sup> His concern was that these government officials might simply do the bidding of the ruling party, with the effect of criminalizing or chilling all speech in opposition to the actions of the government.<sup>111</sup> Richard Burden, a minister from the ruling Labour Party, similarly expressed his concern that the DPP's role constituted no safeguard, seeing as how prosecutions might still lead to decisions based upon the speaker, not the speech.<sup>112</sup> Accordingly, the DPP might arrest those who glorified politically motivated violence conducted by enemies of Britain, but “turn a blind eye to statements in support of political violence committed by our friends.”<sup>113</sup> Minister Burden pointed out that the perception of such double standards had led to skepticism among the British Muslim community with regard to the war on terror.<sup>114</sup>

Minister Burden's concern illustrated another problem with the proposed legislation—that perceived double standards and government oppression might lead to counter-productive results.<sup>115</sup> That is, rather than excising extremist speakers from the public, the Act could have the effect of increasing their ranks. John Denham, from the Labour Party, pointed out that young British Muslims might be afraid of falling under the Act for speaking out. As a consequence, they might be less likely to engage in politics, public speech, and democracy to facilitate a change in their lives, and more likely to turn toward terrorism.<sup>116</sup> Minister Lloyd

---

109. *Id.*

110. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 368-69.

111. *See* 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 369 (“[F]ree speech will be interfered with by the fear of illegality. . . .”). Hogg pointed out that the Attorney General was “nothing more than the in-house lawyer of the Government” and an individual who had recently played a large role in justifying British engagement in Iraq, to which opposition members of Parliament objected. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 368.

112. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 402.

113. *Id.*

114. *Id.*

115. *See, e.g.*, 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 370; *see also* Minow, *supra* note 5, at 489-90 (noting British journalist Mick Hume's argument that prosecutions under the proposed law could lead to the perception of double standards and the counter-productive creation of “martyrs to inspire disaffected Muslim youth”). Professor Liaquat Ali Khan noted the possibility of a similar effect in the United States, if the government curtailed the First Amendment to punish critics of the war on terrorism, seen as terrorist sympathizers. If so, “U.S. Muslim immigrants and citizens might face unprecedented official discrimination and social prejudice, producing more resentments and terrorism.” Liaquat Ali Khan, *The Essentialist Terrorist*, 45 WASHBURN L.J. 47, 88 (2005).

116. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 370.

expressed a similar concern that the public interest is not served by hauling away extremist speakers. The effect, he argued, would be to cease treating such individuals as “subjects of scorn and social condemnation and instead put[ting] them in prison cells, thereby making them martyrs.”<sup>117</sup>

Despite some of these reservations, Parliament passed the Terrorism Act 2006 in Spring 2006, following debate and amendment. The Act received Royal Assent on March 30, 2006<sup>118</sup> and went into effect in April 2006.<sup>119</sup>

#### D. *The Act in Use*

For a year after the passage of the Act, the British government brought no arrests under the glorification provision.<sup>120</sup> Despite the invectives of a number of extremist religious leaders in Britain, the government seemed reluctant to utilize the provision, or unsure of when the offense might apply, to the frustration of some in the public.<sup>121</sup> However, on April 24, 2007, six Muslim preachers were charged under the Act as a consequence of inflammatory speeches made in 2004.<sup>122</sup>

Among those arrested was Abu Izzadeen,<sup>123</sup> an extremist Muslim preacher whose conduct demonstrated a number of the quandaries inherent in the glorification offense. Izzadeen, born Trevor Brooks in East London as the child of Jamaican immigrants, converted to Islam at seventeen.<sup>124</sup> He became a leader of the radical group al-Ghurabaa (the Strangers),<sup>125</sup> which the Home Office proscribed in 2006 for glorifying terror.<sup>126</sup> While a number of statements by Izzadeen might fairly be described as glorifying terrorism,<sup>127</sup> his arrest demonstrated several

---

117. 438 PARL. DEB., H.C. (Pt. No. 53) (2005) 365.

118. See Terrorism Act, 2006, c. 11, Explanatory Notes, Para 1, n.1 (Eng.).

119. See BBC News, Q&A: Terrorism laws, *supra* note 33.

120. See, e.g., Palmer, *supra* note 2, at 12.

121. See, e.g., *id.*; Nikkah & Lusher, *supra* note 4, at 2.

122. See Stephen Wright, Beth Hale, Neils Sears, & Daniel Bates, *Hate Preacher Who Praised Bombers Is Among Six Arrested*, DAILY MAIL (London), Apr. 25, 2007, at 20.

123. See, e.g., John Twomey, *Terror Police Hold “Preachers of Hate”*, THE EXPRESS (United Kingdom), Apr. 25, 2007, at 15.

124. Wright, *supra* note 122, at 20.

125. *Id.*

126. Press Release, John Reid, Home Secretary, Home Office, Commencement of New Terrorism Powers (July 25, 2006), <http://press.homeoffice.gov.uk/press-releases/Commencement-of-New-Terrorism-Po?version=1>. Perhaps because Izzadeen did not admit membership in the organization, he could not be prosecuted even after its proscription. See Philip Johnston, *Firebrand Convert Could Still Be Prosecuted After Praising July 7 Bombers*, DAILY TELEGRAPH (London), Sept. 21, 2006, at 2.

127. See, e.g., John Steele, *Militant Blamed Britain for July 7 Bombings*, DAILY TELEGRAPH (London), Apr. 25, 2007, at 13 (referencing Izzadeen’s refusal to denounce

problems with the new law. First, as noted above, the new Act was not used to prosecute Izzadeen for quite some time, whether due to concern over offending Muslims<sup>128</sup> or the vagueness of the offense.<sup>129</sup> Second, while Izzadeen has made incredibly inflammatory remarks, he has also repeatedly stated that he does not support terrorism.<sup>130</sup> Accordingly, it is conceivable that he could escape conviction with the argument that he does not possess the requisite mens rea of intent.<sup>131</sup> Finally, Izzadeen's arrest could produce the counter-productive results discussed in parliamentary debate by leading young British Muslims to perceive a double-standard in the application of the law.<sup>132</sup> Izzadeen's arrest came less than a year after an incident in which he heckled Home Secretary John Reid during the latter's speech to Muslims at an event in East London.<sup>133</sup> Given that the altercation increased Izzadeen's prominence in England, Muslim youth could conceivably perceive prosecution as an attempt to silence his criticism of the government.

*E. Hypothetical American Legislation and Application*

While America prides itself on the protections established in the Bill of Rights,<sup>134</sup> including the right to free speech,<sup>135</sup> legislation similar to the Terrorism Act 2006 could conceivably arise in the United States should there be an attack similar to the July 7, 2005 bombings in London. First, the response to the terrorist attacks of September 11,

---

the July 7 terrorist attacks, calling them "mujahideen activity"); Wright, *supra* note 122, at 20 (referring to Izzadeen's description of the July 7 bombers as "completely praiseworthy" and calling the victims "cowards"); Stephen Wright, *Preacher of Hate 'Who Praised 7/7 Bombers' Is Arrested*, DAILY MAIL (London), Feb. 9, 2007, at 5 (noting Izzadeen's identification with the views of the July 7 ringleader and jokes regarding the victims of the July 7 and September 11 terrorist attacks).

128. See Palmer, *supra* note 2, at 12.

129. See Mekhennet, *supra* note 7.

130. Steele, *supra* note 127, at 13.

131. It seems unlikely that Izzadeen could avoid conviction for recklessness with respect to his statements. However, the problem could be an issue at trial. Izzadeen might theoretically argue that statements indicating his lack of support for terrorism should be given just as much weight by listeners as his apparent support for suicide bombers.

132. Professor Minow has noted that "[o]verreaction in the form of systematic mistreatment of minorities can stoke fires of alienation, jeopardizing support for the nation and potentially increasing the number of people who support terrorists." Minow, *supra* note 5, at 456. While Izzadeen's arrest under the law might not constitute mistreatment, application of the law only to outspoken critics of the government or to members of the Muslim minority could result in that perception. See, e.g., Khan, *supra* note 115.

133. Wright, *supra* note 122, at 20.

134. See, e.g., Khan, *supra* note 115, at 88 (calling the First Amendment "the citadel of the United States Constitution").

135. See U.S. CONST. amend. I.

2001 in the United States produced a variety of legislation that continues to raise civil liberties concerns.<sup>136</sup> While the PATRIOT Act,<sup>137</sup> enacted in response to the September 11 attacks, itself imposes no restrictions on free speech, the legislation may be conducive to further erosion of civil liberties in the name of security at home.<sup>138</sup> Second, some commentators already call for legislation or judicial interpretations that will go further to restrict speech deemed to facilitate or encourage terrorist acts.<sup>139</sup> Arguing for the monitoring of religious speech, Professor Kenneth Lasson has suggested that the contemporary, religion-based oratory of incitement is more dangerous than the political incitement encountered during the Cold War: “The communist parties of yesteryear that urged the violent overthrow of the government did not engage in the kind of clear incitement as the radical religious movements of today.”<sup>140</sup> A perceived increase in religious exhortations to violence has led some to call for greater punishment of inflammatory, defamatory, and inciting speech, calls which echo those found in the British press.<sup>141</sup> As Professor Martha Minow has noted, “[p]ublic fears, both warranted or manipulated by descriptions of terrorism risks, motivate repeated and increasing sacrifices of liberties.”<sup>142</sup> Accordingly, should there be a further terrorist attack on American soil, especially one perpetrated by home-grown terrorists, it would not be surprising to hear calls, in the interests of safeguarding the homeland, for legislation cutting a deeper swathe into

---

136. See, e.g., Khan, *supra* note 115, at 52 (“A security-conscious Congress has extended the life of the Patriot Act, which shows that the old law of civil liberties might have changed forever, formalistically for everyone”); Minow, *supra* note 5, at 474-75.

137. See generally USA PATRIOT ACT, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8, 15, 18, 22, 31, 42, 49, and 50 U.S.C.).

138. Professor Minow points to the perception of government overreach in permit denials for demonstrations and protests (as well as the confinement of protestors to “free speech zones”) and in an increase in government surveillance power. Minow, *supra* note 5, at 464-69. Similarly, one student commentator notes that “the relaxation of laws regarding government surveillance and wiretapping of suspected terrorists may have a chilling effect upon certain forms of free speech and free association.” Logan, *supra* note 54, at 880.

139. See, e.g., David G. Barnum, *The Clear and Present Danger Test in Anglo-American and European Law*, 7 SAN DIEGO INT’L L.J. 263, 291 (2006) (“The dangers posed by advocacy of terrorist violence are real, . . . and the fact that a particular message advocates violence at some unspecified future time should not necessarily exempt it from punishment.”); Minow, *supra* note 5, at 484 (noting that while some commentators speak of over-reaction following the September 11 attacks, “[o]thers warn of American under-reaction when it comes to speech and expression”). See generally Lasson, *supra* note 5.

140. Lasson, *supra* note 5, at 64, 65.

141. Compare Lasson, *supra* note 5, at 5-7, 74 (urging recognition that discriminatory speech and incitement to violence should not be tolerated in a free society), with Parsons, *supra* note 3, at 25 (“In the end, too much freedom of speech is not freedom of speech at all.”).

142. Minow, *supra* note 5, at 475.

the First Amendment.<sup>143</sup> The hypothetical legislation that follows constitutes just such a statute.

1. Hypothetical Legislation: The Anti-Glorification of Terrorism Act

Following an attack, such as that described in the Introduction, and public demand for measures designed to improve safety from home-grown terrorists, Congress passes the Anti-Glorification of Terrorism Act. The Act is almost identical to section 1 of the United Kingdom's Terrorism Act 2006,<sup>144</sup> providing as follows:

Section 1: Encouragement of terrorism:

(1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation, or instigation of acts of terrorism.<sup>145</sup>

(2) A person commits an offense if: (a) he publishes a statement to which this section applies; and (b) at the time he publishes it or causes it to be published, he: (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare, or instigate acts of terrorism; or (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare, or instigate such acts.<sup>146</sup>

(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism include every statement which: (a) glorifies the commission or preparation (whether in the past, in the future, or generally) of such acts; and (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being

---

143. See, e.g., Lasson, *supra* note 5, at 73 (“Individual liberty should be protected to the greatest extent possible, but not at the sacrifice of national security.”).

144. Terrorism Act, 2006, c. 11, pt. 1, § 1 (Eng.).

145. For the sake of this Comment, “acts of terrorism” shall be broadly defined, including injury or attempted injury to persons or property. Speech to a live audience (and not disseminated in print) shall constitute publication for the purposes of the offense. See generally Terrorism Act, 2006, c. 11, pt. 1 (Eng.).

146. As in the Terrorism Act 2006, intent and recklessness shall be the mens rea. See Terrorism Act § 1(2)(b). Any reference to publishing or publication would include speeches delivered orally and not written down in any way.

glorified as conduct that should be emulated by them in existing circumstances.

(4) For the purposes of this section, the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both: (a) to the contents of the statement as a whole; and (b) to the circumstances and manner of its publication.

(5) It is irrelevant for the purposes of subsections (1) to (3): (a) whether anything mentioned in those subsections relates to the commission, preparation, or instigation of one or more particular acts of terrorism, of acts of terrorism of a particular description, or of acts of terrorism generally;<sup>147</sup> and (b) whether any person is in fact encouraged or induced by the statement to commit, prepare, or instigate any such act.<sup>148</sup>

## 2. Hypothetical Application: Speech and Sanction

Following the enactment of the Anti-Glorification of Terrorism Act, an extremist imam gives a speech in front of a crowd. The radical imam refuses to condemn the suicide bombers involved in the attack that gave rise to the new law and states that “the suicide bombers who gave their lives are completely praiseworthy; they are martyrs. Until the United States and her allies end their occupation of Iraq and Afghanistan, they should be prepared for more acts in the name of Allah.” The audience includes a number of Muslim youth from the area, a predominantly Muslim community, as well as passersby and citizens protesting the radical imam’s speech. The police are present as well.

After the speech, one of the protestors files a complaint with the police. The radical imam is charged with violating section 1 of the Anti-Glorification of Terrorism Act for his statements and is convicted. Despite claims that the Act violates the guarantees of free speech inherent in the First Amendment, his conviction is affirmed by an appellate court and his appeal reaches the Supreme Court. There, the imam poses the question of whether the Anti-Glorification of Terrorism

---

147. Thus, the speech ostensibly inciting a listener to commit a terrorist act need not relate to a specific act of terrorism. *See* Terrorism Act, 2006, c. 11, Explanatory Notes, Para 1, n.26 (Eng.). The speech may therefore glorify, or reasonably be understood as glorifying, one terrorist act, and yet fall under the offense for inciting a different terrorist act.

148. Subsection 5(b) indicates that “it is not necessary in order for the offence to be committed for an act of terrorism . . . actually to take place.” *See* Terrorism Act, Explanatory Notes, Para 1, n.26.

Act and his conviction under it violate the First and Fourteenth Amendments of the Constitution.

### III. ANALYSIS UNDER CURRENT LAW

The Supreme Court's evaluation of the constitutionality of the Act would begin with an analysis under the current test for the speech of advocacy, derived from *Brandenburg v. Ohio*.<sup>149</sup> Accordingly, I will first discuss the *Brandenburg* test and then analyze the Anti-Glorification of Terrorism Act under this jurisprudence.

#### A. *Application of Current Law: Brandenburg v. Ohio*

Under current First Amendment jurisprudence, the Supreme Court's decision in *Brandenburg v. Ohio* is the appropriate starting point for an Act prohibiting speech that could incite audience members to engage in illegal conduct.<sup>150</sup> *Brandenburg* presents what is effectively the latest test in the development of jurisprudence addressing language advocating violent or illegal conduct.<sup>151</sup>

In *Brandenburg*, the Court held that the constitutional guarantee of free speech forbade a State from punishing advocacy of the use of force or the violation of the law "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>152</sup> Speech that did not fulfill this requirement could not be punished as advocacy;<sup>153</sup> statutes that failed to draw this distinction could not stand.<sup>154</sup>

The defendant in the case, a Ku Klux Klan leader, had been convicted under Ohio's Criminal Syndicalism Act for speeches made during several televised rallies.<sup>155</sup> Speech from the rallies included derogatory remarks about minority groups,<sup>156</sup> the announcement of a

---

149. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

150. See *Brandenburg*, 395 U.S. at 447; see also GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *THE FIRST AMENDMENT* 62 (2d ed. 2003) (noting that the Court has followed *Brandenburg* in subsequent cases); Lasson, *supra* note 5, at 53.

151. See Barnum, *supra* note 139, at 278, 279.

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

153. See *id.*

154. See *id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)). Specifically, a statute that makes no distinction between "the mere abstract teaching" of a resort to violence, and the actual preparation of a group for violence and "steeling it to such action" violates the First Amendment. *Brandenburg*, 395 U.S. at 448.

155. *Brandenburg*, 395 U.S. at 444-45.

156. *Id.* at 446. The statements that could be understood from the recordings included the following: "This is what we are going to do to the niggers"; "A dirty nigger"; "Send the Jews back to Israel"; "Let's give them back to the dark garden"; "Save America"; "Let's go back to constitutional betterment"; "Bury the niggers"; "We intend to do our

march in Washington, D.C.,<sup>157</sup> and the statement “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.”<sup>158</sup> The recordings included images of weapons from the rallies as well as footage of a cross-burning ceremony.<sup>159</sup>

The Court held that Ohio’s Criminal Syndicalism Act<sup>160</sup> failed to draw the distinction between “mere advocacy” and “incitement to imminent lawless action.”<sup>161</sup> Accordingly, the Court ruled that the Act ran afoul of the First Amendment and could not stand.<sup>162</sup> Thus, to comply with *Brandenburg*, a law sanctioning advocacy speech can only target language that is directed at inciting imminent lawless action and is likely to incite such action.<sup>163</sup>

Cases following *Brandenburg* may help to demonstrate just how immediate the “imminent lawless action” must be. While unlawful action following speech might provide an overt act to demonstrate the likely effect of a statement,<sup>164</sup> the Supreme Court’s decision in *NAACP v. Claiborne Hardware Company*<sup>165</sup> appears to address the timing of such overt acts. In *Claiborne Hardware*, the NAACP organized a boycott of several white-owned businesses.<sup>166</sup> A boycott leader made a statement suggesting that some members in the boycotting group would physically

---

part”; “Give us our state rights”; “Freedom for the whites”; “Nigger will have to fight for every inch he gets from now on.” *Id.* at 446 n.1.

157. *Id.* at 446 (“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.”).

158. *Id.*

159. *Id.* at 445. The prosecution introduced into evidence some of the items from the recordings, including firearms, a Bible, and a red hood worn by the defendant. *Id.*

160. OHIO REV. CODE ANN. § 2923.13 (1969).

161. *Brandenburg*, 395 U.S. at 448-49. Specifically, the Court read the Act as including punishment for those “who ‘advocate or teach the duty, necessity, or propriety’ of violence ‘as a means of accomplishing industrial or political reform’ . . . or who ‘justify’ the commission of violent acts ‘with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism.’ . . .” *Id.* at 448. The latter category of speech is comparable to the glorification of terrorists as martyrs and rationalizing their acts as necessary to achieve some end.

162. *See id.* at 448, 449. The Court suggested that jury instructions limiting the reach of the statute could have saved conviction under it; however, the trial judge failed to provide sufficiently limiting instructions. *See id.* at 448-49.

163. *See id.* at 448. In his concurring opinion, Justice Douglas noted that “[t]he 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.” *Id.* at 456 (Douglas, J., concurring).

164. *See Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring); *see also* Lasson, *supra* note 5, at 54.

165. 458 U.S. 886 (1982).

166. *Id.* at 900.

discipline African-Americans who broke the boycott and patronized the businesses.<sup>167</sup> Several weeks and months later, a number of boycotters engaged in acts of violence against a handful of citizens who ignored the boycott and the threat.<sup>168</sup> The Court found the violent conduct too remote in time for the speaker to be held liable.<sup>169</sup> Thus, *Claiborne Hardware* serves as a useful demonstration that even where actual violent conduct occurs, and even where that violence may be linked to a prior threat, the passage of time between the two may save the speech and the speaker.

### B. *Application of the Brandenburg Test*

Under the *Brandenburg* test, the government appears unable to convict the hypothetical imam for advocacy to violence. Moreover, like the Ohio Criminal Syndicalism Statute, the Anti-Glorification of Terrorism Act fails to distinguish between mere advocacy and advocacy “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”<sup>170</sup> Accordingly, if the Supreme Court followed the test established by *Brandenburg*, the Act should be deemed unconstitutional.

The hypothetical imam praises terrorists, in clear violation of the Anti-Glorification of Terrorism Act, but his speech alone fails to demonstrate the requisite imminence of violent or lawless action. That is, in his speech, the imam does not direct his listeners to immediately arm themselves with explosives and commit a terrorist act. Thus, the speech itself may not steel any listener to imminent action. Furthermore, although the imam states that the nation should be prepared for further acts, his speech is not necessarily directed at producing violent conduct. Instead, like the Klan leader in *Brandenburg*, he warns of possible retaliation against the United States for government action.<sup>171</sup>

---

167. *See id.* at 900 n.28. The speech was not recorded, but according to a sheriff who was present, the leader “told the assembled black people that any ‘uncle toms’ who broke the boycott would ‘have their necks broken.’” *Id.*

168. *See id.* at 904-07.

169. *See id.* at 928. Specifically, the Court stated that “the acts of violence . . . occurred weeks or months after the . . . speech.” *Id.*

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

171. One could argue that the imam’s warnings are more closely linked to violence than the Klan leader’s vague threats of “revengeance.” *See Brandenburg*, 395 U.S. at 446. However, subsequent cases before the Court involved speech more extreme than that in *Brandenburg*, speech that the Court nonetheless held to be constitutionally protected. *See STONE*, *supra* note 150, at 62-63 (citing, among other cases, the Supreme Court’s decisions in *Claiborne Hardware*, 458 U.S. at 902 (“If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”), and *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (“We’ll take the fucking street later [or again].”)).

Moreover, the Anti-Glorification of Terrorism Act appears unconstitutional under the *Brandenburg* test. The Act sanctions statements that are “likely to be understood . . . as a direct or indirect encouragement” to terrorist conduct but does not require that the conduct itself is likely to flow from the speech.<sup>172</sup> That is, the Act includes the modifier “likely,” but only in connection with how the speech will be interpreted—there is no requirement that the speech be “likely” to produce any illegal action. A listener may be likely to understand the speech as exhorting him or her to violence without being likely to actually engage in that violence.

The language of section 1(3)(b), “a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances,” suggests a time component.<sup>173</sup> Still, “existing circumstances” is a far cry from the imminency requirement of *Brandenburg*. The time component included in the Anti-Glorification of Terrorism Act suggests that the conduct should occur in contemporaneous circumstances—a potentially long period of time. For example, the hypothetical imam’s statement could be interpreted as urging violence as long as United States forces remain in Iraq, as opposed to violence within the hour. Additionally, even if “existing circumstances” refers to immediate conditions, the Act still lacks a requirement that the immediate violence be likely, as mandated by the *Brandenburg* test.

Finally, even if a listener in the audience at the imam’s speech later committed a suicide bombing similar to the events glorified by the imam, the *Brandenburg* test might preclude application of the Act. The speech could easily be identified as a motivating factor in the bomber’s decision to act. However, a suicide bombing could take weeks and months to plan and commit. Under *Claiborne Hardware*, this period of time may be too great, despite the obvious connections between speech and action.

The present test for advocacy under *Brandenburg* therefore appears to preclude conviction for the imam’s speech. It also appears to invalidate the Anti-Glorification of Terrorism Act under the First Amendment. However, analysis of past cases dealing with advocacy suggests that the Supreme Court could very well uphold the Act and sanction the speech. Two periods in American history are instructive in analyzing how the Court might respond to a statute prohibiting certain

---

172. See Anti-Glorification of Terrorism Act § 1(1), *supra* Part II.E.1 (emphasis added).

173. See Anti-Glorification of Terrorism Act § 1(3)(b), *supra* Part II.E.1.

speech in time of peril: the era of World War I and the Red Scare after World War I and World War II.

#### IV. A LOOK TO THE PAST

American history is rife with periods where the dictates of the Constitution are ignored for the sake of safety and security.<sup>174</sup> The development of free speech jurisprudence confronting language that advocates violence or unlawful acts provides spectacular examples of justices shelving civil liberties to prevent anticipated danger to the people in a time of war or other threat to the integrity of the Nation.<sup>175</sup>

Following this precedent, the Court could find that the danger of terrorism is so substantial that the requirements of *Brandenburg* are not an adequate response to the threat.<sup>176</sup> Even more likely, the Court could employ that precedent, including *Brandenburg*, to find that the perils presented by terrorism permit the government to punish speech that, in another time and under different circumstances, would be protected by the First Amendment.<sup>177</sup> The jurisprudence dealing with language advocating, encouraging, or inciting others to violence or illegal acts demonstrates that, at times of tribulation, the Supreme Court has had little difficulty finding speech with the potential to incite to be punishable by the government<sup>178</sup>—speech strikingly similar to the hypothetical presented in Part II-E-2, and punished under legislation reminiscent of the Terrorism Act 2006. Further, this rich history of judicial responses to perceived danger could easily be used to support a measure as broad as the United Kingdom’s Terrorism Act 2006. As Justice Holmes noted in *Schenk v. United States*, “[w]hen a nation is at war many things that might be said in time of peace are such a hindrance

---

174. See Lasson, *supra* note 5, at 54 (“It is almost axiomatic that the tenor of the times determines the degree of protection of civil liberties.”).

175. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (punishing speech in a time of war).

176. See, e.g., Barnum, *supra* note 139, at 291 (“The dangers posed by advocacy of terrorist violence are real, . . . and the fact that a particular message advocates violence at some unspecified future time should not necessarily exempt it from punishment.”); Lasson, *supra* note 5, at 71 (“The current threat is perhaps more imminent than any other that we have ever had to deal with. The threshold of imminence is lower than ever before.”).

177. See, e.g., Barnum, *supra* note 139, at 290; Lasson, *supra* note 5, at 74 (“Although . . . [*Brandenburg*] gave broad protection to speech, the test it announced could well be interpreted to enable regulation and punishment of incitement emanating from mosques.”).

178. See, e.g., *Schenck*, 249 U.S. 47; see also Barnum, *supra* note 139, at 290 (noting that the “clear and present danger” test enables judges to look to the circumstances and find for the government); Lasson, *supra* note 5, at 63 (noting that the results of applying judicial tests “are decidedly different during wartime and peacetime”).

to its effort that their utterance will not be endured so long as men fight.”<sup>179</sup> If a sufficient number of Justices considered the United States to be at war or presented with similar peril, the Supreme Court might find the hypothetical speech punishable and the Anti-Glorification of Terrorism Act presented in Part II-E-1 constitutional.<sup>180</sup>

A. *Wartime Circumstances: Principles from World War I*

The cases arising in the context of World War I demonstrate that the scope of the First Amendment’s guarantee of free speech is particularly limited in times of war.<sup>181</sup> As such, this jurisprudence is instructive, because it constitutes a possible source for the Supreme Court to uphold the hypothetical glorification provision and the radical imam’s conviction. If the Court were to accept that the war on terror constitutes an actual war, especially in light of renewed terrorist attacks in America, the cases from World War I could be used to support the government’s ability to prosecute speech under the Anti-Glorification of Terrorism Act.

Free speech cases from the first several decades of the twentieth century illustrate how the perception of national peril can lead to curtailed civil liberties. These cases present an image of the United States under siege. The language of the decisions demonstrates concern that the conduct of anarchists, socialists, and citizens opposed to World War I would touch off violence and revolution on a massive scale. After an advocate, or perceived advocate, for revolution or an end to the war raised the issue that his or her speech should be protected under the First Amendment, states and federal courts alike were quick to point out that the protections of the First Amendment are not unlimited.<sup>182</sup> Other jurists went even further, declaring attempts to use freedom of speech as a defense to government sanction in such instances to be an abuse of the Constitution itself.<sup>183</sup> As the Supreme Court noted in *Gilbert v.*

---

179. *Schenck*, 249 U.S. at 52.

180. My eternal thanks to Professor Larry Cata Backer, who in Constitutional Law pointed out that the definitive interpretation of the law is what five Justices say it is, at the time they say it.

181. *See, e.g., supra* text accompanying note 179.

182. *See, e.g.,* *Whitney v. California*, 274 U.S. 357, 371 (1927); *Schaefer v. United States*, 251 U.S. 466, 474 (1920); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919). *But see* *Patterson v. Colorado*, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting) (arguing that the rights of free speech and a free press were constitutional privileges which “neither Congress nor any State . . . can, by legislative enactments or by judicial action, impair or abridge”).

183. *See, e.g.,* *Gilbert v. Minnesota*, 254 U.S. 325, 332-33 (1920) (noting that advocacy cases presented “the curious spectacle . . . of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself”).

*Minnesota*, “[i]t would be a travesty on the constitutional privilege [the defendant invoked] to assign him its protection.”<sup>184</sup>

### 1. Key Cases from the Era of World War I

Although the cases from the era of World War I did not arise under the *Brandenburg* formulation of free speech, they provide useful lessons. They serve as a window into how the Court might respond to speech amidst public perceptions that the Nation and its values are under attack. Specifically, these cases demonstrate that the Court had little problem upholding legislation that severely curtailed the freedom of speech in time of war.

In *Schaffer v. United States*,<sup>185</sup> the Ninth Circuit Court of Appeals held that the test for language inciting disloyalty or violation of the law was “whether the natural and probable tendency and effect” of the words might produce an evil Congress sought to prevent.<sup>186</sup> The defendant in *Schaffer* had been convicted under the Espionage Act of 1917, a statute criminalizing speech or prose that could lead to disloyalty, mutiny, or refusal of service in the military or naval forces, or lead to obstruction of the government’s attempts to recruit for the war.<sup>187</sup> Schaffer’s violation consisted of mailing a book that presented anti-war opinions.<sup>188</sup>

In upholding his conviction, the court asked “whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by the statute.”<sup>189</sup> In its analysis, the court stated that even if the speech in question did not mention recruitment or enlistment, it could still run the risk of obstructing the government’s war efforts.<sup>190</sup> A text that attacked the “justice of the cause for which the war is waged” might so undermine loyalty that it would dissuade Americans from joining the fight.<sup>191</sup> Thus, while *Shaffer* presents an early iteration of the incitement test, the case also provides the lesson that a court may draw rather liberal inferences about the effect speech will have on its listeners.

---

184. *Id.* at 333.

185. *Shaffer v. United States*, 255 F. 886 (9th Cir. 1919).

186. *Id.* at 887.

187. *See id.* at 887-88.

188. Schaffer’s argument, as described by the court, was that the book contained “the opinion of the author that patriotism is identical with murder and the spirit of the devil, that war is a crime, and the argument that it was yet to be proved whether Germany had any intention or desire of attacking the United States.” *See id.* at 887.

189. *See id.*

190. *Id.* at 888.

191. *Id.*

In *Schenck v. United States*,<sup>192</sup> the Supreme Court proposed a more developed test for incitement, one which demonstrates that the circumstances in which a speech is made may drive the Court's decision.<sup>193</sup> The defendants in *Schenck* were members of the Socialist Party who had printed and distributed to future military service members a document equating military conscripts to slaves and suggesting that the United States had entered the war for the economic gain "of Wall Street's chosen few."<sup>194</sup> They were convicted under the Espionage Act for "causing and attempting to cause insubordination, &c., in the military and naval forces of the United States and . . . obstruct[ing] the recruiting and enlistment service of the United States when the United States was at war with the German Empire."<sup>195</sup>

Justice Holmes, writing for the Court, stated that the question to be asked is whether the nature of the speech and the circumstances in which it is delivered will create "a clear and present danger" that an evil Congress sought to prevent will arise.<sup>196</sup> Upholding the convictions of the defendants, Holmes noted that "in ordinary times" such language might be protected.<sup>197</sup> However, the circumstances of war led to the conclusion that the speech's effect would be the obstruction of the war effort—the very "evil" Congress sought to prevent.<sup>198</sup>

In *Frohwerk v. United States*,<sup>199</sup> the Supreme Court once again pointed to wartime circumstances and upheld the conviction of the publisher of a German newspaper in Missouri under the Espionage Act.<sup>200</sup> The speech in question praised the spirit and strength of Germany and the Central Powers, argued that economic interests and the influence of England directed America's intervention in the war, and decried the draft.<sup>201</sup> The Court noted that the publisher made no specific effort to reach Americans subject to the draft, but nevertheless suggested that the circumstances created by war permitted the criminalization of the

---

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

193. *See, e.g., id.* at 52 ("[T]he character of every act depends upon the circumstances in which it is done.").

194. *Id.* at 50-52.

195. *Id.* at 49.

196. *Id.* at 52.

197. *Id.* at 51-52.

198. *See, e.g., id.*

199. 249 U.S. 204 (1919).

200. *Id.* at 205, 208-09, 210. *Frohwerk* did not explicitly rely upon the clear and present danger test articulated in *Schenck*, but the Court nevertheless cited the earlier opinion in its reasoning. *See id.* at 206.

201. *Id.* at 207-08. In language reminiscent of the hypothetical imam's speech, the defendant characterized his praise for Germany as, in Holmes' words, a "warning to the American people." *Id.* at 207.

speech.<sup>202</sup> In the view of the Court, the defendant had circulated the paper “in quarters where a little breath would be enough to kindle a flame,” and as such could be punished for his speech.<sup>203</sup>

Using *Schenck* and *Frohwerk* for support, the Supreme Court upheld a state version of the Espionage Act in *Gilbert v. Minnesota*.<sup>204</sup> Gilbert had been charged for making a speech that questioned whether the President or Governor had been democratically elected, whether the decision to enter the war had been made by the people, and the reasons the United States entered the war.<sup>205</sup> The Court again reasoned that the “condition of war and its emergency” permitted conviction under the statute for the defendant.<sup>206</sup> The Court even went so far as to construe Gilbert’s reliance on the First Amendment as an affront to the Constitution, stating that “It would be a travesty on the constitutional privilege [the defendant] invokes to assign him its protection.”<sup>207</sup>

*Debs v. United States*,<sup>208</sup> decided in the same year as *Schenck* and *Frohwerk*, provides a particularly useful comparison to the prosecution of the hypothetical imam. In *Debs*, the Court upheld the conviction of Socialist Party leader and anti-war activist Eugene Debs under the Espionage Act.<sup>209</sup> Debs had publicly praised five individuals convicted for helping others avoid draft registration or for otherwise obstructing recruitment for the war.<sup>210</sup> In the words of the Court, Debs had stated that these “most loyal comrades” were “paying the penalty for standing erect and seeking to pave the way to better conditions for all mankind.”<sup>211</sup> Debs went on to question the justifications for the war and to suggest that the workers of the United States should have no interest in

---

202. *Id.* at 208-09. While the Court did state that such language could be permissible even in time of war, the Nation did not “lose [its] right to condemn either measures or men because the Country is at war.” *Id.* at 208.

203. *Id.* at 209.

204. 254 U.S. 325, 332 (1920). The statute criminalized action “interfere[ing] with or discourag[ing] the enlistment of men in the military or naval forces of the United States or of the State of Minnesota” through speech or print. *Id.* at 326-27.

205. *See id.* at 327 (“Have you had anything to say as to whether we would go into this war? You know you have not. If this is such a great democracy, for Heaven’s sake why should we not vote on conscription of men. [sic] We were stampeded into this war by newspaper rot to pull England’s chestnuts out of the fire for her.”)

206. *Id.* at 327, 333.

207. *Id.* at 333.

208. *Debs v. United States*, 249 U.S. 211 (1919).

209. *See generally Debs*, 249 U.S. 211; *see also* Barnum, *supra* note 139, at 273.

210. *See Debs*, 249 U.S. at 213-14.

211. *Id.* at 213.

its prosecution.<sup>212</sup> Relying on *Schenck*, the Court quickly disposed of Debs' freedom of speech defense under the First Amendment.<sup>213</sup>

Next, the Court focused on the question of whether the lower court had properly admitted into evidence the convictions of the individuals Debs' had glorified.<sup>214</sup> Affirming that decision, the Court reasoned that the grounds for the convictions of these individuals were important to show the message Debs intended to convey through his praise, that is, "to explain the true import of his expression of sympathy and to throw light on the intent of the address."<sup>215</sup>

Notably, the decision, written by Justice Holmes, never mentions the clear and present danger test, relying instead upon the natural tendency and reasonably probable effect of the speech.<sup>216</sup> *Debs* therefore demonstrates the capacity of the Court to largely ignore the prevailing constitutional test and rely instead on the circumstances in which a speech is delivered.<sup>217</sup>

While *Schenck* and its progeny predate *Brandenburg*, the reliance upon circumstances in these earlier cases provides an important lesson. In most of the *Schenck* line of cases, the Court relied a great deal upon the context or circumstances in which a speech is made—specifically, the circumstances inherent in a time of war.<sup>218</sup> The ability of Justices to focus on external facts to determine whether speech constitutes a danger to society suggests that a Justice may very well consider the times, rather than the jurisprudential test to be applied, when deciding whether or not the government may punish a speaker for advocacy. As one commentator has noted, even where the Court ostensibly applied the clear and present danger test, its application may not have been stringent,<sup>219</sup> with the Court instead largely relying upon the presence of a

---

212. *Id.* at 213-14.

213. *See id.* at 214-15 (noting that the jury could find "that one purpose of the speech, whether incidental or not does not matter, 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").

214. *See id.* at 215.

215. *Id.*

216. *See id.* at 216; *see also* Barnum, *supra* note 139, at 273-74. *But see* *Dennis v. United States*, 341 U.S. 494, 505 (1951) (plurality opinion) (including *Frohwerk* in the line of cases applying the clear and present danger test).

217. Justice Vinson noted in *Dennis v. United States* that "neither Justice Holmes nor Justice Brandeis ever envisioned that a shorthand phrase should be crystallized into a rigid rule to be applied inflexibly without regard to the circumstances of each case." *Dennis*, 341 U.S. at 508 (plurality opinion) (citing *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 412 (1950)).

218. Professor David Barnum came to a similar conclusion about wartime circumstances. *See* Barnum, *supra* note 139, at 273.

219. *See id.* at 272-73.

war.<sup>220</sup> Ultimately, “[j]udicial predictions about whether speech will create a particular danger are by definition arbitrary.”<sup>221</sup> The leeway to find speech an incitement to some dangerous or illegal act will be especially conducive to the Court upholding convictions during “war or other emergencies.”<sup>222</sup>

## 2. Application of the Principle

If the government should proclaim that a recent terrorist attack creates a war-like environment, the judiciary may very well be responsive to that assessment. Applying the principle extracted above, that the Court will focus on the circumstances of war more than on the contemporary jurisprudential test, the hypothetical imam’s conviction could very well stand and the Anti-Glorification of Terrorism Act could survive review under the First Amendment.

### a. A Nation at War

The present situation with respect to the fight against al-Qaeda and other proponents of terrorism is not identical to the circumstances present during World War I. There has been no formal declaration of war passed by Congress to initiate America’s involvement in the current crisis, nor a draft to wage that battle. Nevertheless, events since 2001 support claims that the current situation in the world and the Nation is akin to wartime. The PATRIOT Act, wars in Afghanistan and Iraq, and the detention of United States citizens evince the feeling that a conflict is at hand. Such

---

220. *See id.* The Justices of the Supreme Court were not the only government figures to be swayed by the circumstances of war, or to return to a more measured attitude after hostilities ended. Early 20th Century political reporter H.L. Mencken alluded to the change in the Nation’s attitude after the war, noting that Debs’ crime “ceased to be a crime at all long before his prison sentence was completed. Today anyone might commit it with absolute impunity. In large part, in fact, it has been committed over and over again by statesmen at the Disarmament Conference, and even by [President] Harding himself.” H.L. MENCKEN, *Who’s Loony Now?*, in *ON POLITICS: A CARNIVAL OF BUNCOMBE* 50, 52 (Malcolm Moos ed., 1956). In 1921, President Warren Harding pardoned Debs and commuted his sentence. *See* MENCKEN, *supra*, at 50; STONE, *supra* note 150, at 29. Yet Mencken noted that not all were in favor of the pardon. Opposition came from the *New York Times*, the Rotary Club, and the American Legion. *See* MENCKEN *supra*, at 51. Additionally, while Harding and Attorney General Harry M. Daugherty released Debs, they did so “grudgingly, boorishly, with ill grace. As a final touch, they managed to make it impossible for him to get home for his Christmas dinner.” *See id.* at 53.

221. Barnum, *supra* note 139, at 272. Barnum further explains that “[p]ermitt[ing] judges to take into account the circumstances in which antigovernment speech occurs will provide them with an opportunity to uphold the punishment of speech whose content does not come close to constituting ‘direct incitement.’” *Id.* at 273.

222. *See id.* at 273.

sentiment would certainly be heightened by a further attack on American soil. Indeed, the former administration repeatedly made claims that the Nation is already engaged in a war on terrorism,<sup>223</sup> and further attacks would likely bolster support for that claim.

The Court might find statements from the executive and legislative branches posing the argument that the Nation is at war to be persuasive, even in the absence of a formal declaration of war.<sup>224</sup> In such conditions, the Court could invoke cases such as *Schenck* and *Frohwerk* to demonstrate that wartime circumstances justify the incarceration of a speaker who praises the acts of the enemy. The Court may find that such a speech, delivered to a receptive audience, might constitute advocacy made in circumstances where “a little breath would be enough to kindle a flame,”<sup>225</sup> and thus pose a significant danger. In these conditions, legislation as broad as the hypothetical Anti-Glorification of Terrorism Act could stand.

Certainly, the hypothetical imam’s statements differ from those of the defendants in the cases of World War I, insofar as he does not advocate the obstruction of the recruitment process needed to conduct the war.<sup>226</sup> As such, he does not directly counsel listeners to hinder the war effort. But the defendants in the cases arising during World War I were not always punished solely for direct advocacy to draft resistance. Instead, the Court found their comments questioning the war or praising the enemy just as dangerous as opposition to the draft.<sup>227</sup> Like the

---

223. See, e.g., President George W. Bush, State of the Union Address (Jan. 29, 2002), in N.Y. TIMES, Jan. 30, 2002, at A22 (“As we gather tonight, our nation is at war. . . .”); President George W. Bush, State of the Union Address (Jan. 20, 2004), in N.Y. TIMES, Jan. 21, 2004, at A18 (“As we gather tonight, hundreds of thousands of American service men and women are deployed across the world in the war on terror.”).

224. In *Pierce v. United States*, the defendant, a Socialist, had argued that America entered the war for commercial reasons, rather than for “the rights of small nations.” *Pierce v. United States*, 252 U.S. 239, 246-47 (1920). The Court relied upon “common knowledge,” an address by President Wilson to Congress, and a Joint Resolution declaring war to find that his theory was false. *Id.* at 251. Applying this principle, the Court today might take notice of statements by President Bush declaring the Nation to be engaged in a war. See, e.g., President George W. Bush, State of the Union Address (Jan. 20, 2004), *supra* note 223 (“I know some people question if America is really in a war at all. . . . [On September 11, 2001 t]he terrorists and their supporters declared war on the United States and war is what they got.”).

225. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919).

226. Contrast with this the aims of the speeches found in *Schenck*, *Schenck v. United States*, 249 U.S. 47, 49-51 (1919), and *Frohwerk*, 249 U.S. at 207-08.

227. See, e.g., *Frohwerk*, 249 U.S. at 207 (noting the defendant’s opposition to sending soldiers to France, his questioning of the motives for the war, and his praise for the strength of the German nation); cf. *Abrams v. United States*, 250 U.S. 616, 619-22 (1919) (declaring that the defendant’s invectives against President Wilson and calls for industrial strike served the purpose of defeating the war plans of the United States).

defendant in *Frohwerk*, the imam has praised the enemy.<sup>228</sup> Like the defendant in *Schenck*, he has called for the removal of American troops from theatres of operation.<sup>229</sup> If such statements once constituted an inherently dangerous display of disloyalty in a time of war,<sup>230</sup> the present Court could conceivably find the same is true of similar statements arising during the war on terror. An attack on the United States itself, an event unparalleled in the course of World War I, could only bolster the finding that the circumstances are so dire that they require the punishment of certain speech.

b. Unique Precedent: *Debs v. United States*

As mentioned above,<sup>231</sup> *Debs v. United States* provides an excellent parallel to the hypothetical at hand, and thus warrants separate discussion. In *Debs*, the Court apparently viewed the circumstances of war as so dire that not only could the government convict individuals who hindered the draft effort, but it could take action against those who vocalized their support for these individuals.<sup>232</sup> Moreover, in arriving at this conclusion, the Court took as evidence not only Debs' speech, but also the convictions of those he praised, to better demonstrate Debs' illegal and dangerous intent in delivering the praise.<sup>233</sup> Thus, when analyzing the hypothetical imam's speech, a court may admit as evidence not only his words of glorification, but also the acts of those he glorifies. This increases the probability that section (3)(b) of the Anti-Glorification of Terrorism Act will be fulfilled. That is, by admitting evidence of the acts of those praised, a court creates a strong link between the glorification of the individuals and the acts they committed. It follows that a reasonable person is therefore more likely to infer that what is being glorified is not just the actor (here, a suicide bomber), but his conduct as well.<sup>234</sup>

---

228. See *Frohwerk*, 249 U.S. at 207.

229. See *Schenck*, 249 U.S. at 51 (noting the defendant's claim that the government did not have the power to send its citizens abroad to fight).

230. See, e.g., *Shaffer v. United States*, 255 F. 886, 887-88 (9th Cir. 1919) (noting that the defendant had undermined the spirit of loyalty with his excoriations of patriotism and arguments that there was no proof Germany had any intention or desire to attack the United States).

231. See *supra* Part IV.A.1.

232. See *Debs v. United States*, 249 U.S. 211, 213-15 (1919).

233. See *id.* at 215.

234. The admission of this evidence may further facilitate the imam's conviction in two ways. First, a jury, hearing and seeing evidence of the devastating terror attack, may be more likely to convict. Second, the strong link between the praise and the acts of those praised may increase the danger of the advocacy in the eyes of the judge, jury, or Supreme Court on review.

*Debs* is also important in that it sets a precedent of proportionality. Debs was convicted for glorifying war obstructionists, an act held to pose the danger of inciting others to similar conduct.<sup>235</sup> Since the act of mass murder involved in a suicide bombing is arguably many times more serious than aiding another to avoid draft registration, the Court may find *Debs* persuasive. If praise for draft obstructionists constitutes punishable advocacy in a time of war, praising suicide bombers—the enemy itself—as “martyrs” might make the imam even more guilty than Debs.

There are, of course, a number of dissimilarities between the present hypothetical and the circumstances surrounding the criminal actions in *Debs*. First, Debs’ speech involved more than just glorification; he also spoke of the growth of Socialism and mocked aspects of the war effort unrelated to recruitment.<sup>236</sup> Second, Eugene Debs enjoyed a prominent and influential role in America as leader of the Socialist Party and as a notable member of the anti-war movement.<sup>237</sup> Debs also ran for President of the United States on the Socialist Party ticket multiple times,<sup>238</sup> including the 1920 election season, during which he was incarcerated.<sup>239</sup> If the prominence of the speaker has any relation to the magnitude of the danger arising from his or her statements, Debs’ role as a national political figure might have caused his statements to be more dangerous to the war effort than those of the average speaker. Third, in addition to praising the obstructionists, Debs avowed even greater support for their cause, stating outright that if they were guilty, he was too.<sup>240</sup> The hypothetical imam, of course, could not claim that he was guilty of a suicide attack.

Yet these distinctions may not sufficiently distance the circumstances in *Debs* from those presented here. First, Debs’ statements demonstrated a lack of support for the war effort;<sup>241</sup> by contrast, the imam’s glorification of suicide bombers could be construed as demonstrating direct support for the enemy. There is certainly a

---

235. See *Debs*, 249 U.S. at 212, 213, 216.

236. See *id.* at 213-15 (noting Debs’ “sneers at the advice to cultivate war gardens”).

237. See Barnum, *supra* note 139, at 273.

238. See ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 216 (1987). Cox noted that Debs’ popularity at the turn of the Century led to an increase in the Socialist vote “from a hundred thousand in 1900 to a million in 1912, 6 percent of the votes cast.” *Id.*

239. See STONE, *supra* note 150, at 29. The fact that Debs received nearly one million votes while campaigning from prison is a testament to his prominence.

240. See *Debs*, 249 U.S. at 214. Debs went even further, admitting to the jury that he had obstructed the war. *Id.* It should be noted, however, that this statement appears in the context of his opposition to war in general. See *id.* (“I have been accused of obstructing the war. I admit it. Gentlemen, I abhor war. I would oppose the war if I stood alone.”).

241. *Id.* at 213-15.

distinction to be made between withholding one's support for the war and actively engaging in it as an enemy combatant. Second, while the hypothetical imam is not a national leader, one possible conclusion to be drawn from the British press is that incendiary statements made by radical preachers are conducive to an increase in celebrity.<sup>242</sup> Furthermore, although the imam's message might reach fewer listeners than a speech delivered by Eugene Debs, and would be far less well-received than a message of opposition to a draft,<sup>243</sup> one could reasonably argue that the threat posed by acts of terrorism is greater than that posed by opposition to war. The message of the radical imam need only reach the ears of one receptive listener to cause devastation to the Nation and the war effort; Debs would have needed a greater flock to cause a true disruption. Justices might be persuaded by a comparison of the potential effects of the two speeches and, drawing a parallel to the earlier case, view the statements of the imam to be vastly more dangerous than any made by Debs. At the extreme, the effect of Debs' speech would be the disruption of the war effort, while the effect of the imam's speech would be the death of civilians and economic turmoil. The facts alone would arguably enable the Court to distinguish *Debs* while upholding the rule of that case, thereby ensuring the constitutionality of the Anti-Glorification of Terrorism Act and the imam's conviction under it.

c. Summarizing the Lessons from World War I

In short, the free speech cases arising under World War I demonstrate the principle that, when faced with dangerous circumstances, the Supreme Court may accede to the curtailment of freedom of speech, through the punishment of advocacy, in the name of national security. Specifically, these cases suggest that members of the Court may accept the view that the presence of war is itself an inherently dangerous circumstance,<sup>244</sup> in the face of which the government may act to punish speech that poses a threat to the war effort—or to the very

---

242. See, e.g., Wright, *Preacher of hate 'who praised 7/7 bombers' is arrested*, *supra* note 127, at 5 (“Izzadeen came to prominence after refusing to condemn the 7/7 bombings.”).

243. See, e.g., Megan Thee, *Support in U.S. for Initial Invasion in Iraq Has Risen, a Poll Shows*, N.Y. TIMES, July 24, 2007, at A11 (noting that two-thirds of Americans in a national poll favored reducing troop levels in Iraq or withdrawing them altogether). Naturally, being in favor of reduced troop levels in a particularly controversial conflict is not inherently an indication of opposition to war. Still, the point remains that one is likely to find that more Americans oppose war than adhere to the philosophy of the suicide bomber.

244. See *Abrams v. United States*, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting) (“[W]ar opens dangers that do not exist at other times.”).

integrity of the Nation.<sup>245</sup> And while the cases from this era propose several tests to assess the danger innate in the language of advocacy and determine whether or not it may be sanctioned,<sup>246</sup> they also demonstrate a willingness to ignore or alter those tests to meet the circumstances at hand.<sup>247</sup> Following the rationale—if not the holding—from these cases, the Court could conceivably find reason to uphold the Anti-Glorification of Terrorism Act and the imam’s conviction under it.

The circumstances intrinsic to a war or quasi-war involving assaults on American soil are arguably more dangerous than those of World War I, a conflict waged half a world away. Further, if speech that advocated a disruption to the war effort fell within the purview of dangerous advocacy under the circumstances of World War I, a sufficient number of Justices might be persuaded to find danger in speech that even implicitly or indirectly threatens further attacks within America. Finally, as a more specific example of this principle, if praise for those who participated in the opposition to the war effort in World War I amounted to disloyalty and dangerous advocacy, at least five Justices could conceivably find that praise for the perpetrators of domestic terrorism constituted a perilous invitation to further attack. If so, the Anti-Glorification of Terrorism Act and the hypothetical imam’s conviction could withstand an attack under the First Amendment.

As a final note, if Justices were receptive to these arguments, the Court might find the speech capable of sanction even under *Brandenburg*. That is, the cases above used different standards than the *Brandenburg* imminent and likely danger test to assess whether the government could criminalize speech advocating violent or lawless action.<sup>248</sup> By the same token, these cases demonstrate that the Court has once before deemed the circumstances of war to pose severe dangers.<sup>249</sup>

---

245. See *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”).

246. See, e.g., *Schenck*, 249 U.S. at 47 (proffering the “clear and present danger” test); *Shaffer v. United States*, 255 F. 886, 887 (9th Cir. 1919) (applying the “natural and probable tendency and effect” test).

247. See *Barnum*, *supra* note 139, at 272-73 (noting that Holmes did not apply his clear and present danger test to *Debs*, which came only a week after *Schenck*). *Barnum* notes that the invitation to focus on the circumstances in which speech is delivered, in addition to the nature of the speech itself, provides judges with the ability to uphold the punishment of speech that does not approach direct incitement. *Id.* at 273.

248. Compare *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969), with *Schenck*, 249 U.S. at 47 (proffering the “clear and present danger” test), and *Shaffer*, 255 F. at 887 (applying the “natural and probable tendency and effect” test).

249. See cases cited *supra* Part IV.A.1.

The government might successfully suggest to the Court that war itself presents the requisite imminent danger.

*B. An Unprecedented Threat: Principles from the Communist Era*

Given the focus on wartime circumstances to justify the convictions for advocacy to illegal action during World War I, one would expect the Court to have returned to greater freedom of speech after the cessation of hostilities in 1918. But in the years between the first and second world wars, Americans perceived a new source of danger to the integrity of the Nation and its values—the Communist movement.<sup>250</sup>

The view that Communism presented unique perils and the threat of an imminent violent revolution in the early- and mid-twentieth century is now largely regarded as a bizarre and unfounded fear.<sup>251</sup> Nevertheless, the belief that the Communist movement constituted a profound threat, arising from both foreign and domestic sources, held great sway at the conclusion of the first and second world wars.<sup>252</sup> This fear may have emanated from the 1917 Bolshevik Revolution in Russia, social unrest within the Nation, and the rise of Communist governments abroad.<sup>253</sup> Fear of Communism produced organizations and government officials within the United States devoted to finding Communist infiltrators in American life, the expulsion of political leaders for their affiliation with the Socialist Party, and the enactment of statutes targeting Communists throughout the country.<sup>254</sup> The prevailing sentiment espoused by many

---

250. Archibald Cox noted that “[i]n the 1920s the excesses of wartime patriotism yielded to the ‘Red scare.’ Criminal prosecution of alleged Communists and anarchists for conspiring to overthrow the government by force and violence replaced the prosecution of Socialist critics of the war.” COX, *supra* note 238, at 220. On the growth of the Communist movement, the perception of its threat, and the anti-communist response, see generally William M. Wiecek, *The Legal Foundations of Domestic Anticommunism: The Background of Dennis v. United States*, 2001 SUP. CT. REV. 375 (2001).

251. See generally Patricia Leigh Brown, *Armageddon Again: Fear in the 50’s and Now*, N.Y. TIMES, Dec. 23, 2001, § 4, at 10. Brown notes, for example, that “[i]maginings of doom and suspicions that the neighbors could be Commies led to some seriously strange ideas.” *Id.*

252. See, e.g., Wiecek, *supra* note 250, at 377-78 (discussing fears of Communism).

253. See *id.* at 387-89 (pointing to “a greater sense of urgency” to the suppression of dissent in the United States after the Bolshevik Revolution, arguing that the country seemed “vulnerable” to the rise of Communist governments in Europe).

254. See *id.* at 388-89. Wiecek notes that in 1919 alone, twenty-six states enacted red flag laws, *id.* at 389, statutes that prohibited the display of a red flag with a seditious intent, STONE, *supra* note 150, at 35 (citing ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 141-68 (1941)). Cox points to State legislation requiring loyalty oaths from teachers, “[a] pervasive fear of being charged as ‘soft on Communists’” in even liberal organizations, and “equally widespread fear of the taint of association.” COX, *supra* note 238, at 222.

in the Nation was that Moscow directly controlled political organizations such as the Communist Party of the United States.<sup>255</sup> In the years before and after World War II, the legislative branch of government passed a bevy of legislation aimed at the threat of Communism, including the formation of the Special Committee on Un-American Activities, the reenactment of the Espionage Act, and the enactment of the Smith Act, which was “the first peacetime federal sedition act in American history.”<sup>256</sup> Given the trepidation that permeated the Nation with respect to the Communist movement, it is not surprising that the judiciary fell prey to the same fears.<sup>257</sup> In the words of one commentator, “[t]he Justices of the Supreme Court were not exempt from the fears and beliefs of other Americans. If anything, they were more forward than others in cultivating those beliefs and enforcing their consequences.”<sup>258</sup>

Accordingly, analysis of the advocacy cases arising during this period demonstrates two important lessons.

First, even in the absence of war, the government, the public, and the Court may perceive certain threats to be so great as to constitute an inherent danger to the existence of the Nation, and advocacy pertaining to that threat may be punished as a consequence.<sup>259</sup> The general tone of

---

255. See COX, *supra* note 238, at 222 (noting that the Communist Party was believed to be the agent of a Communist conspiracy); Wiecek, *supra* note 250, at 388. Cox further notes that Communists “were widely believed to have infiltrated government agencies,” including the State Department, Treasury Department, and National Labor Relations Board, as well as academia, labor unions, and the film industry. See COX, *supra* note 238, at 222.

256. Wiecek, *supra* note 250, at 398, 401; see also *Dennis v. United States*, 341 U.S. 494, 551 n.15 (1951) (Frankfurter, J., concurring) (listing numerous statutes passed from 1919 to 1950 that demonstrate Congress’ intent to stymie advocacy of overthrow by Communists and other groups); COX, *supra* note 238, at 222 (discussing the Taft-Hartley Act of 1947, which denied labor unions the right to participate in key processes unless their officers and those of any international affiliates filed affidavits “denying membership in the Communist Party”); STONE, *supra* note 150, at 55-56 (listing other federal legislation enacted after World War II as part of “an intensive campaign against the Communist Party and its adherents”). The Smith Act, 18 U.S.C. § 2385, criminalized knowingly or willfully advocating, abetting, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying the government by force or violence, publishing or disseminating material to that end, and organizing to that end. See *Yates v. United States*, 354 U.S. 298, 302 n.1 (1957). It should be noted that while the legislative history of the Smith Act demonstrates that “concern about communism was a strong factor leading to [the] legislation,” Congress nevertheless intended the Act to apply to a variety of groups. *Yates*, 354 U.S. at 307.

257. Archibald Cox said of the Supreme Court’s various opinions in *Dennis v. United States*, “I am left with the feeling that differences of temperament, broad impressions concerning the forces at work in the country and the world, and inarticulate hopes and fears played larger parts in these conflicting judgments than hard-headed factual analysis.” COX, *supra* note 238, at 224.

258. Wiecek, *supra* note 250, at 379.

259. See discussion *infra* Part IV.B.2.

the reasoning in many of the Communist-era cases demonstrates the fear of an international revolutionary movement and its perceived impending success.<sup>260</sup> The threat from Communism, its principles, and the organizations devoted to its success seems almost laughable in hindsight. However, the cases arising under this era demonstrate that even the Justices of the Supreme Court believed the threat credible enough to constrain speech advocating its tenets. As such, these cases demonstrate that even in a time of peace, national and international conditions play a large role when the Court evaluates the language of incitement. Specifically, when the circumstances include a group presumed—by citizens and the government alike—to be capable of violence on a massive scale, the Court may defer to this view and permit the government to constrain speech in anticipation of a threat.

The second principle to be extracted from the advocacy cases of the Communist era is similar to the notion expressed above—that in times of perceived threat to the very existence of the Nation itself, the Court may respond by altering its jurisprudence to curtail the danger. In other words, the advocacy cases from the Communist era, like those from the First World War, show that constitutional tests applied to balance the freedom of speech against the demands of national security may wilt or change under varying circumstances. Under the cases arising during the Communist Era, the Court altered the clear and present danger test to meet perceived conditions in the Nation and the threat of revolution.<sup>261</sup>

#### 1. Key Cases from the Communist Era

Three cases serve as useful demonstrations of these two principles from the Communist era. As with the cases explored in Part IV-A, they were decided well before the Court established the current test from *Brandenburg*. In fact, the Supreme Court expressly overruled one of the Communist Era cases, *Whitney v. California*,<sup>262</sup> in its *Brandenburg* decision.<sup>263</sup> Nevertheless, these three cases serve as profound examples of where the Court has shelved the promise of the First Amendment amidst the perception of great danger to the Nation.

In *Gitlow v. New York*,<sup>264</sup> the Supreme Court upheld the conviction of a member of the Left Wing Section of the Socialist Party for advocating the overthrow of organized government by force.<sup>265</sup> The

---

260. See discussion *infra* Part IV.B.2.

261. See discussion *infra* Part IV.B.3.

262. 274 U.S. 357 (1927).

263. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam).

264. *Gitlow v. New York*, 268 U.S. 652 (1925).

265. *Id.* at 655. The defendant was charged under a New York criminal anarchy statute. See *id.* at 654 n.1.

targeted speech appeared in a manifesto published by the Party with the assistance of the defendant.<sup>266</sup> The manifesto condemned moderate Socialism and argued for the necessity of a “Communist Revolution” through industrial revolts, political strikes, and “revolutionary mass action.”<sup>267</sup> The Court noted the power of a State to punish language that “imperil[s] its own existence as a constitutional State” and deferred to the legislative determination that the type of language prohibited by the criminal anarchy statute used to convict the defendant comprised just such peril.<sup>268</sup> Accordingly, the majority affirmed the conviction and denied a constitutional attack on the statute.<sup>269</sup> The Court reasoned that since the content of the speech fell within the class of language prohibited by the statute as dangerous advocacy, the speech ipso facto constituted advocacy presenting a danger.<sup>270</sup>

In *Whitney v. California*, the Court again deferred to the capacity of a State legislature to determine when language constituted a sufficient danger to the State’s very existence to be, effectively, illegal per se.<sup>271</sup> The *Whitney* Court upheld the conviction of the defendant under California’s criminal syndicalism act<sup>272</sup> for her participation in the formation of an organization allegedly assembled to advocate criminal syndicalism.<sup>273</sup> Specifically, the defendant’s conviction arose from her membership in the Oakland branch of the Socialist Party, which joined the more radical Communist Labor Party of America in 1919.<sup>274</sup> The defendant’s role in the formation of the California branch of the Party included signing a resolution recognizing political action as a means of spreading communist propaganda and calling for the capture of political power by the revolutionary working class.<sup>275</sup> The defendant did not sway the Court with her testimony that she had not intended to participate in

---

266. *Id.* at 655. The defendant served on the board of managers of the *Revolutionary Age*, “the official organ of the Left Wing” section of the Socialist Party. In his capacity as business manager, he “arranged for the printing of the paper and took to the printer” the manuscript of the “Left Wing Manifesto.” *Id.*

267. *Id.* at 656-57.

268. *See id.* at 668-69.

269. *See id.* at 670.

270. *See id.* at 669-70.

271. *See Whitney v. California*, 274 U.S. 357, 371 (1927); Barnum, *supra* note 139, at 275.

272. *See Whitney*, 274 U.S. at 359 (citing Statutes, 1919, c. 188, p. 281).

273. *Whitney*, 274 U.S. at 359-60. H.L. Mencken deemed the California criminal syndicalism act “perhaps the most drastic, cruel, disingenuous and nonsensical statute ever passed in America . . . the foulest blow ever delivered at the Bill of Rights . . . [which would have the effect of] railroading scores of foolish and harmless men and women to prison.” H.L. MENCKEN, *Little Red Ridinghood*, in H.L. MENCKEN ON POLITICS, *supra* note 220, at 232, 235.

274. *Whitney*, 274 U.S. at 363-65.

275. *See id.* at 365 (presenting the text of the resolution).

an organization designed to be an instrument of terrorism or violence.<sup>276</sup> Citing *Gitlow* for support, the majority affirmed the capacity of the State, through its police power, to determine that certain acts or advocacy involve intrinsic danger to public peace and security, and that the judiciary should give such determinations “great weight.”<sup>277</sup>

Between these decisions and *Dennis v. United States*,<sup>278</sup> decided in 1951, was a period during which the Supreme Court reversed convictions under criminal syndicalism statutes.<sup>279</sup> At the conclusion of World War II, however, the national anxiety returned,<sup>280</sup> as did a similar outlook in a majority of the Justices on the Court.<sup>281</sup> The formation of the Iron Curtain, the fall of China, the onset of the Cold War, and the development of an atomic bomb by the Soviets produced concerns about the rise of Communism.<sup>282</sup> Against this backdrop, the government

---

276. *See id.* at 366-68. The Court pointed to the defendant’s membership in the National Party and her acquiescence to its resolution through her continued participation to negate the claim that she could not foresee the character the state organization would adopt. *See id.*

277. *See id.* at 371. The Court further noted the adoption of similar statutes in other states in support of the “wide-spread conviction of the necessity for legislation of this character.” *Id.* at 370-71.

278. 341 U.S. 494 (1951).

279. *See, e.g.,* *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937); *Fiske v. Kansas*, 274 U.S. 380 (1927). These cases contrast remarkably with *Whitney* and *Gitlow*, and correspond with a period in American history where the Communist Party gained some traction. *See* Wiecek, *supra* note 250, at 394-95. Wiecek notes that the Communists benefited from a number of conditions in the United States, including the Great Depression, President Roosevelt’s recognition of the Soviet Union, and the creation of the antifascist Popular Front. *Id.* So, too, the alliance between the United States and the Soviet Union during World War II led to an increase in the activities and membership of the Communist Party. *See id.* at 403; *cf.* Barnum, *supra* note 139, at 276 (suggesting that while the Smith Act’s principle target was the United States Communist Party, the wartime alliance stayed the government’s use of the Act). Cox proffers several factors for the change in attitude, including the suggestion that the New Deal “encouraged the expansion of civil liberties” in the Nation. Ultimately, even during World War II, those who opposed the war “were fewer and fared better” than their World War I predecessors. *See* COX, *supra* note 238, at 221-22.

280. *See* Wiecek, *supra* note 250, at 400 (“After the war, . . . the nation’s very survival seemed to be bound up with the anti-Red struggle, and indifference or detachment became impossible for most people.”); *see also* STONE, *supra* note 150, at 48 (“During the post-World War II ‘cold war’ era, fears over national security again generated wide-ranging federal and state restrictions on ‘radical’ speech.”).

281. *See* Wiecek, *supra* note 250, at 406 (“A majority of the Justices regarded Communists and their Party as *sui generis*, different from other radical groups . . . , uniquely threatening to America’s national security.”).

282. *See id.* at 416-18. As Wiecek aptly describes the situation, “[w]hat Americans called ‘the free world’ was now ranked in hostile array confronting the superior land forces of the Red Army and the bloc nations.” *Id.* at 417. Judge Learned Hand spoke of conditions in the world in his opinion for the Second Circuit in *Dennis v. United States*:

We must not close our eyes to our position in the world at that time [1948]. By far the most powerful of all the European nations had been a convert to

brought charges under the Smith Act<sup>283</sup> against leaders of the Communist Party of the United States.<sup>284</sup>

In the ensuing case, *Dennis v. United States*,<sup>285</sup> Chief Justice Vinson, writing for the plurality, adopted and applied a new version of the clear and present danger test to uphold the convictions of the defendants.<sup>286</sup> The new version of the test came from Judge Learned Hand, who had presided over the case at the appellate level.<sup>287</sup> Hand's test required the Court to inquire "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."<sup>288</sup> Applying this test, the Supreme Court found the Communist leaders guilty of advocating the violent overthrow of the government of the United States.<sup>289</sup>

## 2. Anxiety Over the Threat of Communism

From the language and reasoning employed in the opinions of *Gitlow*, *Whitney*, and *Dennis*, one can perceive that even the Justices of the Supreme Court believed Communism to be a significant threat to the Nation.<sup>290</sup> This aspect of the opinions demonstrates that even when the Country is not embroiled in war, the Court may acquiesce to contemporary concerns regarding international, revolutionary, political movements and respond by punishing advocacy related to those movements. The anxiety can be seen in many of the majority, concurring, and even dissenting opinions from these three cases,

---

Communism for over thirty years. . . . Moreover in most of West Europe there were important political Communist factions, always agitating to increase their power. . . . Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*—such as the Berlin blockade . . .—might prove a spark in the tinder-box, and lead to war.

United States v. Dennis, 183 F.2d 201, 213 (2d Cir. 1950).

283. See *supra* note 256.

284. See STONE, *supra* note 150, at 48; Barnum, *supra* note 139, at 276; Wiecek, *supra* note 250, at 416. The trial took more than nine months and produced an evidentiary record of 16,000 pages. See *Dennis v. United States*, 341 U.S. 494, 497 (1951) (plurality opinion); COX, *supra* note 238, at 222-23.

285. *Dennis*, 341 U.S. 494.

286. See *id.* at 510-11; see also Barnum, *supra* note 139, at 276-77.

287. *Dennis*, 183 F.2d 201; see also *Dennis*, 341 U.S. at 510; Barnum, *supra* note 139, at 277.

288. *Dennis*, 183 F.2d at 212; see also *Dennis*, 341 U.S. at 510 (adopting the Hand test). Hand explicitly withheld a timing requirement from his test, explaining that the test must discount the "improbability" of success rather than the "remoteness" of any action, because "it would be wholly irrational to condone future evils which we should prevent if they were immediate; that could be reconciled only by an indifference to those who come after us." *Dennis*, 183 F.2d at 212.

289. *Dennis*, 341 U.S. at 516-17 (plurality opinion).

290. For an examination of the Supreme Court and the anti-communist movement as background to *Dennis*, see Wiecek, *supra* note 250.

presenting itself in two ways: acceptance of legislative determinations regarding the threat,<sup>291</sup> and anxiety in the very language of the opinion.<sup>292</sup>

a. Deference to Legislative Determinations of the Threat

In *Whitney* and *Gitlow*, the Court relied heavily on the determination of state legislatures that the Communist movement presented a novel and dangerous challenge.<sup>293</sup>

In his opinion for the Court in *Whitney*, for example, Justice Sanford pointed to the growing number of states enacting anti-syndicalism statutes as evidence of the belief that there was a necessity to halt the growth of organizations advocating the use of violent and illegal means to bring about industrial and political change.<sup>294</sup> Even Justices Brandeis and Holmes, who had dissented in *Gitlow*,<sup>295</sup> agreed with the majority in *Whitney* that the defendant's actions presented a danger.<sup>296</sup> While they did not agree that the legislature should have the capacity to make the determination of whether particular language inherently presents a clear and present danger,<sup>297</sup> they agreed nevertheless that the jury could have found that danger did exist under the circumstances of the case.<sup>298</sup>

---

291. See, e.g., *Whitney v. California*, 274 U.S. 357, 371 (1927) (noting that the State had deemed certain advocacy to “involve[ ] such danger to the public peace and security of the State, that these acts should be penalized. . . . That determination must be given great weight”); *Gitlow v. New York*, 268 U.S. 652, 668 (1925) (“By enacting the present statute the State has determined . . . that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized. . . . That determination must be given great weight.”).

292. See, e.g., *Dennis*, 341 U.S. at 510 (plurality opinion) (deeming the Communist movement “an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis”); *Whitney*, 274 U.S. at 370-71 (“That there is a wide-spread conviction of the necessity for legislation of this character is indicated by the adoption of similar statutes in several other States.”); *Whitney*, 274 U.S. at 379 (Brandeis, J., concurring) (“[T]here was testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes.”); *Gitlow*, 268 U.S. at 669 (“A single revolutionary spark may kindle a fire that, smouldering [sic] for a time, may burst into a sweeping and destructive conflagration.”).

293. Wiecek summarizes this facet of the two cases well: “Under the doctrine of *Gitlow v. United States*, when a legislative body makes such a finding, no court may apply the clear-and-present-danger test, being precluded by the legislative declaration itself.” Wiecek, *supra* note 250, at 426 (internal footnotes omitted).

294. See *Whitney*, 274 U.S. at 370-71.

295. *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting).

296. See *Whitney*, 274 U.S. at 378, 380 (Brandeis, J., concurring).

297. See *id.* at 374.

298. See *id.* at 378.

Similarly, Justice Frankfurter's opinion in *Dennis* reflects a willingness to rely on congressional determinations about the threat posed by Communism. Frankfurter concluded that Congress had the primary responsibility for balancing the competing interests of free speech and national security.<sup>299</sup> For support, he enumerated the congressional statutes that he felt demonstrated Congress' determination that Communists and similar groups presented a serious danger through their advocacy of revolution.<sup>300</sup>

b. Anxiety in the Language of the Supreme Court's Opinions

Just as *Debs* uniquely demonstrated principles that might apply to the hypothetical, the Court's opinion in *Dennis* serves as an important lesson in how the Court might share the trepidation of the general public. A majority of the Court, comprised of the plurality and concurring opinions, demonstrated through their very language a concern that the threat of communist revolution presented a danger to the security and very existence of the Nation.<sup>301</sup>

Chief Justice Vinson's description of the Communist Party and the circumstances at hand demonstrate that he perceived the threat from Communism to be severe. From the language used in his plurality opinion, Vinson appears convinced that the defendants and their Party presented a unique challenge to the integrity of the United States. To Vinson, the Party goal of political revolution was a threat regardless of the probability of its success.<sup>302</sup> Distinguishing the circumstances from the "comparatively isolated event[s]" of *Gitlow*, *Fiske*, and *De Jonge*, Vinson stated that the Court in those instances had not been "confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government, in the context of world crisis after crisis."<sup>303</sup> While applying the Hand

---

299. See *Dennis v. United States*, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring).

300. See *id.* at 550-51, 551 n.15.

301. For a presentation of similar expressions of concern from Justices of the era, including those made outside the Court, see Wiecek, *supra* note 250. Wiecek notes that the Court "shared in the nation's mounting anxiety over international crises and believed in the emerging image of domestic Communists. A majority . . . regarded Communists and their Party as sui generis, different from other radical groups like the Klan, uniquely threatening to America's national security." *Id.* at 406.

302. See *Dennis*, 341 U.S. at 509-11 (plurality opinion) ("Certainly an attempt to overthrow the Government by force, even though doomed from the outset . . . is a sufficient evil for Congress to prevent. . . . We must therefore reject the contention that success or probability of success is the criterion.").

303. *Id.* at 510.

variation to the clear and present danger test, Vinson described the circumstances produced by Communism, stating that the formation of a

highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprising in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score.<sup>304</sup>

This description of the threat from Communism seems eerily prescient of the danger that organizations such as al-Qaeda present today.

The language employed by Justice Frankfurter in his concurring opinion similarly suggests that he viewed the threat posed by Communism to be serious and novel. Posing the issue presented by the case as one of striking the appropriate balance between the defendants' right to advocate a political theory and the government's right to safeguard the Nation through a measure like the Smith Act, he noted that "[f]ew questions of comparable import have come before this Court in recent years."<sup>305</sup> While Frankfurter's opinion discussed the origins of the First Amendment and the essential restrictions it places on government,<sup>306</sup> he nonetheless concluded that Congress had the primary responsibility for balancing the competing interests.<sup>307</sup> Frankfurter listed a number of statutes enacted by Congress as a demonstration of that body's determination, "after due deliberation" that advocacy by Communists and other groups to overthrow the government presented a serious danger to the Nation.<sup>308</sup>

Contrasting the circumstances before the Court in *Dennis* with those in *Gitlow*, Justice Frankfurter determined that the legislature had struck the appropriate balance through the Smith Act.<sup>309</sup> In enumerating those circumstances (specifically, the danger posed by the tenets of the Party),

---

304. *Id.* at 510-11. The fact that no revolution actually occurred in the years between 1945 to 1948, the period during which the defendants were active, was irrelevant to Chief Justice Vinson, and "no answer to the fact that there was a group that was ready to make the attempt." *Id.* at 510.

305. *Id.* at 518-19 (Frankfurter, J., concurring).

306. *Id.* at 519-25. Frankfurter noted that the First Amendment's restriction on government "exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are." *Id.* at 520. Given his subsequent deference to Congress with respect to punishment of the speech of advocacy, this statement seems somewhat at odds with the rest of his opinion.

307. *See id.* at 525.

308. *See id.* at 550-51, 551 n.15.

309. *See id.* at 541-42 ("[T]here is ample justification for a legislative judgment that the conspiracy now before us is a substantial threat to national order and security.").

Frankfurter added his own evidence to that found by the jury.<sup>310</sup> This included data on Communist membership from the now-infamous House Un-American Activities Committee, a report of the Canadian Royal Commission appointed to investigate espionage, and an observation of the movement's gains and behavior throughout the world.<sup>311</sup>

Justice Jackson's concurring opinion also demonstrates serious concerns about the threat posed by Communism. Presenting the ethos as something of a graduation from the Anarchist movement, Jackson argued that Communism was "a more sophisticated, dynamic and realistic movement," which through "an aggressive international Communist apparatus . . . has seized control of a dozen other countries."<sup>312</sup> His discussion of the development and goals of the Communist movement presents a sense of imminent danger and the feeling that an attempt to overthrow the government of the United States was almost inevitable.<sup>313</sup>

Jackson stated that, to the Communists, overthrow of a government was to be "the consummation of a long process," anticipated but not acted upon until the time was right.<sup>314</sup> Since revolution was to be the final stage, taken when government response would be too late, he viewed the clear and present danger test as insufficient to counter the threats posed by the Communist movement.<sup>315</sup> Justice Jackson

---

310. *See id.* at 546-48.

311. *Id.*

312. *See id.* at 563 (Jackson, J., concurring). While Jackson at one point identified Communism as "the antithesis of anarchism," *id.* at 563 (citing Beard, *Individualism and Capitalism*, 1 Encyc. Soc. Sci. 145, 158), he nevertheless asserted that many of the more "incendiary radicals" of the Anarchist movement had joined the Communist Party. *See Dennis*, 341 U.S. at 563.

313. *See id.* at 563-66 (describing the goals of the movement, the means it employed, and its impact in nations abroad); *see also id.* at 578-79 ("I have little faith in the long-range effectiveness of this conviction to stop the rise of the Communist movement.").

314. *Id.* at 566.

315. *Id.* at 564-65, 567. Jackson noted that the Communist movement might not even require force and violence, "because infiltration and deception may be enough." *Id.* at 565. This viewpoint seems to directly evoke the quintessential fear of Communism, that proponents of the movement would infiltrate American institutions. On this concern, *see COX, supra* note 238, at 222, and Wiecek, *supra* note 250, at 375. Wiecek notes that Chief Justice Taft even went so far as to suggest that the Supreme Court itself had been infiltrated, and was "determined to stay on the Court as long as possible 'to prevent the Bolsheviks from getting control.'" Wiecek, *supra* note 250, at 393 (citing Taft to Horace Taft, Nov 14, 1929, reel 315, William Howard Taft Papers, LCMss) (internal citation omitted). Wiecek suggests that the "Bolsheviks" to whom Taft referred were Justices Oliver Wendell Holmes, Louis D. Brandeis, and Harlan Fiske Stone. Wiecek, *supra* note 250, at 393. By contrast, Justice Douglas, dissenting in *Dennis*, was far from convinced that Communists had or would infiltrate American industry or government. *See Dennis*, 341 U.S. at 589 (Douglas, J., dissenting).

concluded his concurrence with rather dire doubts that contemporary law could constrain the movement.<sup>316</sup>

While subsequent cases moved away from the perception of Communism as an unparalleled threat,<sup>317</sup> incapable of restriction by the First Amendment jurisprudence of the past, the lesson is an important one. The opinions of the *Dennis* case demonstrate the Court's susceptibility to the fears of the Nation.

### 3. Altering the Test to Meet New Threats

*Gitlow*, *Whitney*, and *Dennis* also demonstrate that in these periods where the members of the Supreme Court echo the sentiments of the Nation as a whole, they may alter existing incarnations of First Amendment jurisprudence to meet the perceived danger.

In *Gitlow*, the majority limited the (ostensibly) reigning clear and present danger test to accommodate legislative determinations that some speech carried with it an innate threat to society.<sup>318</sup> The majority proposed the rule that where a legislature has determined that a certain category of language, in and of itself, constitutes a clear and present danger, a court may not assess whether specific speech that falls within that category is likely to bring about the danger.<sup>319</sup> The language is simply too dangerous, and must be punished.<sup>320</sup> From this class of legislation, the majority distinguished statutes that did not refer to language itself, but rather prohibited certain acts involving substantive danger.<sup>321</sup> Courts were to use the "clear and present danger" and "natural tendency and probable effects" tests to assess the danger presented by advocacy only under these more general statutes.<sup>322</sup> Justices Holmes and Brandeis dissented, arguing that the clear and present danger test should

---

316. See *Dennis*, 341 U.S. at 578-79 (Jackson, J., concurring); see also *supra* note 313 and accompanying text.

317. See, e.g., *Noto v. United States*, 367 U.S. 290 (1961); *Yates v. United States*, 354 U.S. 298 (1957); see also *Barnum*, *supra* note 139, at 277-78.

318. See *Gitlow v. New York*, 268 U.S. 652, 670 (1925).

319. See *id.* at 669-70, ("[W]hen the legislative body has determined generally . . . that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely . . . to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be constitutional and that the use of the language comes within its prohibition."); see also *Dennis*, 341 U.S. at 506 (plurality opinion) (noting that the *Gitlow* majority refused to apply the clear and present danger test to a statute where the "legislature had found that a certain kind of speech was, itself, harmful and unlawful").

320. See *Gitlow*, 268 U.S. at 669-70.

321. See *id.* at 670-71.

322. See *id.*

have been applied, under which the speech in question constituted no present danger.<sup>323</sup>

The Court adhered to the *Gitlow* rule in *Whitney*, supporting the right of the California legislature to categorize certain speech as creating an inherent danger.<sup>324</sup> Because the defendant had participated in the organization of a party with viewpoints banned by the statute, she was guilty—regardless of the peril her conduct actually raised.<sup>325</sup>

The plurality and concurring opinions in *Dennis* similarly demonstrate that contemporary jurisprudence may fluctuate to meet the perceived threat of the day.<sup>326</sup> Chief Justice Vinson noted for the Court in *Dennis* that slavish adherence to the established test would not adequately meet the demands presented by the circumstances of an individual case.<sup>327</sup> This statement hewed closely to Judge Hand's prior statement that the clear and present danger test could not be applied rigidly, but must instead be evaluated in light of the facts before a court.<sup>328</sup> Chief Justice Vinson's rhetoric suggests that he viewed the circumstances before the Court in 1951 as significantly more threatening than those presented in *Gitlow*.<sup>329</sup> Accordingly, Vinson adopted Hand's variation on the clear and present danger test, weighed the seriousness of the circumstances present, and upheld convictions not just for advocacy, but for conspiracy to advocate.<sup>330</sup>

---

323. See *Gitlow*, 268 U.S. at 672-73 (Holmes, J., dissenting). In response to the majority's assertion that the manifesto was an incitement, Holmes responded with language evoking the "marketplace of ideas": "Every idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth." *Id.*

324. See *Whitney v. California*, 274 U.S. 357, 371 (1927).

325. See *id.* at 368, 371; see also *Barnum*, *supra* note 139, at 275.

326. On this theory, see *Barnum*, *supra* note 139, at 277 ("The effect of adoption by the *Dennis* Court of Hand's version of the danger test was to deprive the type of advocacy with which the Communist Party was identified of all constitutional protection.").

327. See *Dennis v. United States*, 341 U.S. 494, 508, 510 (1951) (plurality opinion) ("To those who would paralyze our Government in the face of impending threat by encasing it in a semantic straitjacket we must reply that all concepts are relative.").

328. See *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950) ("[T]he phrase, 'clear and present danger,' is not a slogan or a shibboleth to be applied as though it carried its own meaning; but that it involves in every case a comparison between interests which are to be appraised qualitatively.").

329. See *Dennis*, 341 U.S. at 510 (plurality opinion) (noting that the facts in *Gitlow*, *Fiske*, and *De Jonge* did not rise to the level of the instant case—a nation faced with "the development of an apparatus designed and dedicated to the overthrow of the Government").

330. See *id.* at 511 ("It is the existence of the conspiracy which creates the danger.").

Justice Frankfurter similarly expressed the view that a change in circumstances may necessitate an alteration in tests from the past.<sup>331</sup>

Justice Jackson's view with respect to the clear and present danger standard provides an excellent example of the connections between the perception of a novel and unique threat and the resulting conviction that the established test is simply not an adequate response. Jackson argued that the Communists, unlike the anarchists, did not view violence as a means or an end in itself, but rather "the consummation of a long process."<sup>332</sup> As such, the tactics employed by the movement could not be constrained by the statutes of the anarchist era and the clear and present danger test, which would hinder the government's ability to respond to the threat until it was too late.<sup>333</sup> Indeed, Jackson alleged that the clear and present danger standard even extended immunity to the early, non-violent stages of the Communist revolution.<sup>334</sup> As such, he recommended saving the clear and present danger test as a "rule of reason" for the cases it was designed for,<sup>335</sup> and applying a more realistic approach to the present threat, "a well-organized, nation wide conspiracy."<sup>336</sup>

#### 4. Application of the Communist Era Principles

The standard for evaluating speech that advocates illegal acts or violence has changed.<sup>337</sup> The tests applied above have been altered or repudiated by the Court.<sup>338</sup> Yet, the principles derived from these cases

---

331. *See id.* at 543 (Frankfurter, J., concurring) ("It is a familiar experience in the law that new situations do not fit neatly into legal conceptions that arose under different circumstances to satisfy different needs.").

332. *Id.* at 565 (Jackson, J., concurring).

333. *See id.* at 567-71. Jackson argued that "[t]he authors of the clear and present danger test never applied it to a case like this. . . . If applied as it is proposed here, it means that the Communist plotting is protected during its period of incubation; its preliminary stages of organization and preparation are immune from the law; [and] the Government can move only after imminent action is manifest, when it would, of course, be too late." *Id.* at 570.

334. *See supra* note 333.

335. *See Dennis*, 341 U.S. at 568 (Jackson, J., concurring). Jackson's examples of such cases are those where "the danger . . . has matured by the time of trial or . . . was never present." *Id.*

336. *Id.*

337. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (establishing the current standard that speech can only be punished if it is directed toward and likely to produce imminent lawless action).

338. *See, e.g., id.* at 449 (overruling *Whitney*); *Yates v. United States*, 354 U.S. 298, 321 (1957) (distinguishing *Dennis* as a case concerned with a conspiracy to presently advocate forcible action in the future, rather than a conspiracy to advocate at some future moment); *Dennis*, 341 U.S. at 507 (plurality opinion) (noting that opinions subsequent to *Whitney* and *Gitlow* favored the Holmes-Brandeis standard in those cases). *But see* COX, *supra* note 238, at 226 (pointing out that a *Brandenburg* footnote seems to cite *Dennis*

constitute an important lesson for advocacy cases in the future. Although the Supreme Court eventually returned to a more measured response to the purported threat from Communism,<sup>339</sup> the fact remains that members of the Court, at one time, were every bit as susceptible to anti-communist hysteria as the rest of the Nation, and responded by allowing the government to intensify its punishment of the language of incitement.<sup>340</sup> In short, the threat of Communism in a time of peace produced anxiety in the Court. One might reasonably assume that Justices could respond to homegrown suicide attacks in the United States—and the resulting national fear and anxiety—with a great degree of concern and a willingness to uphold government restrictions on free speech.

a. Anxiety in the Terror Era

American citizens are already frequently reminded about the very real threat of terrorism. Posters in our subways warn us to be on the lookout for suspicious activity.<sup>341</sup> The major news networks bombard us with information when terror alerts arise.<sup>342</sup> The government advises us to take unique and sometimes absurd protective measures.<sup>343</sup> Following another attack on American soil, one can imagine a renewed response at least as profound as that of September 2001. The fear, despondency, and sense of danger could return, and do so reasonably. The anxiety produced by terrorism today draws many parallels to the circumstances

---

“as one of the sources of the rule”); Barnum, *supra* note 139, at 280 (arguing that the *Brandenburg* Court preserved the decision in *Dennis*).

339. See, e.g., *Yates*, 354 U.S. at 327 (acquitting a number of defendants charged under the Smith Act); cf. Barnum, *supra* note 139, at 278 (identifying *Yates* as the first time the Supreme Court had been willing to rebuff governmental efforts to punish advocacy of violence). Cox notes a changed Court attitude outside of advocacy cases as well. See COX, *supra* note 238, at 225 (noting that the Court struck down statutes preventing members of the Communist Party from working in defense facilities, holding office in labor unions, or obtaining passports).

340. See Wiecek, *supra* note 250, at 406 (“Justices differed little from other Americans in their attitudes toward Communism. They shared in the nation’s mounting anxiety over international crises and believed in the emerging image of domestic Communists.”).

341. See, e.g., PATH Safety Poster, [http://www.panynj.gov/CommutingTravel/path/pdfs/TPA\\_G01\\_G6\\_050B.pdf](http://www.panynj.gov/CommutingTravel/path/pdfs/TPA_G01_G6_050B.pdf) (last visited Jan. 25, 2008).

342. See, e.g., Alessandra Stanley, *All Terrorism All the Time: Fear Becomes Reality Show*, N.Y. TIMES, Aug. 12, 2006, at A9 (noting that coverage of terrorism has extended from news programs to prime-time shows and even entertainment news).

343. See, e.g., Jeffrey Selinger, *For Some, the Jitters Help the Bottom Line*, N.Y. TIMES, Feb. 20, 2003, at G5 (noting Homeland Security Secretary Tom Ridge’s recommendation that Americans stock up on duct tape and plastic sheeting after a heightened terrorist alert). While the duct tape example may seem ludicrous, the fact remains that a fair number of Americans responded by flocking to their local hardware stores. See Lynette Clemetson, *Reshaping Message on Terror, Ridge Urges Calm With Caution*, N.Y. TIMES, Feb. 20, 2003, at A1 (noting the buying spree).

and national mood surrounding the Court's decisions in *Gitlow*, *Whitney*, and *Dennis*.<sup>344</sup> As such, it is not unthinkable that the contemporary Court might, intentionally or not, return to those opinions to counter the threat of terrorism.

One need look no further than President Bush's descriptions of the plague of terrorism to find a parallel to the threat of Communism expressed in *Dennis*: expressions of a unique, novel threat;<sup>345</sup> a force opposed to freedom;<sup>346</sup> members controlled by foreign countries;<sup>347</sup> and an international organization devoted to the destruction of democracy.<sup>348</sup> In the Second Circuit's *Dennis* opinion, Judge Learned Hand specifically drew a comparison to the Islamic caliphate, noting that other than Communism, "no such movement in Europe of East to West had arisen since Islam."<sup>349</sup> Hand further invoked a religious lexicon to describe Communism, arguing that the movement

has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed

---

344. For an entertaining comparison of present American life to that during the Cold War, as well as examples of the extent to which the threat of terrorism permeates our lives, see Patricia Leigh Brown, *Armageddon Again: Fear in the 50's and Now*, N.Y. TIMES, Dec. 23, 2001, § 4, at 10.

345. Compare *Dennis v. United States*, 341 U.S. 494, 510 (1951) (plurality opinion) (suggesting Justices Holmes and Brandeis, when they dissented in *Gitlow*, were not faced with circumstances like those in *Dennis*), with President George W. Bush, State of the Union Address (Jan. 29, 2002), *supra* note 223 ("[T]he civilized world faces unprecedented dangers.").

346. Compare *Dennis*, 341 U.S. at 566 (Jackson, J., concurring) (noting how the Communist Party in Czechoslovakia took power, established an oppressive reign, and denied its people certain freedoms), with President George W. Bush, Address on Terrorism Before a Joint Meeting of Congress (Sept. 20, 2001), in N.Y. TIMES, Sept. 21, 2001, at B4 ("They hate what they see right here . . . , a democratically elected government. . . . They hate our freedoms. . . .").

347. Compare *Dennis*, 341 U.S. at 511 (plurality opinion) (noting the Party leaders' ideological, at least, connection to foreign counties), and Wiecek, *supra* note 250, at 378 (noting the perceived connection between American Communists and Moscow), with President George W. Bush, Address on Terrorism Before a Joint Meeting of Congress (Sept. 20, 2001), *supra* note 346 (noting the relationship between the Taliban regime of Afghanistan and Al-Qaeda).

348. Compare *Dennis*, 341 U.S. at 566 (Jackson, J., concurring) (noting Communist revolution in Russia and Czechoslovakia), and Wiecek, *supra* note 250, at 416-17 (noting the formation of the Communist bloc nations in Europe as a backdrop to *Dennis*), with President George W. Bush, Address on Terrorism Before a Joint Meeting of Congress (Sept. 20, 2001), *supra* note 346 ("[The goal of Al Qaeda] is remaking the world and imposing its radical beliefs on people everywhere."), and *id.* ("They want to overthrow existing governments in many Muslim countries. . . .").

349. *United States v. Dennis*, 183 F.2d 201, 213 (2d Cir. 1950).

of that faith, which abjures the possibility of success by lawful means.<sup>350</sup>

According to Hand, this quasi-religion had “singled out [the United States] as the chief enemy of the faith.”<sup>351</sup> The present Court could easily adopt this language to describe al-Qaeda and other adherents to a radical incarnation of Islam.

Justice Douglas’ dissent in *Dennis* contains the prescient suggestion that terrorism may present unique dangers, even when compared to those perceived during the Communist era. As Douglas noted, “[t]he teaching of methods of terror and other seditious conduct should be beyond the pale. . . .”<sup>352</sup>

Ultimately, the language of the Communist era cases demonstrates the susceptibility of the Supreme Court to the perception that a contemporary movement constitutes a revolutionary threat to the existence of the Nation itself. The revolutionary overthrow of the United States government never occurred. But terrorism has struck the Nation and presented unique challenges. Subsequent attacks would further suggest that the threat from terrorism is at least as great as that ever presented by Communism. Given the similarities between the two movements, if only in the language by which they are described, the Court could find some use of the Communist era cases to uphold legislation such as the Anti-Glorification of Terrorism Act.

b. Deference to Congress

Under the principle of deference to legislative determinations of danger, which appears in *Gitlow* and *Whitney*, the conviction of the hypothetical imam would surely stand. The Supreme Court held in these cases that where a legislative body determined that certain speech presented such risk of substantive evil, such an inherently clear and present danger that it must be punished, the use of language within that category of speech need not be assessed under the clear and present danger test.<sup>353</sup> If the statute enumerates the types of speech that are illegal, and the defendant’s speech falls within that class, the speech may be sanctioned, irrespective of the danger it does or does not pose on an individual basis.<sup>354</sup>

---

350. *Id.* at 212.

351. *Id.* at 213.

352. *Dennis*, 341 U.S. at 581 (Douglas, J., dissenting).

353. *See Whitney v. California*, 274 U.S. 357, 371 (1927); *Gitlow v. New York*, 268 U.S. 652, 669 (1925).

354. *See Whitney*, 274 U.S. at 371; *Gitlow*, 268 U.S. at 669.

In the hypothetical at hand, like the legislatures of New York and California in *Gitlow* and *Whitney*, Congress has determined that certain forms of speech pose such an inherent threat to the safety and welfare of the Nation in a time of terrorism, that their very utterance may be punished. Section 1(3) of the Anti-Glorification of Terrorism Act explicitly states that glorification falls into the category of speech likely to be understood by members of the public as advocacy to acts of terrorism.<sup>355</sup> The hypothetical imam's statements proclaim perpetrators of terrorist acts to be "praiseworthy" and "martyrs." Thus, his language has fallen within the category of language proscribed by the statute. Under *Gitlow* and *Whitney*, no further inquiry as to the dangerousness of his statements is required;<sup>356</sup> Congress has determined that such language inherently presents a substantial danger, and he may be convicted for his speech.

The *Brandenburg* requirements of imminence and likelihood could even be included in the language of the statute, which might enable the Anti-Glorification of Terrorism Act to withstand scrutiny under a version of *Brandenburg* altered to include the principles of *Whitney* and *Gitlow*. That is, if Congress explicitly found that the glorification of terrorism is inherently likely to produce imminent terrorist acts, the Court might be even more amenable to sustaining the Act. One might even persuasively argue that Congress has already made this assessment, by stating in subsection 5(b) that "[i]t is irrelevant . . . whether any person is in fact encouraged or induced by the statement to commit, prepare, or instigate" an act of terrorism.<sup>357</sup> Such language might be cited in support of the argument that Congress deems glorification intrinsically likely to produce imminent terrorist conduct.

While the Anti-Glorification of Terrorism Act (and the Terrorism Act 2006, for that matter) includes a mens rea requirement absent from

---

355. See *supra* Part II.E.1.; see also Terrorism Act, 2006, c. 11, pt. 1, § 1(3) (Eng.).

356. See *Whitney*, 274 U.S. at 371; *Gitlow*, 268 U.S. at 670. The hypothetical imam might raise the defense that for language to truly fall within the category of speech proscribed by the statute, not only must it glorify, but it must be such that members of the public could reasonably be expected to infer that it is a call to emulation. See Hypothetical Anti-Glorification of Terrorism Act, § 1(2)(b), *supra* Part II.E.1. However, his second statement links the actions of the "martyrs" to the ongoing military presence in Iraq and Afghanistan, suggesting that the former will continue to occur until the latter is ended. A court could construe this as fulfilling section 1(2)(b). That is, members of the public could reasonably be expected to infer that the acclamation invites them to take action in the existing circumstances—specifically, in light of the continuing military presence.

357. See Hypothetical Anti-Glorification of Terrorism Act § 1(5)(b), *supra* Part II.E.1.

the statutes in *Gitlow* and *Whitney*,<sup>358</sup> *Whitney* nevertheless provides an important lesson for the radical imam. In *Whitney*, the Court rejected the protests of the defendant that she had not intended and could not foresee the radical tack the California Communist Labour Party would take.<sup>359</sup> The Court reasoned that her participation in the organization belied this objection.<sup>360</sup> Similar objections from the imam, averring that he could not foresee that members of the audience would take his message of glorification to heart and act upon it, might also be rejected by the Court—he made the speech, and that is enough. The Court may similarly cast his argument aside on the basis of the fact that the Anti-Glorification of Terrorism Act also penalizes statements made recklessly.<sup>361</sup>

*Whitney* has been expressly overruled by *Brandenburg*.<sup>362</sup> Still, the principle of deference to legislative determinations that certain language constitutes an inherent threat in the face of grave peril may be of some use to Justices following another attack within America.

c. Alterations to Existing Standards—Moving Past *Brandenburg*

The shifting tests for determining when advocacy presents danger, as seen in the Communist era,<sup>363</sup> suggest that *Brandenburg* is not permanent. The Government could argue at trial that the *Brandenburg* decision involved a threat far less dire than Communism, at least so far as the government perceived Communism in the first half of the twentieth century.<sup>364</sup> The opinion expresses none of the profound concerns or anxieties present in *Gitlow*, *Whitney*, and *Dennis* with respect to Communism—namely, no reference to similar statutes in other

---

358. See Terrorism Act § 1(2)(b); Hypothetical Anti-Glorification of Terrorism Act § 1(2)(b), *supra* Part II.E.1; see also *Whitney*, 274 U.S. at 360 (reproducing the pertinent text of California's Criminal Syndicalism Act); *Gitlow*, 268 U.S. at 654-55 (reproducing the pertinent text of New York's criminal anarchy statute).

359. See *Whitney*, 274 U.S. at 367.

360. See *id.* at 367-68.

361. See Hypothetical Anti-Glorification of Terrorism Act, *supra* Part II.E.1.

362. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (per curiam).

363. See discussion *supra* Part IV.B.3.

364. Cf. Wiecek, *supra* note 250, at 406. Wiecek states that “[a] majority of Justices regarded Communists and their Party as . . . different from other radical groups like the Klan, uniquely threatening to America's national security.” *Id.* As such, the Court assigned adherents to Communism, “a special status under the Constitution,” *id.*, and permitted Congress greater power to restrict their freedom. *Id.* at 377. See also COX, *supra* note 238, at 225 (“[O]ne seeking to foretell the course of decisions cannot wholly forget that it was easier to write brave words defending speech in 1969 than in time of war.”). Cf. Lasson, *supra* note 5, at 74 (arguing that *Brandenburg* could be used to regulate hate speech and incitement coming from mosques, since “[t]errorism creates a kind of permanent imminence.”).

states to demonstrate the need,<sup>365</sup> no definitions of the Klan as “an apparatus designed and dedicated to the overthrow of the Government,”<sup>366</sup> no description of the issue as a conflict of interests beyond the pale of the ordinary case,<sup>367</sup> and no suggestion that the threat posed by the Klan cannot be constrained through existing jurisprudence or law.<sup>368</sup> Implicit in the *Brandenburg* opinion is the notion that the threat posed by the Klan was not significant enough to justify punishing its members for advocacy.<sup>369</sup> Implicit in the *Dennis* opinion is the notion that the threat posed by Communism cannot be constrained.<sup>370</sup>

Given these differing circumstances, the Supreme Court could decide that *Brandenburg* is a more apt test for a time of peace, or for times where no entity threatens the destruction of the United States.<sup>371</sup> The Court could find that terrorism has turned the Nation into a battlefield, that violent terrorist groups imperil the economy, functioning government, and daily existence itself. It could rule that the government needs greater powers to contend with a threat of a magnitude never encountered in the Nation’s history. With such a finding, the Court could look to the cases arising in the era of Communism as guidance in a time of terror, anxiety, and enemies within the Nation itself. It could determine that cases such as *Gitlow*, *Whitney*, and *Dennis*, and the tests for speech therein, provide a better solution—albeit a temporary one—than the test propounded in *Brandenburg*.<sup>372</sup> Under these tests, the Court

---

365. Cf., e.g., *Whitney*, 274 U.S. at 370-71.

366. Cf. *Dennis v. United States*, 341 U.S. 494, 510 (1951) (plurality opinion).

367. Cf. *id.* at 518-19 (Frankfurter, J., concurring).

368. Cf. *id.* at 567, 578 (Jackson, J., concurring).

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

370. See discussion *supra* Part IV.B.2.

371. Cf. *Dennis*, 341 U.S. at 568 (Jackson, J., concurring) (arguing for the clear and present danger test, the contemporary standard for advocacy, as a rule of reason under other circumstances, but for a different approach to combat the threat posed by Communism).

372. In fact, the *Brandenburg* decision seems to preserve—and perhaps even endorse—*Dennis*. Archibald Cox observed that a footnote in *Brandenburg* suggests that *Dennis* is the source of the *Brandenburg* test for advocacy. See COX, *supra* note 238, at 226. The footnote immediately follows the *Brandenburg* Court’s announcement of the new test and states that “[i]t was on the theory that the Smith Act embodied such a principle [i.e., the *Brandenburg* imminent and likely test] and that it had been applied only in conformity with it that this Court sustained the Act’s constitutionality.” See *Brandenburg*, 395 U.S. at 447 n.2 (internal citations omitted) (citing *Dennis v. United States*, 341 U.S. 494 (1951)). I would add that the *Brandenburg* decision also appears to refer to *Dennis* as one of the “later decisions” from which the *Brandenburg* rule was derived. The text immediately preceding the Court’s announcement of the *Brandenburg* rule reads: “But *Whitney* has been thoroughly discredited by later decisions. See *Dennis v. United States*, 341 U.S. 494, at 507 (1951). These later decisions have fashioned the principle. . . .” *Brandenburg*, 395 U.S. at 447. Whatever the Court intended by citing *Dennis* in this manner, its presence in the *Brandenburg* decision creates a judicial loophole that could permit a future Court to return to *Dennis* without much difficulty. As

would very likely affirm the hypothetical imam's conviction and uphold the Anti-Glorification of Terrorism Act.

## V. CONCLUSION

As a response to the July 7, 2005 terrorist attacks in London, the United Kingdom enacted the Terrorism Act 2006. Section 1 of that Act, sanctioning the glorification of acts of terror, constitutes a far-reaching attempt to curb incitement to commit terrorist acts. Whether or not the Act will truly silence the preachers of hate, whose words may have influenced the suicide bombers, remains to be seen. Whether the British government will successfully use the Act to prosecute radical preachers like Abu Izzadeen remains unclear. Whether use of the Act will lead to greater extremism by Muslim youth who feel victimized by one-sided application must be assessed.<sup>373</sup>

For better or for worse, the Supreme Court's decision in *Brandenburg v. Ohio* presents an imposing obstacle to similar legislation in the United States. To avoid running afoul of current First Amendment jurisprudence, Congress would have to carefully craft a statute that made the proper distinction between "the mere abstract teaching" of the tenets of terror, and language "steeling" a listener to action.<sup>374</sup> Any speech that fell short of the *Brandenburg* test could not be punished.

And yet, the history of the speech of advocacy to violence demonstrates that there are times when the Supreme Court has ranked First Amendment guarantees secondary in importance to concerns for the Nation's safety. During the First World War, the danger presented by those whose speech might prove injurious to the war effort justified the punishment of advocacy.<sup>375</sup> During the Communist era, the specter of a vast, international organization, poised to destroy American democracy justified the curtailment of inciting speech.<sup>376</sup>

---

Cox notes of the inconsistency in the footnote, "[i]n a time of apparent crisis, ambiguity coupled with the citation [to *Dennis*] might make it all too easy to write an opinion reviving the *Dennis* version of the 'clear and present danger' test." COX, *supra* note 238, at 226. It is important to note, however, that while the *Brandenburg* majority appeared to view *Dennis* as positive precedent, the concurring Justices expressly denied the continuing validity of *Dennis*. See *Brandenburg*, 395 U.S. at 450 (Black, J., concurring) (understanding the majority's opinion as citing *Dennis*, but not indicating any agreement "with the 'clear and present danger' doctrine on which *Dennis* purported to rely"); *id.* at 454 (Douglas, J., concurring) ("I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.").

373. See *supra* notes 116-17 and accompanying text.

374. See *Brandenburg*, 395 U.S. at 448 (citing *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

375. See, e.g., *Debs v. United States*, 249 U.S. 211 (1919).

376. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951) (plurality opinion).

With this precedent before it, the Supreme Court could determine that the threat from terrorism is far too novel, far too difficult to stop, and far too deadly to be dealt with under the normal rules. Applying the lessons of the cases from World War I and the Communist eras, the Court might find reason to support the punishment of speech that glorifies terrorists or their acts.

The Court *could* uphold an act similar to Britain's Terrorism Act 2006; the inevitable question, however, is *should* it? The answer, I believe, is an unequivocal "no." The idea that certain actions "let the terrorists win" has been bandied about in the United States since September 11, 2001. Surely there is no clearer example of relenting to the desires of al-Qaeda and other organizations, of succumbing to the pressures presented by terrorists worldwide, than the curtailing of the liberties that our Nation is founded upon. Free speech can survive without the United States, but the United States cannot survive without free speech. On the surface and in name, the Nation might remain very much the same in an era in which the glorification of terrorists is punished, but our ideals will have been trumped by fear, and the promise of the Nation will be greatly reduced.

The cases presented in this Comment should to serve more as a reminder of how the government, the public, and the Court have occasionally diverted from the path of freedom rather than as tools the Court might use to support future detours from the American ideal. As H.L. Mencken noted, while reflecting upon the ebb and flow of the First Amendment's guarantees during his life, "[w]ar, in this country, wipes out all the rules of fair play, even those prevailing among wild animals."<sup>377</sup> History may provide examples of times when the Court has been complicit in such an attitude, when it has allowed national hysteria to trump settled values—if not settled law—but this is no excuse to make the same mistake in the current conflict, or in those we may face in the future. There will be wars and threats to national integrity in the future, dangers that test the wisdom of guaranteeing freedom of speech. But without that freedom, without the guarantee of the First Amendment, there will not truly be a United States.

---

377. H.L. MENCKEN, THE DIARY OF H.L. MENCKEN 376 (Charles A. Fecher ed., 1989).