Note

New Threats, Old Problems: Adhering to *Brandenburg*'s Imminence Requirement in Terrorism Prosecutions

Elisa Kantor*

Introduction

> We can no longer take either security or liberty for granted. The best that we can now hope for seems to be a prolonged period of international tension and rumors of war, with war itself as the ever threatening alternative. For security against foreign attack we must look to the professions which manage our armed forces and to the economy of the country that sustains them. But I see not the slightest probability in the foreseeable future that any conqueror can impose oppression upon us, and the dangers to our liberties which I would discuss with you are those that we create among ourselves.[1]

---

* J.D. expected 2008, The George Washington University Law School. Sincere thanks to Professor Ira C. Lupu, whose insights were central to the development of this Note. Additional thanks to Professors Bradford R. Clark, Thomas Colby, and Jonathan Turley for their comments and suggestions, to Joshua Teitelbaum for his help in beginning this Note, to Marcy Busch and Megan Murphy for their editorial efforts, and to Arlene and Howard Kantor for their support and encouragement.

1 Robert H. Jackson, *Wartime Security and Liberty Under Law*, 1 BUFF. L. REV. 103, 104 (1951).

The terrorist attacks of September 11, 2001, profoundly changed the way that many Americans think about terrorism and national security.[2] As part of the nation's response to the attacks, the justice system began to focus intensely on terrorist prosecution and terrorism prevention,[3] wrestling to find the most effective way to prevent another terrorist attack from occurring on American soil. Consistent with this effort, federal prosecutors have adopted a new strategy: taking preemptive legal action against possible terrorists as opposed to prosecuting known terrorists after major incidents have already occurred.[4] "We can't afford to wait," declared one senior Justice Department official.[5] "You may never know what you prevented, but those may be our greatest successes."[6]

Under the government's preemptive approach, federal prosecutors have taken a closer look at the role of the Muslim cleric in terrorist conspiracies.[7] Officials believe that fundamentalist imams may

---

2 *See* Jennifer Van Bergen, *In the Absence of Democracy: The Designation and Material Support Provisions of the Anti-Terrorism Laws*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 107, 108–09 (2003).

3 *See, e.g.*, *Dismantling the Financial Infrastructure of Global Terrorism: Hearing Before the H. Comm. on Financial Servs.*, 107th Cong. 141 (2001) (statement of Dennis M. Lormel, Chief, Financial Crimes Section, FBI), *available at* http://financialservices.house.gov/media/pdf/107-46.pdf ("[T]he FBI, in conjunction with law enforcement and intelligence agencies throughout the U.S. and the world, is in the midst of the largest, most complex and perhaps the most critical criminal and terrorism investigation in our history. The FBI has dedicated all available resources to this investigation including over 4,000 special agents and 3,000 support personnel. Nothing has a higher priority than determining the full scope of these terrorist acts, identifying all those involved in planning, executing and/or assisting in any manner the commission of these acts, and bringing those responsible to justice. First and foremost in our priorities is doing everything in our power to prevent the occurrence of any additional terrorist acts."); Press Release, Dep't of Justice, Fact Sheet: Department of Justice Anti-Terrorism Efforts Since Sept. 11, 2001 (Sept. 5, 2006), http://www.usdoj.gov/opa/pr/2006/September/06_opa_590.html ("The highest priority of the Department of Justice since the terrorist attacks of Sept. 11, 2001, has been to protect Americans by preventing acts of terrorism.").

4 *See* Christopher Drew & Eric Lichtblau, *Two Views of Terror Suspects: Die-Hards or Dupes*, N.Y. TIMES, July 1, 2006, at A1 (describing the Department of Justice's preemptive strategy); *see also* Press Release, Dep't of Justice, *supra* note 3 ("The ability of the Department to identify and prosecute would-be terrorists, thereby thwarting their deadly plots, has improved dramatically over the past five years thanks to: a core set of structural reforms, the development of new law enforcement tools, and the discipline of a new mindset that values prevention and communication.").

5 Drew & Lichtblau, *supra* note 4, at A1.

6 *Id.*

7 *See Hearing Before the H. Homeland Security Comm. Subcomm. on Intelligence, Information Sharing, and Terrorism Risk Assessment*, 109th Cong. (2006) (statement of Donald Van Duyn, Deputy Assistant Director, Counterterrorism Division, FBI), *available at* http://www.fbi.gov/congress/congress06/vanduyn092006.htm (discussing the rise of Islamic radicalism in America and the influence of extremist imams).

play a central role in the creation of terrorist schemes by providing guidance and instruction to groups of Muslims who are likely to commit terrorist acts.[8] The government's new concentration on religious leaders, however, raises questions as to whether this preventative strategy, which can involve prosecuting Muslim preachers for their speech to followers, will cause important free speech principles to be violated. Under First Amendment jurisprudence, when can a Muslim leader's words truly be seen as a serious terrorist threat? How will America's much-coveted free speech rights be affected if Muslim preachers can be prosecuted for this type of speech?

As one author writes, "[t]errorism presents a special challenge to a democratic society: how to prevent and punish ideologically motivated violence without infringing on political freedoms and civil liberties."[9] This Note maintains that to rise to this challenge, our justice system must adhere vigorously to the imminence requirement established by the Supreme Court in *Brandenburg v. Ohio*.[10] A strict defense of *Brandenburg*'s temporal element will protect the American public from speech that escalates the threat of domestic terrorist activity while guarding speech that deserves to compete in our country's "marketplace of ideas."[11] Furthermore, although some commentators have argued that, because America has changed drastically since Sep-

---

8 *See id.*

> Particularly for Muslim converts, but also for those born into Islam, an extremist imam can strongly influence individual belief systems by speaking from a position of authority on religious issues. Extremist imams have the potential to influence vulnerable followers at various locations of opportunity; can spot and assess individuals who respond to their messages; and can potentially guide them into increasingly extremist circles.
>
> . . . .
>
> Imams are often active and influential in other venues [than mosques] . . . . These various forums allow imams to reach new audiences and potentially susceptible followers outside of the mosque itself.

Id.

9 DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 1 (2002).

10 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that a state cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

11 *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . [and] the best test of truth is the power of the thought to get itself accepted in the competition of the market.").

tember 11,[12] heightened restrictions on free speech are justified,[13] this Note argues that it is precisely in such urgent moments that the protection of free speech is most essential. Despite the government's new focus, our judicial system must be careful to allow convictions of Islamic preachers only when their expression causes an imminent threat of terrorist activity and must not allow basic free speech rights to be compromised. Otherwise, as Justice Jackson foretold, we may truly become the greatest threat to our own civil liberties.[14]

Part I of this Note outlines a brief history of the jurisprudence leading up to *Brandenburg*. Part I also analyzes *Brandenburg*'s imminence requirement and explains the importance of imminence. Part II examines the case of *United States v. Al-Timimi*,[15] in which a Muslim preacher was convicted of soliciting others to wage war against the United States.[16] Part II also discusses a predecessor case, *United*

---

12 *See, e.g.*, Emanuele Ottolenghi, *Life and Liberty*, NAT'L REV. ONLINE, July 29, 2005, http://article.nationalreview.com/?q=NGJkOWI2Zjg4ZGVmNTYyMGNkNjVkMTlmYzc1OTFjMjg= ("One can sympathize with the opinion that no freedom should be sacrificed on the altar of security, but unless this is qualified, in the post-9/11 world this view is neither serious nor realistic."); *cf.* David Crumm, *Unfinished Business: At the Height of America's Power, We Are Learning to Live with Anxiety over Our Surprising Vulnerability*, DETROIT FREE PRESS, Sept. 11, 2003, at 1A; Bennett Ramberg, Op-Ed., *Safety or Secrecy?*, N.Y. TIMES, May 20, 2003, at A27 (describing how security requirements for nuclear power plants have changed in a "post-9/11 world"); Editorial, *Sept. 11—Two Years Later*, DENVER POST, Sept. 11, 2003, at 6B (discussing perceptions of major change since the World Trade Center attacks); Robin Toner, *Political Memo: Bush's Speech Offers Focus for Democrats' Attacks*, N.Y. TIMES, Sept. 11, 2003, at A13 (indicating that national security is a paramount concern in the "post-9/11 world"); *Voices: Layoffs, Fear, Patriotism: Readers Tell Us How 9-11 Changed Their Lives*, DALLAS MORNING NEWS, Sept. 11, 2002, at 8E.

13 *See* Thomas E. Crocco, Comment, *Inciting Terrorism on the Internet: An Application of* Brandenburg *to Terrorist Websites*, 23 ST. LOUIS U. PUB. L. REV. 451, 482 (2004) (arguing that *Brandenburg*'s incitement standard "was designed for the soapbox speaker" and thus is not adept to address the threat of terrorism; therefore, "[u]ntil terrorism is removed from the world, there exists a 'threshold of imminence' such that the potential for additional terrorist acts is so great that they must be considered imminent"); Robert S. Tanenbaum, Comment, *Preaching Terror: Free Speech or Wartime Incitement?*, 55 AM. U. L. REV. 785, 790 (2006) (arguing that the incitement standard "should be recast in the context of the War on Terror"); Ottolenghi, *supra* note 12.

14 *See supra* note 1 and accompanying text.

15 United States v. Al-Timimi, No. 1:04cr385 (E.D. Va. filed Sept. 23, 2004).

16 *See* News Release, Dep't of Justice (Apr. 26, 2005), http://www.usdoj.gov/usao/vae/Pressreleases/04-AprilPDFArchive/05/42605TimimiPR.pdf; *see also* Superseding Indictment of Defendant at 1, United States v. Al-Timimi, No. 1:04cr385 (E.D. Va. Feb. 3, 2005) [hereinafter Superseding Indictment] (listing the ten counts with which Al-Timimi was charged). In 2006, the U.S. Court of Appeals for the Fourth Circuit granted Al-Timimi's motion to vacate his appeal and remand the case for further proceedings before the trial court. United States v. Al-Timimi, No. 05-4761, 2006 U.S. App. LEXIS 32554, at *1–2 (4th Cir. Apr. 25, 2006). Al-Timimi argued that at trial the government had withheld evidence material to his defense. *Id.* at *1. He be-

States v. Rahman,[17] which laid the groundwork for *Al-Timimi* before September 11. Part II argues that Al-Timimi should not have been convicted because *Brandenburg*'s imminence requirement was not satisfied and warns that the case indicates a relaxation of the requirement in terrorism prosecutions of Muslim clerics. Part III describes the consequences of failing to adhere to the imminence requirement during America's current "war on terror."[18] Part IV discusses alternative arguments to the view that courts must adhere to the imminence requirement. Finally, this Note concludes that strict adherence to the imminence requirement of *Brandenburg* is essential to the preservation of free speech liberties during wartime and suggests a future approach towards First Amendment jurisprudence.[19]

I. The Development of Brandenburg *and the Modern Incitement Exception*

Freedom of expression is the cornerstone of American democracy, and it was the notion upon which the country's Founders based the theory of American independence and social enlightenment.[20] At the same time, "the rights of free speech and assembly are fundamen-

---

lieved that the government's evidence against him was obtained by using the National Security Agency's ("NSA") warrantless wire-tapping program. *See* On the Media, Transcript of "Tap Dance," Jan. 20, 2006, http://www.onthemedia.org/transcripts/2006/01/20/01. Pursuant to the order of the court of appeals, the case was returned to the trial court to determine whether the NSA's program had been used to gather evidence against Al-Timimi. Toni Locy, *Judge to Probe if NSA Spied on Scholar*, Boston Globe, Apr. 25, 2006, http://www.boston.com/news/nation/washington/articles/2006/04/25/judge_to_probe_if_nsa_spied_on_scholar. The determination of the trial court is still pending.

17 United States v. Rahman, 189 F.3d 88 (2d Cir. 1999).

18 This Note will use the term "war on terror" to refer to America's ongoing operations against militant terrorist groups throughout the world, although the appropriateness of this phrase is presently under debate. *See, e.g.*, *Britain Stops Using 'War on Terror' Phrase*, MSNBC, Apr. 16, 2007, http://www.msnbc.msn.com/id/18133506; Anne Flaherty, *Lawmakers Bicker over Terror War Phrase*, ABC News, Apr. 4, 2007, http://abcnews.go.com/Politics/wireStory?id=3008584.

19 For a general discussion of *Al-Timimi* with a brief focus on the concept of imminence, see Wayne McCormack, *Inchoate Terrorism: Liberalism Clashes with Fundamentalism*, 37 Geo. J. Int'l L. 1, 55–60 (2005).

20 *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); Elliot L. Richardson, *Freedom of Expression and the Function of Courts*, 65 Harv. L. Rev. 1, 3 (1951). For many reasons, the American system of free expression has been considered fundamental to our democratic society: it assures individual self-fulfillment through the search for truth, enables individuals to benefit from open discussion and make intelligent and informed choices, facilitates political discussion, and enhances social stability by making rational judgment possible. *See* Thomas I. Emerson, The System of Freedom of Expression 3–7 (1970).

tal, [but] not . . . absolute."[21] Freedom of speech must be balanced against the important interests of national security and criminal punishment. Recognizing this tension, the Supreme Court has determined that speech that incites dangerous action or serious injury is not protected under the First Amendment.[22] It is under this theory that federal prosecutors may seek to convict radical Muslim clerics for their expression.

The development of modern sedition law demonstrates the manner in which today's incitement standard has evolved.[23] Between World War I and the Cold War, the Court saw a swell in arguments over the precise meaning of the First Amendment's Free Speech Clause.[24] During these formative years, the Court shifted from a focus on the context surrounding a speaker's expression to temporal concerns of immediacy, giving only marginal attention to circumstance.[25] Today's incitement standard places more emphasis on the immediacy of the dangerous effects of inciting speech than any other previous standard.

A. Before Brandenburg*: The Epic Dissents of Holmes and Brandeis*

The Court's modern analysis of incitement began with *Abrams v. United States.*[26] Prior to this opinion, Justice Holmes had authored Supreme Court decisions explaining that speech is outside the realm of First Amendment protection if the threat posed by the public speech at issue tends to be linked to future harm.[27] However, by October 1919, Holmes had begun to reconsider his approach to free speech doctrine. He wrote to his close friend Harold Laski:

---

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

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

23 Previously, sedition laws focused on restricting expression "sharply critical of the government or seeking to change government or the institutions of society through democratic procedures." EMERSON, *supra* note 20, at 100–01. Modern sedition laws, however, have been focused on attempting to "punish or outlaw organizations alleged to be anti-democratic in character or subject to foreign control." *Id.* at 101.

24 *See, e.g.*, *Whitney*, 274 U.S. 357; Abrams v. United States, 250 U.S. 616 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).

25 *See* Tanenbaum, *supra* note 13, at 805–06.

26 Abrams v. United States, 250 U.S. 616 (1919).

27 *See generally* Debs v. United States, 249 U.S. 211 (1919) (using the "bad tendency" standard to convict defendants); *Frohwerk*, 249 U.S. 204 (same); Schenck v. United States, 249 U.S. 47 (1919) (same); Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919) (discussing the "bad tendency" standard).

> I fear we have less freedom of speech here than they have in England. Little as I believe in it as a theory[,] I hope I would die for it[,] and I go as far as anyone whom I regard as competent to form an opinion, in favor of it.[28]

The next day, the Supreme Court heard oral arguments for *Abrams* and afterward affirmed the Espionage Act[29] convictions of a group of Russian immigrants who had distributed several thousand copies of leaflets calling for a general strike in protest of U.S. policy towards Russia.[30] The majority opinion, authored by Justice Clarke, maintained that, because "the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and . . . revolution," the language in the leaflets was not protected by the First Amendment.[31]

It was Justice Holmes's dissent, however, joined by Justice Brandeis, that laid the foundation for the Court's modern approach to incitement.[32] Justice Holmes argued that, although the government's power to punish speech is "greater in time of war than in time of peace," "[i]t is *only* the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."[33] Justice Holmes further stated that "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."[34] With this opinion, Justice Holmes established the famous "marketplace of ideas" rationale of the First Amendment, a theory that would later become central to the Supreme Court's jurisprudence.[35]

---

28 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916–1935, at 217 (Mark DeWolfe Howe ed., 1953).

29 Act of June 15, 1917 (Espionage Act), ch. 30, tit. I, § 3, 40 Stat. 217, 219, *amended by* Act of May 16, 1918, ch. 75, 40 Stat. 553, 553–54 (current version at 18 U.S.C. § 2388 (2000)).

30 *Abrams*, 250 U.S. at 616–24.

31 *Id.* at 623.

32 *See* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 720 (1975) ("[I]t was not until the fall of 1919, with his famous dissent in *Abrams v. United States*, that Holmes put some teeth into the clear and present danger formula . . . ."); *see also* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CAL. L. REV. 391, 392 (1992) (describing Justice Holmes as "the architect of a speech-protective interpretation of the First Amendment").

33 *Abrams*, 250 U.S. at 627–28 (Holmes, J., dissenting) (emphasis added).

34 *Id.* at 630.

35 *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of

To Justice Holmes, free expression contributed to the fitness of an open society, and a "free trade in ideas" provided rational actors the opportunity to consider all available information.[36] In an open society, unpopular or dangerous ideas could always be countered in the marketplace by good and truthful counsels, but speech that was too immediately dangerous to have a chance to compete in the marketplace was not protected by the First Amendment because it could not be mitigated by contrasting viewpoints.[37] The marketplace metaphor harkened back to philosopher John Stuart Mill's mid-nineteenth-century advocacy of communicative liberty and the classic libertarian perspective of expressive freedom as a means for discovering truth.[38]

In *Whitney v. California*,[39] Justices Holmes and Brandeis continued to build the foundation of modern free speech law. In a concurring opinion joined by Justice Holmes, Justice Brandeis argued that "the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and

---

public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."); Brandenburg v. Ohio, 395 U.S. 444, 452 (1969) (Douglas, J., concurring); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (discussing the Court's "commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

36 *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

37 *See id.* at 627–28.

38 *See* JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* MILL: TEXTS, COMMENTARIES 41 (Alan Ryan ed., 1997).

> First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.
>
> Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.
>
> Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct; the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience.

Id. at 82.

39 Whitney v. California, 274 U.S. 357 (1927), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

imminent danger of some substantive evil."[40] Arguing strenuously for public faith in the strength of the marketplace of ideas, Justice Brandeis famously maintained:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They 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; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . . They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[41]

According to the marketplace doctrine, the government can only quell speech in an emergency where there is no time to expose the errors of dangerous speech before it has its ultimate effects.[42] Imminence is the key to this perspective: the marketplace of ideas will balance out unfavorable or dangerous speech with a more moderate viewpoint unless the speech poses such an immediate threat that moderating speech cannot reach the marketplace quickly enough to prevent a "clear and present" danger.[43]

The next landmark free speech case took place at the beginning of the Cold War. During one of the most repressive periods in U.S. history, Americans gripped by Communist paranoia set the stage for courtroom battles over the meaning of the First Amendment.[44] In *Dennis v. United States*,[45] the Court affirmed the convictions of leaders of the Communist Party for violations of the Smith Act.[46] The group had been charged with conspiring to teach and advocate the necessity

---

40 *Id.* at 373 (Brandeis, J., concurring).

41 *Id.* at 375 (footnote omitted).

42 *See id.* at 377.

43 *Id.*

44 *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 312–14 (2004).

45 Dennis v. United States, 341 U.S. 494, 516–17 (1951) (plurality opinion).

46 Smith Act (Alien Registration Act of 1940), ch. 439, tit. I, §§ 2–3, 54 Stat. 670, 671 (current version at 18 U.S.C. § 2385 (2000)).

of overthrowing the U.S. government by force and violence.[47] Chief Justice Vinson, in an opinion announcing the judgment of the Court, wrote that "it is within the *power* of the Congress to protect the Government of the United States from armed rebellion"[48] and that "a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime."[49]

Applying the temporal principles previously articulated by Justices Holmes and Brandeis,[50] the Court rejected the contention that probability of danger was the sole criterion by which cases of unlawful speech should be judged.[51] Rather, the Court found that "'[i]n each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger,'" adopting Judge Learned Hand's model from the court below.[52] In this way, the Court squarely adopted the "clear and present danger" standard of review for incitement cases, which was satisfied in this case because the petitioners were part of an organized group that was poised to act against the government at the moment its leaders felt the time was ripe.[53]

The *Dennis* Court's formulation of the "clear and present danger" test balanced gravity and probability of harm, thus deviating from the test proposed by Brandeis in *Whitney*, which would have considered the gravity of harm brought about by the speech only after imminence had been shown.[54] In assessing probability under "clear and present danger" principles, however, Judge Hand had made it clear that his test, which was adopted by the *Dennis* Court, embraced the importance of proximity in time as it affects the probability of harm.[55] Giving credence to the marketplace of ideas theory, Judge Hand stated that "[i]t is only because a substantial intervening period

---

47 *Dennis*, 341 U.S. at 497.

48 *Id.* at 501.

49 *Id.* at 505.

50 *See id.* at 507 ("Although no case subsequent to *Whitney* and *Gitlow* has expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.").

51 *Id.* at 510.

52 *Id.* (second alteration in original) (internal quotation marks omitted) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950)).

53 *Id.* at 510–11.

54 David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1349 (1983).

55 Richardson, *supra* note 20, at 8.

between the utterance and its realization may check its effect and change its importance, that its immediacy is important."[56] Judge Hand's merger of imminence and probability, however, required that circumstance and context receive great weight, and his standard assessed whether the existence of certain situational factors made it more or less likely that the "evil" would occur.[57] Accordingly, the *Dennis* Court's analysis of "clear and present danger" emphasized communism's threat of harm and the "world conditions" that made the speech in question more dangerous.[58]

B. The Emergence of the Modern Incitement Test: A Focus on Imminence

The *Dennis* Court's emphasis on context waned with *Brandenburg v. Ohio*,[59] in which the Court finally adopted the Holmes-Brandeis marketplace of ideas model. *Brandenburg* involved the prosecution of a Ku Klux Klan leader who had stated during a rally that "the nigger should be returned to Africa" and that "if our President, our Congress, our Supreme Court, continues [sic] to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken."[60] The Klansman was convicted under an Ohio statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[61]

Holding the Ohio statute unconstitutional, the Court declared the prevailing First Amendment standard of incitement:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[62]

---

56 United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950).

57 *See* Richardson, *supra* note 20, at 9–16 (discussing three situational circumstances relevant to the issue of probability: (1) elements of the larger situation, including local, national, and international opinion; (2) the existing situation in which the speech is made; and (3) circumstances tending to increase the likelihood that the speech will produce harm, such as the number of people affected and the character of the speech).

58 *See Dennis*, 341 U.S. at 511 (evaluating "the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned").

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

60 *Id.* at 446–47.

61 *Id.* at 444–45 (alteration in original) (internal quotation marks omitted).

62 *Id.* at 447.

Advocacy thus could only be punished if the defendant (1) *expressly* advocated illegal action, (2) called for *immediate* illegal action, and (3) such immediate illegal action was *likely* to occur.

In producing the "most speech-protective standard yet evolved by the Supreme Court,"[63] *Brandenburg* explicitly overruled *Whitney* and made clear that imminence is central to determining the legality of speech.[64] According to *Brandenburg*, the Klansman's speech was protected even if he intended for his words to incite violence because his speech was not an immediate trigger to violent action and his listeners would have needed to take additional steps before they could engage in the lawless action he encouraged.[65] The risk of unlawful action therefore was not imminent.

To some, the Court's explicit reliance on imminence was surprising,[66] given the nature of previous decisions appearing to set forth a rule that if speech called for specific unlawful action, it was not protected even if the danger would occur in the far future.[67] The Court did not, however, abandon consideration of the effect of context and the concreteness of the advocated actions, as articulated in *Dennis*, but incorporated these concerns into an analysis of imminence on a larger scale.[68] Subsequent decisions by the Court reaffirmed the *Brandenburg* test as integral to First Amendment analysis and established imminence as a threshold requirement that the government must meet before it can suppress expression.[69]

---

63 Gunther, *supra* note 32, at 755.

64 *See Brandenburg*, 395 U.S. at 447–49.

65 *See id.* at 448–49.

66 *See, e.g.*, Hans A. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1167 (1970).

67 *See* Scales v. United States, 367 U.S. 203, 251 (1961) ("*Dennis* and *Yates* have definitely laid at rest any doubt that present advocacy of *future* action for violent overthrow satisfies statutory and constitutional requirements equally with advocacy of *immediate* action to that end."); Yates v. United States, 354 U.S. 298, 324–25 (1957) (stating that advocacy of unlawful conduct must include a call for specific action "now or in the future"), *overruled on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

68 *See* Tanenbaum, *supra* note 13, at 806.

69 *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (invalidating a judgment because speech did not meet the *Brandenburg* test); Hess v. Indiana, 414 U.S. 105, 107–08 (1973) (per curiam) (holding that a protester's statement that "[w]e'll take the fucking street later" was not imminent, amounting to "nothing more than advocacy of illegal action at some indefinite future time").

C. Brandenburg *Interpreted: A Strong Imminence Requirement Protects Speech by Reinforcing the Marketplace of Ideas*

The *Brandenburg* decision is committed to the marketplace of ideas model developed throughout the century and is thus a final validation of Justice Holmes's *Abrams* dissent.[70] In fact, the *Brandenburg* test contains an even stricter imminence requirement than did the marketplace theory originally advocated by Justice Holmes.[71] Speech only satisfies the *Brandenburg* imminence requirement when it "brings about [a law] violation by bypassing the rational processes of deliberation."[72]

Brandenburg's support of marketplace theory promotes the traditional purposes of the First Amendment and strengthens the basic precepts of democracy. Marketplace theory ensures that rational actors are presented with many alternative arguments and the time to decide between them, and in this way the marketplace serves society by creating an informed citizenry.[73] Punishment of speech, on the other hand, causes self-censorship, which leaves members of the public with an incomplete and inaccurate picture of their environment.[74] By requiring competition between many opinions rather than the suppression of certain opinions, the marketplace of ideas allows individuals to consider all sides of an issue and benefit from open discussion of

---

70 *See* Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 239 (discussing Holmes's crucial contribution to what would become the *Brandenburg* test). Marketplace theory has, of course, endured its share of criticism. *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 982 (1978) (arguing that the classic marketplace of ideas model is based on flawed assumptions and is unworkable); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641–44 (1967) (arguing that because of changes in modern communication, the marketplace of ideas no longer exists); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 16–49 (maintaining that marketplace theory is based on assumptions that are not workable in reality).

71 *See* Schwartz, *supra* note 70, at 236–41.

72 David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 339 (1991).

73 Ingber, *supra* note 70, at 9.

74 *See, e.g.*, Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 482 (1985) (emphasizing the "chilling effect" of restrictions on speech). *See generally* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685 (1978) (analyzing the "chilling effect" doctrine). The Supreme Court began discussing the concept of chilled speech in *Wieman v. Updegraff*, 344 U.S. 183 (1952). *See id.* at 195 (Frankfurter, J., concurring) ("Such unwarranted inhibition . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.").

ideas, which in turn makes intelligent and informed choice possible.[75] As Professor Stanley Ingber elaborates, "[t]he only truth that self-governing individuals can rely upon is that which they themselves devise in the give and take of public discussion and decision."[76]

Brandenburg's standard, therefore, is correct to emphasize a strong imminence requirement because imminence is essential to the marketplace of ideas theory and the First Amendment rationales upon which the theory is based. By requiring immediacy, the *Brandenburg* test acknowledges that to keep from chilling speech that could contribute to the functioning marketplace, there must be a strict tie between expression and harm, and the expression must be nearly equal to action.[77] After all, by the time of the *Brandenburg* decision, "[t]he Court had come to understand that free expression is fragile, that dissent is easily chilled, that government often acts out of intolerance when it suppresses dissent, and that it is essential to protect speech at the margin."[78]

Although the speech-protective imminence requirement of *Brandenburg* is promising, the future of the test remains uncertain in many respects. The standard was created at a relatively placid point in the nation's history, during a time of "greater popular acceptance of freedom of expression" after the civil rights and antiwar movements of the 1960s.[79] Previously, in wartime periods, however, the Court had troublingly failed to uphold First Amendment values.[80] The "war on terror" is the first time the Court's protective *Brandenburg* standard truly will be tested, and it remains to be seen whether *Brandenburg* will be able to guard free speech during this new period of national insecurity.[81]

---

75 *See* EMERSON, *supra* note 20, at 6–7.

76 Ingber, *supra* note 70, at 8.

77 To reconcile restrictions on speech with the First Amendment tenet that expression must be permitted and only consequent action controlled, the Supreme Court views the line between "expression" and "action" on a continuum. *See* EMERSON, *supra* note 20, at 124–25; *see also* Texas v. Johnson, 491 U.S. 397, 404 (1989); United States v. O'Brien, 391 U.S. 367, 376 (1968).

78 STONE, *supra* note 44, at 521.

79 *See* Rabban, *supra* note 54, at 1352.

80 *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."); Rabban, *supra* note 54, at 1352.

81 *See* Rabban, *supra* note 54, at 1352–53. Other aspects of the *Brandenburg* Court's short per curiam opinion are also uncertain, including the manner in which the test might distinguish between private and public advocacy. *Id.* at 1351–52.

II. Combating Domestic Terrorism: Applying Brandenburg *During the "War on Terror"*

Under *Brandenburg*, the imminence requirement is key to the robust protection of free speech. Therefore, when a Muslim cleric's religious speech amounts to only encouragement to plan a terrorist attack rather than incitement to engage in illegal activity, the *Brandenburg* requirement of imminence is not satisfied. In this situation, only actors who engage in illegal exploits—and not speakers who encourage their behavior—should be held criminally culpable for terrorist activity.

The recent conviction of Muslim preacher Ali Al-Timimi is troubling because it indicates a potential judicial willingness to relax *Brandenburg*'s imminence requirement when domestic terrorism is at issue. In *United States v. Al-Timimi*,[82] Al-Timimi was convicted of inciting his followers to plan to wage war against the United States, even though his encouragement was several steps removed from any illegal activity.[83] In light of the success of the Al-Timimi prosecution, federal prosecutors may decide to charge more Muslim preachers who believe in a radical spiritual doctrine on the basis of those beliefs. If federal prosecutors are successful, *Brandenburg*'s imminence requirement will be severely undermined.

A. The "Blind Sheik" of New Jersey: Precedent Before 9/11

Before the attacks of September 11, the case of *United States v. Rahman*[84] set the groundwork for the prosecutorial strategy in the *Al-Timimi* case. In July 1993, the FBI broke up an extensive terrorist plot involving the blind Egyptian cleric Sheik Omar Abdel Rahman, an Islamic fundamentalist living in New Jersey.[85] According to the government, "Rahman and eleven others conspired to machine-gun guards at FBI headquarters in Manhattan, plant a bomb at the United Nations building and drive vehicles laden with explosives into the Lincoln and Holland commuter tunnels, killing thousands of motorists in 'unimaginable horror.'"[86] Prosecutors also linked members of the group to the 1990 murder of Jewish Defense League founder Rabbi Meir Kahane, the 1993 bombing of the World Trade Center in New

---

82 United States v. Al-Timimi, No. 1:04cr385 (E.D. Va. filed Sept. 23, 2004).

83 *See* News Release, Dep't of Justice, *supra* note 16.

84 United States v. Rahman, 189 F.3d 88 (2d Cir. 1999).

85 *See id.* at 104, 111.

86 Robert L. Jackson, *Terror Plot Trial Opens for Sheik, 11 Followers*, L.A. TIMES, Jan. 31, 1995, at A20.

York, and the attempted murder of Hosni Mubarak, the President of Egypt.[87] Prosecutors alleged that Rahman had been the group's overall supervisor and leader and had issued fatwas (religious opinions on the holiness of the group's acts) to participants to sanction their plans as furthering jihad.[88] Popularly termed the "Blind Sheik" case, at the time the trial began in early 1995, it was considered the most important terrorism trial in U.S. history.[89]

Alleging that Rahman inspired the members of the group to action with his fiery sermons, the prosecution introduced tapes of Rahman's speeches, one of which showed Rahman arguing that "[t]he Koran makes [terrorism] among the means to perform jihad in [sic] the sake of Allah, which is to terrorize the enemies of God . . . . We must be terrorists and must terrorize the enemies of Islam and frighten them and . . . disturb them."[90] In addition, Rahman told one group member that he could make up for fighting in the Egyptian military—part of an "infidel government"—by assassinating Mubarak, who was a "loyal dog to the Americans."[91] The jury found Rahman guilty of all charges, and he was sentenced to life imprisonment for his role in the crimes.[92]

On appeal, Rahman argued that the seditious conspiracy statute under which he was charged was unconstitutional because it criminal-

---

87 *Rahman*, 189 F.3d at 103–05. In a separate case, four of the six active participants in the 1993 World Trade Center bombing were convicted of orchestrating the attack. *See* United States v. Salameh, 152 F.3d 88, 108 (2d Cir. 1998).

88 *Rahman*, 189 F.3d at 104. Rahman's attorney argued, however, that "Dr. Rahman [was] not . . . charged because of anything he did. Blind since infancy and diabetic, he [was] charged with conspiracy only because of his words—words uttered as religious teaching, words protected by our Constitution." Jackson, *supra* note 86.

89 *See* Jackson, *supra* note 86. The charges against Rahman included seditious conspiracy, soliciting the murder of Mubarak and the attack on American military installations, conspiracy to murder Mubarak, and bombing conspiracy. *Rahman*, 189 F.3d at 103; *see* 18 U.S.C. §§ 371, 2384 (2000). The other members of the group were charged with seditious conspiracy, among other things. *Rahman*, 189 F.3d at 103–04.

90 Joseph Grinstein, Note, Jihad *and the Constitution: The First Amendment Implications of Combating Religiously Motivated Terrorism*, 105 YALE L.J. 1347, 1353 (1996) (alterations in original) (internal quotation marks omitted). Rahman had also voiced his belief in violent jihad at a conference in Brooklyn in 1993. *Rahman*, 189 F.3d at 107.

91 *Rahman*, 189 F.3d at 106 (internal quotation marks omitted). Rahman also offered insights into the group's military-style training, *id.* at 107, kept in close telephone contact with the group members who built the World Trade Center bomb, *see id.* at 109, and told a group member that bombing the United Nations was "not illicit, however will be bad for Muslims," and thus the member should "find a plan . . . to inflict damage on the American army itself" and "plan carefully," *id.* (alteration in original) (internal quotation marks omitted).

92 *Id.* at 111.

ized speech protected under the First Amendment.[93] The court of appeals disagreed, stating that the law "proscribes 'speech' only when it constitutes an agreement to use force against the United States."[94] Because the statute prohibited conspiracy to use force, not the mere advocacy of the use of force, the speech outlawed by the statute was less likely to be constitutionally protected.[95] Speech uttered by Rahman, therefore, was prohibited by the statute even if it did not directly incite any concrete violent action, as long as it sufficiently demonstrated that Rahman was a member of the conspiracy.[96] As the court stated, "a line exists between expressions of belief, which are protected by the First Amendment, and threatened or actual uses of force, which are not."[97]

The court of appeals found that the government had presented sufficient evidence to support the jury's conclusions that there was a conspiracy to "levy war" against the United States and that Rahman was a member of the conspiracy.[98] The court considered evidence "that Rahman was in constant contact with other members of the conspiracy, that he was looked to as a leader, and that he . . . encouraged his coconspirators to engage in violent acts against the United States" to be sufficient to demonstrate that Rahman was part of the conspiracy.[99] Evidence of Rahman's speeches and his support of the mem-

---

93 *Id.* at 114. The government's decision to prosecute Rahman and nine others under seditious conspiracy law surprised many in the legal world. *See* Jeff Barge, *Sedition Prosecutions Rarely Successful: Government Tries to Beat the Odds in Trial of Blind Cleric's Followers*, 80 A.B.A. J. 16, 16 (1994). Before *Rahman*, sedition trials were generally unusual and unsuccessful. *See id.* at 16–17 (describing seditious conspiracy prosecutions between the early 1980s and 1994). Black's Law Dictionary defines sedition as "[a]n agreement, communication, or other preliminary activity aimed at inciting treason or some lesser commotion against public authority" or "[a]dvocacy aimed at inciting or producing—and likely to incite or produce—imminent lawless action." BLACK'S LAW DICTIONARY 1388 (8th ed. 2004). "To support a conviction for seditious conspiracy, the government must prove that: (1) in . . . the United States; (2) two or more persons conspired to levy war against or oppose by force the authority of the United States government; and (3) that the defendant was a member of the conspiracy." 70 AM. JUR. 2D *Sedition, Subversive Activities, and Treason* § 4 (2005). In addition, to be convicted of seditious conspiracy, the defendants must actually "conspire to use force, not just advocate the use of force." *Id.* The seditious conspiracy statute allows defendants to be convicted simply for creating general plots against the government, meaning that the prosecution need not prove that the defendants engaged in specific subversive acts. Grinstein, *supra* note 90, at 1351; *see* 18 U.S.C. § 2384 (2000) (seditious conspiracy statute); *see also* 70 AM. JUR. 2D *Sedition, Subversive Activities, and Treason* § 4 (2005).

94 *Rahman*, 189 F.3d at 114.

95 *Id.* at 115.

96 *See id.*

97 *Id.*

98 *See id.* at 123–24.

99 *Id.* at 124.

bers' actions—even though his speech was in the abstract—thus could be used to convict him under the seditious conspiracy statute.[100] The court came to a similar conclusion regarding Rahman's conviction of the crime of solicitation, stating that his speeches "crossed the line" from political speech and religious exercise into the realm of illegal incitement.[101]

Because he had specifically instructed members of the group to target Mubarak and to target military bases, the court considered Rahman's speech sufficient to support his conviction. The court found that "[w]ords of this nature—ones that instruct, solicit, or persuade others to commit crimes of violence—violate the law and may be properly prosecuted regardless of whether they are uttered in private, or in a public speech, or in administering the duties of a religious ministry."[102] The court made no mention of the *Brandenburg* standard or whether Rahman's speech satisfied the standard's imminence requirement.[103]

The result in *Rahman* has troubling implications for free speech. The government did not present proof that Rahman's speech led to

---

100 *See id*. at 123–25. The district court judge, Michael B. Mukasey, also drew this conclusion. *See* United States v. Rahman, No. S3 93 Cr. 181 (MBM), 1994 U.S. Dist. LEXIS 10151, at *4–5 (S.D.N.Y. July 21, 1994) ("[E]ven speech protected by the *First Amendment* may be received as evidence that conduct not so protected is afoot." (citing Wisconsin v. Mitchell, 508 U.S. 476, 488–89 (1993))).

101 *Rahman*, 189 F.3d at 117.

102 *Id.* As examples of Rahman's "criminal solicitation," the court cited some of Rahman's previous statements to other members of the group:

> Abdel Rahman told Salem he "should make up with God . . . by turning his rifle's barrel to President Mubarak's chest, and kill[ing] him."
>
> On another occasion, speaking to Abdo Mohammed Haggag about murdering President Mubarak during his visit to the United States, Abdel Rahman told Haggag, "Depend on God. Carry out this operation. It does not require a fatwa . . . . You are ready in training, but do it. Go ahead."
>
> The evidence further showed that Siddig Ali consulted with Abdel Rahman about the bombing of the United Nations Headquarters, and Abdel Rahman told him, "Yes, it's a must, it's a duty."

Id. (alterations in original) (citations omitted).

There was also evidence that Rahman decided whether to pursue certain causes, picked targets, and approved plans. *Id.* at 126. Rahman's attorney argued, however, that "Abdel Rahman was tried and convicted not for anything that he did but because of his religious speech," and that there was not "a scintilla of evidence that Judge Mukasey could cite where Sheik Abdel Rahman directed 'acts' that would have caused [mass destruction]." Letter to the Editor, *Sheik Abdel Rahman's Conviction*, WASH. POST, Feb. 3, 1996, at A18; *see also* Grinstein, *supra* note 90, at 1353 ("Rahman was prosecuted essentially because of the content of his sermons and his religious advice."); James C. McKinley, Jr., *Sheik's Talk at Issue in Trial*, N.Y. TIMES, Mar. 1, 1995, at B2.

103 *See generally Rahman*, 189 F.3d at 88.

overt acts committed against the government; it only charged the sheik with inciting his followers to make terrorist plans.[104] Rahman's conviction caused concern that the government would use the threat of terrorism to take a more aggressive stance towards "radical" faiths.[105] Furthermore, Rahman's conviction for incitement also demonstrated that the government could successfully use sedition charges against radical Muslim clerics, setting a precedent for future prosecutorial strategy.

B. The "Virginia Jihad" Cases and Ali Al-Timimi: Seditious Speech After 9/11

The prosecution of Ali Al-Timimi arose out of an investigation that produced more guilty verdicts than any domestic terrorism case since the attacks of September 11, 2001.[106] In June 2003, federal prosecutors announced indictments against eleven men they claimed were members of a group they called the "Virginia jihad network."[107] Prosecutors alleged that the group had trained to work with terrorists by playing games of paintball in the Virginia countryside.[108] Prosecutors also claimed that members of the group had trained with and fought for Lashkar-e-Taiba ("LET"), a Pakistani group identified as a terrorist organization by the U.S. government that has been linked to Muslim warfare against India in the Kashmir region.[109]

The men—all but one from the suburbs of Washington, D.C.—met occasionally for lectures at a local Islamic center.[110] Although there was no evidence that the men were planning attacks on the United States or that there had been any specific plots to target U.S. troops,[111] the government hailed the investigation as a key step in its campaign against domestic terrorism.[112] Law enforcement officials stated that this case represented the government's general strategy of "preemption": given the climate since September 11, the government had decided to pursue the case despite the absence of evidence of

---

104 Grinstein, *supra* note 90, at 1352.

105 *Id.* at 1364.

106 Jerry Markon, *'Va. Jihad' Defendant Sentenced to 15 Years*, WASH. POST, Aug. 26, 2006, at B1.

107 Jerry Markon & Susan Schmidt, *11 Indicted in Alleged Va. Jihad Network*, WASH. POST, June 28, 2003, at A1.

108 *Id.*; Markon, *supra* note 106.

109 Markon & Schmidt, *supra* note 107.

110 Mary Beth Sheridan, Caryle Murphy & Jerry Markon, *Va. 'Jihad' Suspects: 11 Men, Two Views*, WASH. POST, Aug. 8, 2003, at A1.

111 Markon & Schmidt, *supra* note 107.

112 Sheridan, Murphy & Markon, *supra* note 110.

specific plots against the United States.[113] Six members of the group pled guilty, and three other members were found guilty in March 2004.[114]

Ali Al-Timimi was a frequent lecturer at the local Islamic center, Dar Al Arqam, in Falls Church, Virginia.[115] Evidence indicated that in some of his speeches at Dar Al Arqam, Al-Timimi endorsed violent jihad and discussed the "'end of time' battle between Muslims and non-Muslims," although in one speech he condemned terrorism and airplane hijackings.[116] At the time the group was indicted, Al-Timimi was not charged with any crime.[117] However, federal prosecutors began a case against Al-Timimi in September 2004,[118] ultimately alleging that Al-Timimi had induced the paintball group to conspire to use firearms,[119] solicited the paintball group to wage war against the United States,[120] counseled them to engage in a conspiracy to levy war against the United States,[121] attempted to aid the Taliban,[122] advised them to attempt to aid the Taliban,[123] counseled them to conspire to violate the Neutrality Act,[124] and directed them to use firearms and explosives in furtherance of crimes of violence.[125] Federal prosecutors essentially believed that Al-Timimi was the motivator behind the paintball group's illegal actions,[126] and each statute under which Al-Timimi was charged alleged that he violated federal law by inducing and persuading the paintball group to engage in illegal action. The government's allegations centered around two meetings: the first on September 11, 2001, and the second at a dinner party on September 16, 2001.[127]

First, on September 11, 2001, a previously planned meeting at Dar Al Arqam turned into a group discussion of the terrorist attacks

---

113 Markon & Schmidt, *supra* note 107.

114 United States v. Khan, 309 F. Supp. 2d 789, 796 (E.D. Va. 2004).

115 *See* Superseding Indictment, *supra* note 16, at 4.

116 *Khan*, 309 F. Supp. 2d at 809.

117 *See* Markon & Schmidt, *supra* note 107.

118 *See* Indictment of Defendant at 1, United States v. Al-Timimi, No. 1:04cr385 (E.D. Va. Sept. 23, 2004) [hereinafter Original Indictment].

119 *See* 18 U.S.C. §§ 2, 924(n) (2000).

120 *See id.* § 373.

121 *See id.* §§ 2, 2384.

122 *See* 50 U.S.C. § 1705 (2000).

123 *See* 18 U.S.C. § 2; 50 U.S.C. § 1705.

124 *See* 18 U.S.C. §§ 2, 371.

125 *See id.* §§ 2, 844(h), 924(c); Superseding Indictment, *supra* note 16, at 1.

126 *See generally* Superseding Indictment, *supra* note 16, at 1.

127 *See* United States v. Khan, 309 F. Supp. 2d 789, 809–10 (E.D. Va. 2004).

that had taken place earlier that day.[128] Some of the members of the paintball group were present.[129] According to two of the attendants, Al-Timimi asserted that although the attacks may not have been permissible under Islam, they were not a tragedy because they were brought on by American policy.[130] Another attendant recalled engaging with Al-Timimi in a scholarly discussion as to whether attacks on the innocent can ever be permissible under Islam.[131]

Second, on the evening of September 16, one of the members of the paintball group, Yong Kwon, organized a dinner meeting at the urging of Al-Timimi.[132] Al-Timimi came to the meeting to address how Muslims could protect themselves after September 11.[133] Only members of the paintball group who owned weapons were in attendance.[134] The court found that Al-Timimi told the group that his statements at the meeting should be kept secret and asked to have the window blinds drawn and the phones disconnected.[135] Al-Timimi then stated that the September 11 attacks were justified and that America and Islam were at war, thus the group should go abroad and defend Muslims, preferably by fighting against the United States in Afghanistan.[136] Al-Timimi cited fatwas that called upon Muslims to defend Afghanistan against the American military.[137] Alternatively, the group members could relocate their families to a Muslim country.[138] One group member suggested that LET camps in Pakistan were a good place to receive training to fight in Afghanistan, and he told the group that he could assist others in accessing them.[139] According to Al-Timimi, however, during this meeting, he merely counseled "those who [were] worried of a [post-September 11] backlash and [had] the

---

128 *Id.* at 809.

129 *See id.*

130 *Id.*

131 *See id.*

132 *Id.*

133 *Id.* The September 16 meeting was at the heart of the government's case. *See id.* at 819, 821.

134 *Id.*

135 *Id.* at 809–10.

136 *Id.* at 810.

137 *Id.*; *see also* United States v. Khan, 461 F.3d 477, 484 (4th Cir. 2006) ("Timimi said that the September 11 attacks were justified and that it was the obligatory religious duty of those present to defend the Taliban against the American troops that were expected to invade Afghanistan in pursuit of Al-Qaeda. The discussion focused on training at the LET camps as necessary preparation to fight with the Taliban against the United States.").

138 *Khan*, 309 F. Supp. 2d at 810.

139 *Id.*

opportunity to travel to a Muslim land, then that [was] an alternative."[140]

After the dinner, four of the men who had attended the dinner party began journeys to Karachi, Pakistan and arrived at LET camps in early October.[141] According to prosecutors, the actions of these men demonstrated the pronounced effect of Al-Timimi's speeches and encouragement and underscored his guilt in this case.[142]

Al-Timimi was convicted by a jury on all counts on April 26, 2005, and sentenced to life in prison.[143] The conviction immediately stirred a debate as to whether his fundamentalist diatribes could truly be criminal or whether he had merely been exercising his right to free speech.[144] "By his treasonous criminal acts, [Al-Timimi] has proven himself to be a kingpin of hate against America and everything we stand for, especially our freedom," argued U.S. Attorney Paul J. McNulty.[145] Many disagreed, however, and argued that Al-Timimi had been a victim of an overzealous prosecution that played on American fears of another domestic terrorist attack.[146] As a member of another mosque in the Washington, D.C., suburb of Falls Church stated, "[Al-Timimi] never opened a weapon or fired a shot, and he is going to get life imprisonment for talking."[147] Al-Timimi's defense attorney similarly argued that "[a]ll this man has done is exercise the rights all American citizens have. He has uttered words, . . . mere words."[148]

C. Al-Timimi's Speech Did Not Incite "Imminent" Action

The expression for which Al-Timimi was convicted fails to satisfy *Brandenburg*'s imminence requirement because it amounted to only incitement to plan and not direct incitement to illegal activity. Al-Timimi's speech was several steps removed from action: he was convicted of encouraging the men at the September 16 dinner party to plan to travel to Pakistan, which would later lead to training with ter-

---

140 Sheridan, Murphy & Markon, *supra* note 110.

141 Superseding Indictment, *supra* note 16, at 6–7.

142 *See* Government's Response to Al-Timimi's March 2005 Motions at 3, United States v. Al-Timimi, No. 1:04cr385 (E.D. Va. Mar. 16, 2005).

143 Jerry Markon, *Muslim Leader Is Found Guilty: Fairfax Man Urged Followers to Train for Violent Jihad*, WASH. POST, Apr. 27, 2005, at A1.

144 *See, e.g.*, *id.*

145 *Id.* (internal quotation marks omitted).

146 *See* Timothy Dwyer, *Prosecution Called Overzealous: Guilty Verdict in Terror Case Angers Muslims Who Know Lecturer*, WASH. POST, Apr. 27, 2005, at A10.

147 *Id.* (internal quotation marks omitted).

148 Markon, *supra* note 143 (internal quotation marks omitted).

rorist forces.[149] Thus, "at best, Dr. Al-Timimi advocated some future violent action in some far off place at some unknown time."[150] Al-Timimi's speech may not even have been the primary reason the four men traveled to Pakistan—three of the men in the group had already traveled to LET camps in Pakistan, had told the other men about their exploits, and may have planted the idea of training with LET long before Al-Timimi made his statements at the dinner party.[151]

Furthermore, because there was sufficient time for the men to be exposed to contrary viewpoints from the marketplace, Al-Timimi's expression should be protected under *Brandenburg*'s marketplace theory. Unlike when one shouts fire in a crowded theater and causes an immediate, dangerous stampede,[152] the listeners at the dinner party had time to consider Al-Timimi's words, weigh the consequences of following his advice, and make plans to travel. Five days passed before four of the men from the dinner party traveled to Pakistan, and almost a month passed before they reached LET training camps.[153] Al-Timimi's speech at the dinner party, therefore, did not "bypass[ ] the rational processes of deliberation"[154] of the men who traveled to Pakistan. As Al-Timimi's counsel argued in post-trial motions,

> Dr. Al-Timimi [was] charged with advocating the use of force in a conflict that had not yet begun, in a place that was thousands of miles away, against an enemy that may or may not ever arrive . . . . [T]here can . . . be no doubt that violence was not 'imminent' at Yong Kwon's home in September of 2001.[155]

Al-Timimi's convictions were based solely on the content of his speech and the effect of that speech on his listeners.[156] Because Al-Timimi's conviction does not satisfy the imminence requirement, it cannot stand up to scrutiny under *Brandenburg*'s First Amendment standard. Taken as precedent, however, *Al-Timimi* implies that courts will allow *Brandenburg*'s strict imminence constraint to be under-

---

149 *See generally* Superseding Indictment, *supra* note 16.

150 Defendant's Reply to the Government's Response to Defendant's Post-Trial Motions at 19, United States v. Al-Timimi, No. 1:04cr385 (E.D. Va. June 28, 2005) [hereinafter Defendant's Reply]; *cf.* Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (arguing that speech cannot satisfy an immediacy requirement if it is an attempt to induce unlawful action "at some indefinite time in the future").

151 *See* United States v. Khan, 309 F. Supp. 2d 789, 807–09 (E.D. Va. 2004).

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

153 Superseding Indictment, *supra* note 16, at 6–7.

154 Strauss, *supra* note 72, at 339.

155 Defendant's Reply, *supra* note 150, at 18.

156 *See id.*; Tanenbaum, *supra* note 13, at 787–89.

mined when issues of terrorism are present. This renewed focus on context and probability of harm forms a standard of analysis functionally equivalent to *Dennis*'s "clear and present danger" model, which was put to bed by *Brandenburg* over thirty years ago. If other courts follow *Al-Timimi* as precedent, they may initiate a trend towards relaxing the imminence requirement when the fear of terrorism is present.

III. Contemporary Concerns: Applying Brandenburg *amid Worries of Domestic Terrorism*

Despite the questionable precedent established by *Al-Timimi*, courts should adhere to *Brandenburg*'s strong imminence requirement.[157] The imminence standard is essential during the "war on terror" because it keeps at bay the impulse to suppress unorthodox views and chill Islamic speech. Furthermore, by requiring that speech be censored only when circumstances preclude rational thought, the *Brandenburg* test reduces the hazard that factfinders examining speech will be affected by personal fears or biases when assessing the risk of harm.[158] This hazard is particularly pronounced in cases of radically subversive speech involving domestic terrorism, where jurors are likely to be most passionate. Finally, relaxing the imminence requirement might actually increase the country's domestic terrorism problem by enabling the terrorists to cite our government's failure to defend constitutional liberties and gain some sympathy for their cause. Cases in which Muslim clerics are prosecuted for their speech, therefore, are precisely those cases in which the strengthened imminence requirement should be brought to the fore, not relaxed and brushed to the side in light of other situational factors.

A. Relaxing the Imminence Requirement Threatens to Chill Speech

Relaxing the imminence requirement of *Brandenburg* may severely chill expression in the Muslim community. Speech is "chilled" due to the combination of the deterrent effects of possible punishment and the uncertainty created when governmental regulation appears to target broad areas of expressive activity.[159] Importantly, chilling ef-

---

157 *Contra* Tanenbaum, *supra* note 13, at 806–19 (arguing that the *Brandenburg* imminence requirement should be relaxed in the context of the war on terror and when the speech at issue is privately advocated to Islamic fundamentalists and sanctioned by an imam).

158 *See* Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 44 (2003).

159 *See* Schauer, *supra* note 74, at 685–94.

fects can be at their most powerful during wartime periods, when uncertainty and fear are at their peak.[160] If Muslim religious groups perceive courts to be condemning expression in their communities, they will be likely to censor much of their speech.

The prosecution of Al-Timimi appears to have chilled religious expression already within a conservative Muslim community that worships in northern Virginia, where the case was tried. Salafism, a sect of Muslim thought that emphasizes separatism and a return to traditional Islamic principles, was once widely practiced by Muslims in that area.[161] Al-Timimi was one of the area's most prominent Salafi preachers.[162] Now, the Dar Al Arqam center where Al-Timimi preached is closed. Saudi Arabian Salafi missionary efforts in the area have been discontinued.[163] At least one Salafi institute no longer has students, and some adherents are now afraid to admit that they are Salafi.[164] Others feel the need to argue against the perception that Salafism fosters extremism.[165] Many Muslims now warn of the dangers of preaching separatism and other tenets of Salafism, worried that such actions will attract the attention of the U.S. government.[166]

Prosecutions such as *Al-Timimi* chill speech because courts fail to adhere strictly to *Brandenburg*'s requirements. When courts focus on the perceived magnitude of danger created by religious speech of the type at issue in *Al-Timimi*, rather than focusing on whether that speech satisfies the imminence requirement, they validate the government's perception of the danger caused by that speech and, in doing so, legitimate the fear that such speech will generate terrorist threats.[167] This creates the impression that certain areas of expression are disfavored, which chills wide areas of speech. The *Al-Timimi* and *Rahman* courts, by relaxing the imminence requirement, thus contributed to chilling effects on speech in the Muslim community. Other courts following their approach will only exacerbate this result.

---

160 *See* Blasi, *supra* note 74, at 482.

161 Caryle Murphy, *For Conservative Muslims, Goal of Isolation a Challenge: 9/11 Puts Strict Adherents on the Defensive*, WASH. POST, Sept. 5, 2006, at A1.

162 *Id.*

163 *Id.*

164 *Id.*

165 *See id.*

166 *See id.*

167 *See* Blasi, *supra* note 74, at 483.

B. Remaining Rational During Wartime

Constitutional analysis does not occur in a vacuum, and any court applying *Brandenburg* must take into account the post-September 11 awareness of terrorist threats. Scholars on both sides of the debate agree that although the Constitution applies in times of war, times of war can also affect the application of the Constitution.[168] Judicial analysis of free speech protections must therefore contain a practical examination of "benefits" and "costs" to society at large.[169] The United States has a history, however, of failing to evaluate appropriately wartime dangers and tending to overly restrict civil liberties during times of national insecurity.[170] Many worry that no standard, not even one as protective as *Brandenburg*, will be able to protect free speech during future times of crisis.[171] The question then becomes: how can we enable courts to protect free speech after September 11?[172]

Relaxing our most protective standard of free speech analysis will actually hinder the judiciary in keeping a pragmatic and well-reasoned focus during this difficult period of national instability. Although judges are meant to check the elected branches of the government and enforce the Constitution, they are just as prone as ordinary citizens to being swept up in the fever of war.[173] Without the constraint of the imminence requirement, judges will have a more liberal rein in analyzing the danger of Muslim speech in a post-September 11 environment. They will feel pressured by the fear of terrorism and unable to act as rational keepers of constitutional liberty.[174] As Judge Richard Posner writes:

---

168 *See* STONE, *supra* note 44, at 543.

169 *See* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739–40 (2002).

170 *See* STONE, *supra* note 44, at 528–29.

171 *See* Rabban, *supra* note 54, at 1352; *see also* Horwitz, *supra* note 158, at 6 ("First Amendment jurisprudence must contend with the unmistakable truth that people are *not* rational, and that the individual can in fact be irrational, a captive of emotion rather than reflection, capable of being swept away by hysterical, emotional appeals." (internal quotation marks omitted)).

172 *See* EMERSON, *supra* note 20, at 55.

173 STONE, *supra* note 44, at 544; *cf.* Jackson, *supra* note 1, at 105 ("Those admonitions addressed to the judges are designed to keep the judicial process as independent, neutral and non-partisan as procedural safeguards can, and to make certain that courts will not be used as instruments of oppression or of political policy.").

174 *See* THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which,

> When the danger posed by subversive speech passes, the judges become stricter in their scrutiny of legislation punishing such speech. They know that such legislation may curtail worthwhile public debate over political issues. Hence, when the country feels very safe the Justices of the Supreme Court can[,] without paying a large political cost[,] plume themselves on their fearless devotion to freedom of speech and professors can deride the cowardice of the *Dennis* decision. But they are likely to change their tune when next the country feels endangered.[175]

The return to a flexible standard such as the "clear and present danger" rule of *Dennis*, a move indicated by the *Rahman* and *Al-Timimi* courts, would not be advisable in the context of the "war on terror." The *Dennis* standard is too malleable to adequately protect free speech when the passions of the citizenry are at their peak.[176] It places a high emphasis on context and can be freely manipulated when there is an overemphasized perception of insecurity. In today's terrorism-phobic atmosphere, the "world conditions" cited by *Dennis*[177] could again appear to counteract a person's right to free speech. "[T]he costs of freedom of expression are often more salient than the benefits, . . . caus[ing] the balance to shift too far towards suppression"[178] because the costs of allowing speech may actually be much smaller than they seem. If a reawakening of "clear and present danger" occurs in today's atmosphere, it could cause serious curtailment of First Amendment protections.

In looking forward to future periods of national crisis, Professor Vincent Blasi has argued that the most robust protection of constitutional liberties should occur during "pathological periods," or abnormal periods in history "when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically."[179] Because these pathological periods make the world "seem so different [and] so out of joint, [and] the threats from within or without seem so unprecedented," society often

---

though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

175 Posner, *supra* note 169, at 741.

176 *See* EMERSON, *supra* note 20, at 115 (discussing the clear-and-present-danger test and stating that "the Hand-Vinson formula is so pale in tone and so neutral in emphasis that it is hard to conceive of it as being used effectively to control governmental power over expression").

177 Dennis v. United States, 341 U.S. 494, 511 (1951).

178 Posner, *supra* note 169, at 744.

179 Blasi, *supra* note 74, at 449–50.

sees the Constitution as overly formalistic and impractical to meet the needs of such unusual times.[180] Due to this perception, constitutional protections are most likely to be curtailed during these pathological periods.[181] Free speech principles can be the first victims as the instinct to suppress dissent takes hold.[182] This is especially damaging to our system of free expression because the core principles of the First Amendment depend on "the attitudes . . . regarding the practical wisdom and moral propriety of tolerating unorthodox, disrespectful, potentially disruptive ideas."[183]

To reduce the negative impact of these pathological periods, First Amendment jurisprudence "should be targeted for the worst of times."[184] Standards developed during normal times should create procedures "that are relatively immune from the pressure of urgency by virtue of their formality, rigidity, built-in delays, or strong internal dynamics."[185] They should emphasize historic First Amendment values,[186] simple and time-honored precepts,[187] and confinement of judicial discretion,[188] while still leaving some room for innovation.[189]

The *Brandenburg* test is "targeted for the worst of times,"[190] and it is exactly the sort of robust protection that must be maintained in today's "post-9/11 world,"[191] which fits Professor Blasi's definition of a pathological period.[192] *Brandenburg*'s strong imminence requirement satisfies Professor Blasi's criteria by reducing the impact of pathologi-

---

180 *Id.* at 456–57; *see also* EMERSON, *supra* note 20, at 55 ("War and preparation for war impose serious strains on a system of freedom of expression. Emotions run high, lowering the degree of rationality which is required to make such a system viable."); Jackson, *supra* note 1, at 105 ("An excited public opinion sometimes discredits [constitutional liberties] as 'technicalities' which irritate by causing delays and permitting escapes from what it regards as justice. But by and large, sober second thought sustains most of them as essential safeguards of fair law enforcement and worth whatever delays or escapes they cost.").

181 *See* Blasi, *supra* note 74, at 457.

182 *See id.*

183 *Id.* at 462.

184 *Id.* at 450, 468.

185 *Id.* at 468.

186 *See id.* at 469.

187 *See id.* at 472.

188 *See id.* at 474.

189 *See id.* at 476.

190 *Id.*

191 The term "post-9/11 world" has become common parlance for the notion that America today is less secure and in greater need of protection than during previous periods. *See, e.g.*, Christian Caryl, *America's Unsinkable Fleet: Why the U.S. Military Is Pouring Forces into a Remote West Pacific Island*, NEWSWEEK, Feb. 26, 2007, http://www.newsweek.com/id/68465 (describing the increase in America's use of force in a "post-9/11 world").

192 *See* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the*

cal pressures. It emphasizes the value of dissent, depends upon the marketplace of ideas, prevents excessive judicial deliberation by requiring a strict and close tie to lawless action, and leaves some room for judicial tailoring to specific circumstances by tying in a limited analysis of context and concreteness of speech. *Brandenburg*'s imminence requirement presents a clear-cut standard that can help American society keep a rational focus during our current time of uncertainty. Therefore, adherence to *Brandenburg*'s robust imminence requirement is essential to the preservation of our free speech principles.

C. Subverting the Imminence Requirement Could Worsen the Threat of Terrorism

In addition to keeping the effects of pathological periods at bay, utilizing a test, such as *Brandenburg*, that adheres closely to the core principles of the First Amendment may actually aid in suppressing domestic terrorism. According to Michael German, who spent years as an undercover FBI agent within domestic terrorist groups, terrorists view themselves as warriors and revolutionaries who are unsatisfied with current circumstances but who lack the ability to challenge their situation by socially accepted methods.[193] Therefore, they attempt to create chaos in the hopes that "out of the chaos, their people will rise and dominate."[194] In furtherance of this goal, terrorists seek to ignite a "severe government reaction" that will create a sense of oppression and bitterness among the citizenry.[195] This harsh reaction to their terrorist threat validates the group's message that the government is using its power to mistreat and victimize the group's members and others.[196] The terrorists' strategy therefore depends upon the government's tendency to overreact to domestic threats.[197] As the government's reaction intensifies, it restricts fundamental liberties traditionally enjoyed by society.[198] This further validates the ter-

---

Temptations of 9/11, 6 U. PA. J. CONST. L. 1001, 1023 (2004) ("'The world after 9/11' has become a specific historical moment, referred to as if it has a logic of its own.").

193 Michael German, *Squaring the Error*, *in* LAW VS. WAR: COMPETING APPROACHES TO FIGHTING TERRORISM 11, 11–12 (Strategic Studies Inst. ed., 2005), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB613.pdf.

194 *Id.* at 12.

195 *Id.* at 13.

196 *See id.*

197 *See id.*

198 *See id.*

rorists' cause and creates more discontent, allowing the group to grow and continuing the cycle.[199]

Thus, as America relaxes its traditional free speech protections, it may actually be aiding the domestic terrorist movement. A loosening of the imminence requirement makes it appear as though the judicial system allows prosecution of Muslims for merely discussing their beliefs rather than carrying out actual harms.[200] Terrorists who seek to indoctrinate followers can utilize these perceived injustices of American jurisprudence to their advantage. For example, as Osama Bin Laden announced in an October 2001 interview with Al-Jazeera television correspondent Tayseer Alouni:

> The values of this Western civilization under the leadership of America have been destroyed . . . .
>
> The proof came when the U.S. government pressured the media not to run our statements that are not longer than very few minutes [sic]. They felt that the truth started to reach the American people . . . .[201]

In the same interview, Bin Laden referenced the procedures of military commissions, opining that "[w]e never heard in our lives [of] a court decision to convict someone based on a 'secret' proof it has. The logical thing to do is to present a proof to a court of law."[202] Terrorists are able to undermine the government's legitimacy by citing its failures to defend traditional liberties.

The most effective tool we have to combat domestic terrorism, then, is our strong set of constitutional principles.[203] When the government strengthens and protects fundamental rights, terrorist groups have much more difficulty claiming that the government is tyrannical and unjust. The *Brandenburg* test, by presenting imminence as a hurdle to suppressing expression, restricts the government's ability to punish protected expression. Consequently, adhering to the imminence requirement may combat terrorism more effectively than relaxing it.

---

199 *See id.*

200 *Cf.* Grinstein, *supra* note 90, at 1354 ("[T]he *Rahman* case provides a dramatic example of governmental criminalization of religious sermons . . . .").

201 Interview by Tayseer Alouni, Al-Jazeera Television Correspondent, with Osama Bin Laden (Oct. 2001), http://archives.cnn.com/2002/WORLD/asiapcf/south/02/05/binladen.transcript/index.html.

202 *Id.*

203 *See* German, *supra* note 193, at 13 (explaining how a government's overreaction to terrorist attacks can help to unite the general public behind the terrorists' cause).

IV. Counterarguments to the View that a Strong Imminence Requirement Is Essential

There are several possible counterarguments to the view that *Brandenburg*'s imminence requirement should be strictly construed in the context of domestic terrorism cases. First, one might argue that imminence and marketplace theory do not apply to private speech such as Rahman's and Al-Timimi's because private speech, by its nature, is not introduced into the marketplace and, therefore, cannot be countered by "good counsels."[204] According to this argument, if the imminence requirement is mainly grounded in marketplace theory, then imminence becomes irrelevant in cases of private speech.[205]

Although the Supreme Court has not yet addressed the implications of the *Brandenburg* test for private advocacy of illegal action,[206] it is incorrect to assume that private speech does not have the opportunity to enter the marketplace of ideas. If we accept that advocacy has a pronounced effect on its listeners, these listeners will then carry the speaker's message with them after leaving the private forum in which it was expressed. In the time between the advocacy and the proposed action, the listeners will have the opportunity to be exposed to counterarguments, to discuss the proposed plan of illegal action with others, and to consider any counterspeech before acting. Thus, listeners of private speech can act as vessels that introduce the speaker's ideas into the marketplace, enabling counterspeech to have its ameliorative effects.

Although Al-Timimi advocated terrorist activity in a secret forum without the possibility of immediate counterspeech from the marketplace, the gap in time between the advocacy and the action taken by the listeners was sufficient for the effects of the marketplace to take hold. The imminence requirement was neither irrelevant nor ineffective in this case: when faced with the counterarguments of the marketplace, the listeners chose the path of illegality over the path of legality.

---

204 *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *cf.* Tom Hentoff, Note, *Speech, Harm, and Self-Government: Understanding the Ambit of the Clear and Present Danger Test*, 91 COLUM. L. REV. 1453, 1465–66 (1991) (suggesting a two-step approach to the clear-and-present-danger test and arguing speech causing harms that cannot be cured by counterspeech to be outside the ambit of the clear-and-present-danger test).

205 *See* Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 12 (1992) (noting that the "Court's cases have thus far involved only public political advocacy" and that the "extent of the . . . test's applicability remains unclear"); Rabban, *supra* note 54, at 1352.

206 Rabban, *supra* note 54, at 1351–52.

Because the marketplace had ample time to work, this decision to act made the *listeners* and *not* the speaker culpable for any illegal activity.

Another possible counterargument is that under a strict application of *Brandenburg's* imminence requirement, encouragement to train for jihad will never be punishable. A proponent of this argument would note that it usually takes a long time to act upon such advocacy, and *Brandenburg*, therefore, would preclude control over radical Islamist rhetoric.[207] Under this argument, an adherence to the imminence requirement will cause radicalism in the United States to increase because extremists will take advantage of the greater opportunity to indoctrinate new followers to commit terrorist acts. The argument may conclude that the government, thus deprived of the ability to punish radical advocates, will be restrained from acting until it is too late to prevent another attack.

As previously noted, however, protecting the free speech rights of radical Muslim preachers will probably discourage rather than encourage further terrorist action.[208] "To accomplish their goals, terrorists need to trigger a severe government reaction . . . to stir resentment and validate the terrorist's propaganda that 'they' are persecuting 'us.'"[209] Because of this, an adherence to the imminence requirement will both serve justice and reduce fodder for terrorist propaganda. Second, under seditious conspiracy law, the government is still capable of prosecuting those who take action and is therefore not powerless to stop terrorist acts.[210] The government is merely restrained from prosecuting one who advocates action on the part of his listeners if the requirement of immediacy is not met and the advocate takes no action in furtherance of the conspiracy.

A third possible argument is that courts should defer to the judgment of the executive branch in wartime. Under this argument, because national security is of paramount interest during periods of war, the executive branch should determine when advocates are threats to the nation.[211] Although the *Brandenburg* test may be a fitting standard during peacetime, a proponent of this argument would say that it is not appropriate at a time when the government needs maximum

---

207 *But cf.* United States v. Rahman, 189 F.3d 88, 116 (2d Cir. 1999) ("[I]t is well established that the Government may criminalize certain preparatory steps towards criminal action, even when the crime consists of the use of conspiratorial or exhortatory words.").

208 *See supra* Part III.C.

209 German, *supra* note 193, at 13.

210 *See generally* United States v. Khan, 461 F.3d 477 (4th Cir. 2006); *Rahman*, 189 F.3d 88.

211 STONE, *supra* note 44, at 543.

control over the nation.[212] Therefore, the argument may conclude, courts should use something similar to the "bad tendency" test, which would give the executive branch the most power over security issues.[213]

The judiciary, however, is meant to provide a rational check on executive power, even—or perhaps especially—during wartime.[214] But judges can also be influenced by the passions of war and may tend to overestimate dangers evoked by radical speech.[215] Therefore, a restrictive test such as *Brandenburg* reduces the chance that the executive branch's security fears will overly affect the judiciary.[216] Considering that the judiciary has never overprotected free speech rights in a way that has impeded the country's war effort, it is highly improbable that courts will protect free speech rights so excessively as to damage national security.[217]

Conclusion

Today's domestic terrorism prosecutions must remain devoted to the strict imminence requirement set by the *Brandenburg* standard. A relaxation of the imminence requirement and a return to clear-and-present-danger principles would undermine the progress made by *Brandenburg*'s protective standard. Courts should not regard *Al-Timimi* as precedent but should continue to follow the prevailing model of analysis set forth by *Brandenburg*. When the imminence requirement is not met, courts should punish only those who engage in illegal conduct, not those who encouraged its planning.

Many argue that today's world is different than it ever has been before, justifying a new jurisprudential logic.[218] Radical Islamic speech in the context of the "war on terror," however, does not present dangers that are substantially different from those in former wartime environments. American history is replete with threats presented by extremist advocacy, and courts need not relax constitutional principles to meet such threats.[219] Indeed, *Dennis*'s more speech-protective standard arose even amidst fears that Communist

---

212 *Id.*

213 *Id.*

214 *Id.* at 544 ("The elected branches tend to give inadequate weight to civil liberties in wartime, and it is the responsibility of courts in our constitutional system to act as a corrective.").

215 *See supra* text accompanying notes 168–75.

216 *See supra* Part III.B.

217 STONE, *supra* note 44, at 544–45.

218 *See supra* notes 12–13 and accompanying text.

219 *See* Jackson, *supra* note 1, at 104.

advocacy could succeed in overthrowing the government, and the speech at issue in *Brandenburg* advocated for "send[ing] the Jews back to Israel" and "[b]ury[ing] the niggers" at a white supremacist rally.[220] Radical fundamentalist speech is no stranger to First Amendment jurisprudence, and yet the Supreme Court nevertheless developed strongly protective standards. There is no reason to treat the speech at issue in *Al-Timimi* by any different standard.

If anything, prosecutions such as *Rahman* and *Al-Timimi* threaten to take the United States once again down an oft-traversed yet much-regretted path. Although many believe it is necessary to restrict civil liberties and limit basic constitutional principles in times of war, the effects of these mistakes stay with us after the smoke has cleared and we are once again in a time of peace and neutrality.[221] In fact, "just about every time the country has felt seriously threatened the First Amendment has retreated."[222] We would like to think, however, that as a country we have evolved past errors such as the McCarthyism of the Cold War period. As Chief Justice Warren observed:

> For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . liberties . . . which make[ ] the defense of the Nation worthwhile.[223]

Protecting *Brandenburg*'s imminence requirement in today's period of crisis may be our best defense against terrorism; although terrorism will continue to threaten our national security, we can ensure that our liberty, which we fight so assiduously to defend, remains intact.

---

220 Brandenburg v. Ohio, 395 U.S. 444, 446 n.1 (1969) (per curiam).

221 *See* STONE, *supra* note 44, at 528–29 (discussing previous historical periods in which the nation has taken liberty restrictions "too far" and arguing that after every period, the nation regretted many of its decisions).

222 *Id.* at 523 (internal quotation omitted).

223 United States v. Robel, 389 U.S. 258, 264 (1967) (discussing freedom of association).