

Extremist Speech and the Internet: The Continuing Importance of *Brandenburg*

Judge Lynn Adelman*
Jon Deitrich**

In *Reno v. American Civil Liberties Union*, the Supreme Court's first significant attempt to address the application of the First Amendment to the internet, the Court declined to qualify "the level of First Amendment scrutiny that should be applied to this medium."¹ The Court explained that "the vast democratic forums of the Internet" have not "been subject to the type of government supervision and regulation that has attended the broadcast industry," and "the Internet is not as 'invasive' as radio or television."² Comparing regulation of the internet to a previous congressional attempt to regulate "indecent" commercial telephone messages, the Court noted that an internet user generally must take affirmative steps to receive potentially troubling communications.³ The Court observed that:

unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail ex-ploders, and newsgroups, the same individual can become a pamphleteer.⁴

Thus, in *Reno*, the Court acknowledged the vastness, diversity, and dynamism of the internet and granted internet communication the full measure of constitutional protection. And since *Reno*, the number of internet users has increased dramatically to an estimated 259,561,000 in North America and 1,802,330,457 worldwide.⁵ These numbers suggest that the internet has become perhaps the most extensive means of communication yet devised.

* Judge, U.S. District Court, Eastern District of Wisconsin.

** Law clerk to Judge Lynn Adelman; Adjunct Professor of Law, Marquette University Law School.

¹ 521 U.S. 844, 870 (1997).

² *Id.* at 868–69.

³ *Id.* at 867, 869.

⁴ *Id.* at 870 (footnote omitted).

⁵ InternetWorldStats.com, World Internet Users and Population Stats (Dec. 31, 2009), <http://www.internetworldstats.com/stats.htm> (on file with the Harvard Law School Library).

However, the diversity of human thought found on the web includes not just the inspired and the banal, but also the depraved. Due to its speed, global reach, and promise of anonymity, the internet has undoubtedly become a valuable means of communication for those of ill will. Perhaps not surprisingly, the use of the internet by people interested in promoting terrorism, racism, and the like has made many anxious. Articles discussing this subject appear frequently,⁶ and some vigorously advocate greater regulation of extremist speech on the internet.⁷ For example, Alexander Tsesis argues that “the state should prohibit persons and organizations from intentionally conveying racial animus through the Internet when their messages are substantially likely to produce bias motivated malfeasance.”⁸ Tsesis further advocates the establishment of an international treaty to deter the dissemination of hate propaganda via the internet and to prevent “terrorists and supremacists from indoctrinating volatile followers.”⁹ And a number of commentators have questioned whether present First Amendment doctrine “is flexible enough to deal with the current threat, terrorism, and new media, particularly the Internet.”¹⁰

As Lee Bollinger explains, “every time a new communication technology comes along, people get nervous. They are afraid that the technology is going to change the way people think and behave, and societies want to clamp down on it.”¹¹ There can be no doubt that in times of danger, real or imagined, Americans have too often “allowed fear to get the better of them” and have unjustifiably curtailed civil liberties.¹² Further, countries with traditions less protective of speech than the United States have taken a variety of steps to quell the spread of internet hate speech.¹³

It is easy to denigrate the value of speech that most consider hateful and ignorant¹⁴ and to point to examples of atrocities committed after racist incitement.¹⁵ It is also easy to exaggerate the harm that can come from a new

⁶ See, e.g., Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, ¶¶ 5–13 (2002) (surveying hate speech on the internet); Megan Anne Healy, Comment, *How the Legal Regimes of the European Union and the United States Approach Islamic Terrorist Web Sites: A Comparative Analysis*, 84 TUL. L. REV. 165, 167 (2009).

⁷ See, e.g., Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 501 (2009).

⁸ Tsesis, *supra* note 6, ¶ 4.

⁹ *Id.*

¹⁰ Chris Montgomery, Note, *Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism?: The Secret Weakening of a Venerable Doctrine*, 70 OHIO ST. L.J. 141, 144 (2009).

¹¹ Interview with Lee C. Bollinger, President, Colum. Univ., COLUM. MAG. 21, 22 (Winter 2009–10).

¹² Geoffrey R. Stone, *War Fever*, 69 MO. L. REV. 1131, 1131 (2004).

¹³ See, e.g., Christopher D. Van Blaricum, Note, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781 (2005).

¹⁴ See Tsesis, *supra* note 7, at 501 (“Hate speech is a threatening form of communication that is contrary to democratic principles. It not only asserts personal opinion but also aims to prevent segments of the population from participating in deliberative decision making. In combating the threat, states committed to free speech may adopt laws that prevent the dangerous dissemination of messages without interfering with legitimate, although sometimes offensive, discourse.”) (footnote omitted).

¹⁵ See *id.* at 501–02.

means of communication such as the internet. In our view, it is critical that we not succumb to the temptation to weaken our protections of speech based on concerns about terrorists and hatemongers and their use of the internet. We further contend that when the Supreme Court decided *Brandenburg v. Ohio* in 1969, it established a framework that has well protected the values served by the First Amendment, and that nothing about the internet suggests a need to modify that framework.¹⁶

In this Article, we seek to explain why the balance that the Court struck in *Brandenburg* between protecting speech and protecting society against the commission of unlawful acts is appropriate for internet communication. We begin by briefly outlining the key values underlying the First Amendment and how those values relate to internet communication. We then discuss the *Brandenburg* test and some of the decisions applying it, including some specifically concerning internet communication. We conclude with several general observations about *Brandenburg*'s impact and an explanation of why we oppose the application of a less speech-protective standard to internet communication.

I.

The Constitution protects freedom of speech for many reasons. Some theorists argue that the primary purpose of the First Amendment is to facilitate democratic self-determination,¹⁷ which “requires the maintenance of a structure of communication open to all.”¹⁸ Others contend that the Amendment’s most significant contribution is the development of “deliberative autonomy,” that is, the ability of individuals to formulate their own views based on all available information.¹⁹ Yet others emphasize that uninhibited debate assists in the search for the truth and that exposure to plainly false or offensive speech, which does not directly assist in the search for truth, may, by virtue of its very wrongfulness, reinforce our understanding of the truth.²⁰ One justification—the so-called “safety-valve argument”—holds that permitting extremists to blow off steam allows us to know who they are and

¹⁶ 395 U.S. 444 (1969).

¹⁷ See, e.g., Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279–82 (1991); see also Stone, *supra* note 12, at 1136 (“When the government silences dissent, in wartime or otherwise, it warps the thinking process of the community and undermines the very essence of self-government.”).

¹⁸ Post, *supra* note 17, at 282.

¹⁹ See, e.g., Aditi Bagchi, *Deliberative Autonomy and Legitimate State Purpose Under the First Amendment*, 68 ALB. L. REV. 815, 816 (2005) (“The reason that the United States government may not prevent such individuals from proclaiming the evils of a religion, a society, or a nation lies neither in their right to express hatred nor in the public interest in hearing or ‘airing’ such a hatred. Rather, the government must allow speakers to express disdainful and even indirectly dangerous views because to disallow speech out of fear that the speech will be persuasive violates the deliberative autonomy of those whom censorship aims to protect.”).

²⁰ See, e.g., JOHN STUART MILL, *On Liberty*, in ON LIBERTY AND OTHER ESSAYS 5, 24 (John Gray ed., Oxford Univ. Press 1998) (1859) (“Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth . . .”).

what they are thinking.²¹ Another posits that while some categories of speech likely contribute nothing to society, we are incapable of censoring precisely enough to avoid “threatening speech we value.”²²

We do not intend to explore these theories in any depth. However, we agree with Robert Post that the most important function of the First Amendment is to protect the communicative process necessary for the maintenance of democracy.²³ The Amendment ensures that individuals can freely contribute to the formation of public opinion. This is critical because, in a democracy, public opinion guides the conduct of government.²⁴ By safeguarding the ability of persons to participate in the formation of public opinion, the First Amendment contributes to the preservation of government’s democratic legitimacy.²⁵

We also note that various kinds of offensive or extremist speech can contribute to the formation of public opinion and provide other value. Extremist speech, for example, can educate people about governmental or organizational misconduct. Speech allegedly advocating the commission of illegal acts—the kind of speech that was at issue in *Brandenburg*—can also have significant value.²⁶ In his important book *Speech, Crime, & the Uses of Language*, Kent Greenawalt argues that “encouragements” to commit crimes “that do not involve threats, orders, offers of agreement or offers of benefits the speaker will confer”²⁷ should receive a significant degree of First Amendment protection if such encouragements are both “public” and “ideological.”²⁸ This is so because advocacy that is publicly expressed and based on an ideological motive or appeal, that is, advocacy that refers to “duty, right, overall welfare, or some historical, philosophical, political, or religious view,” often has substantial value as expression.²⁹ Speech that is both public and ideological is likely to have value because it represents an effort to persuade the public of the wisdom of a position or course of action rather than an attempt to persuade a person or small group of persons to commit a crime. Thus, Greenawalt contends that for public ideological appeals, “something like the stringent requirements of the *Brandenburg v. Ohio* test are most plainly apt.”³⁰ Such speech “should be constitutionally punishable if and only if (1) the speaker seriously urges commission of a specific crime within the very near future, and (2) it is reasonably likely that

²¹ Interview with Lee C. Bollinger, *supra* note 11, at 21.

²² *Id.*

²³ Robert C. Post, *A Progressive Perspective on Freedom of Speech*, in *THE CONSTITUTION IN 2020*, at 179, 179 (Jack M. Balkin & Reva B. Siegel eds., 2009).

²⁴ *Id.* at 179–80.

²⁵ *Id.* at 182.

²⁶ See Eugene Volokh, *Crime-Facilitating Speech*, 57 *STAN. L. REV.* 1095, 1111–26 (2005).

²⁷ KENT GREENAWALT, *SPEECH, CRIME, & THE USES OF LANGUAGE* 260 (1989).

²⁸ Marc Rohr, *Grand Illusion? The Brandenburg Test and Speech That Encourages or Facilitates Criminal Acts*, 38 *WILLAMETTE L. REV.* 1, 67 (2002) (citing GREENAWALT, *supra* note 27, at 261–72).

²⁹ GREENAWALT, *supra* note 27, at 261.

³⁰ *Id.* at 266.

the speech will contribute to the commission of the crime within the very near future.”³¹ In contrast, private solicitations to commit crimes that lack any ideological motive or appeal have little, if any, value in comparison to the danger they pose.³²

In modern life, issues involving extremist speech and the First Amendment are most likely to arise in the context of internet communication. This is so because public opinion is formed in a “public sphere” in which citizens communicate with people they may not know,³³ and today, the internet comprises a substantial portion of that public sphere. Not only do citizens obtain much of their news and information online, they also communicate with one another through e-mail, chat rooms, and social networking sites. Many politicians and other public figures have taken advantage of these forums; for instance, even the President of the United States has a Facebook page³⁴ and answers questions from citizens via YouTube.³⁵

In *Reno*, the Supreme Court strengthened the First Amendment values discussed above by protecting extremist speech on the internet to the same extent that it is protected in other modes of communication. Most significantly, the Court reinforced the right of all individuals to use the internet to attempt to influence public opinion.

It is particularly important that the internet be free from censorship because, more than most other media, the internet empowers individual citizens and equalizes opportunities for communication. It vastly increases individuals’ access to information and enables them to transmit messages to large numbers of other people at the same time. Although an individual may lack the financial or political wherewithal to transmit messages via traditional broadcast or print media, any person with access to a computer can use the internet. Thus, the internet is an equalizing as well as an empowering means of communication.³⁶ And by applying traditional First Amendment principles to the internet, the Supreme Court left these important characteristics undisturbed.

Because the internet expands both the number of people who are able to participate in the democratic conversation and the number of opinions available for consideration, an uncensored internet promotes democracy. Any person may seek an internet audience and, as the success of many bloggers attests, speakers who have ideas can sometimes succeed in doing so. In this respect, the internet embodies in a relatively pure form the First Amendment

³¹ *Id.*

³² *Id.*

³³ Post, *supra* note 23, at 182.

³⁴ Barack Obama, Facebook, <http://www.facebook.com/barackobama> (on file with the Harvard Law School Library).

³⁵ See, e.g., Michael D. Shear, *Obama Opens Up Again, This Time on YouTube*, WASH. POST, Feb. 2, 2010, at A05.

³⁶ Rachel Weintraub-Reiter, Note, *Hate Speech Over the Internet: A Traditional Constitutional Analysis or a New Cyber Constitution?*, 8 B.U. PUB. INT. L.J. 145, 162 (1998).

notion of the marketplace of ideas.³⁷ Ideas that are attractive will attract readers, and those that are not will not.

As the foregoing analysis makes clear, the values underlying the First Amendment apply equally to all communication, whether via the internet or other means. Because maintenance of a healthy public sphere is critical to self-governance, an understanding of the democratic values underlying the First Amendment will lead to close scrutiny of any regulation of internet communication to ensure that the vitality of the democratic conversation is not diminished.

II.

The case in modern constitutional law that perhaps most clearly embodies the values discussed above is *Brandenburg*. In *Brandenburg*, the Supreme Court held that government may “forbid or proscribe advocacy of the use of force or of law violation [only] where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”³⁸

The origins of *Brandenburg* trace back to a series of World War I era cases in which the Court introduced the famous “clear and present danger” test for evaluating provocative speech.³⁹ In practice, the test permitted the government to punish speech that seemed unlikely to produce actual harm. As a result, the test’s originator, Justice Holmes (often joined by Justice Brandeis), soon became disenchanted with the manner of its application.⁴⁰ Despite the eloquence of Holmes, Brandeis, and the Justices who would later assume their roles,⁴¹ in the thirty years following the adoption of the clear and present danger test, the Court never invoked it in favor of radicals prosecuted for seditious advocacy.⁴²

However, in 1957, in *Yates v. United States*, the Court drew a distinction between advocacy of rebellion “as an abstract principle, divorced from

³⁷ See *id.* at 161–63. We do not explore the differences between Robert Post’s view of the First Amendment as a safeguard of individuals’ ability to contribute to the formation of public opinion and Justice Holmes’s marketplace of ideas concept. These models may be largely interchangeable. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); see generally Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 *YALE L.J.* 1757, 1763 (1995) (analyzing the applicability of various theories of the First Amendment to speech conveyed over the internet).

³⁸ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³⁹ *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.); see also *Frohwerk v. United States*, 249 U.S. 204 (1919) (Holmes, J.) (applying *Schenck*’s analytical framework and upholding petitioner’s conviction for having frustrated the military’s recruitment efforts); *Debs v. United States*, 249 U.S. 211 (1919) (Holmes, J.) (similarly applying *Schenck* in upholding labor leader Eugene Debs’s conviction under the Espionage Act).

⁴⁰ See, e.g., *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *Abrams*, 250 U.S. at 624 (Holmes, J., dissenting).

⁴¹ See, e.g., *Dennis v. United States*, 341 U.S. 494, 579–81 (1951) (Black, J., dissenting); *id.* at 581–91 (Douglas, J., dissenting).

⁴² Rohr, *supra* note 28, at 5.

any effort to instigate action to that end” and “advocacy directed at promoting unlawful action.”⁴³ And in 1961, in *Noto v. United States*, the Court differentiated between “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence” and actually preparing “a group for violent action and steeling it to such action.”⁴⁴ Although the Court purported to decide *Yates* and *Noto* on the basis of statutory construction, the cases nevertheless provided the First Amendment context for *Brandenburg*, which involved a conviction of a Ku Klux Klan leader under Ohio’s Criminal Syndicalism Act. The *Brandenburg* Court struck down the statute as facially violative of the First Amendment and, for the first time, subjected communication advocating violence or other illegal acts to a highly speech-protective test, requiring the government to show that the speech was both directed to inciting imminent lawless action and likely to produce such action.⁴⁵

As Marc Rohr points out, numerous ironies surround *Brandenburg*’s status as perhaps the most speech-friendly case in Supreme Court history. Although the Court drew on past precedent, in some respects the formulation it arrived at seemed to come out of the blue. First, the Court announced its decision in a relatively brief, unanimous per curiam opinion in which the three most conservative Justices on the fabled Warren Court—Justices Stewart, Harlan, and White—joined.⁴⁶ Second, the First Amendment standard that the Court adopted, although ostensibly derived from prior case law, set forth a highly specific refinement of the “clear and present danger” test.⁴⁷ And third, the Court likely could have resolved the case based on the principles announced in *Yates* and *Noto* without establishing a new constitutional test.⁴⁸ As Rohr puts it, “[t]he conclusion that the *Brandenburg* test was unnecessary to the decision of the *Brandenburg* case is, on balance, all but inescapable.”⁴⁹

Ironies aside, the test that the Court articulated in *Brandenburg* has served us well, and nothing about the internet provides cause for seeking a less speech-protective standard for internet communication. As Daniel Kobil explains:

the *Brandenburg* test is clear and relatively easy to apply[,] . . . [it] properly channels governmental efforts toward preventing unlawful *behavior* rather than . . . attempting to police and potentially punish provocative speech[, and] . . . it is flexible enough . . . to punish expression that amounts to little more than the first

⁴³ 354 U.S. 298, 318 (1957).

⁴⁴ 367 U.S. 290, 297–98 (1961).

⁴⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

⁴⁶ Rohr, *supra* note 28, at 6.

⁴⁷ *Id.* at 7–8.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.*

step in carrying out unlawful conduct such as soliciting murder for hire⁵⁰

Judicial decisions in which *Brandenburg*'s principles have been scrupulously applied illustrate Kobil's points. By understanding and embracing *Brandenburg*'s insistence that the proper focus of the criminal law is conduct, not speech, such decisions have generally reached outcomes reflective of the values underlying the First Amendment. Since 1969, the Supreme Court has applied *Brandenburg* on only two occasions, but in both cases it ruled in favor of free speech.

In *Hess v. Indiana*, the Court reversed the disorderly conduct conviction of an antiwar demonstrator who said in response to a directive to disperse, "We'll take the fucking street later."⁵¹ The Court rejected the notion that such expression amounted to unlawful incitement, explaining that "[a]t best . . . the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time."⁵² Because the defendant had not directed the statement to any person or group, the Court concluded that he was not advocating action. The Court further noted that "since there was no evidence or rational inference from the import of the language that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had a tendency to lead to violence."⁵³ Thus, *Hess* placed particular emphasis on the imminence requirement. Rohr suggests that the case may be viewed as holding that even where a speaker advocates an illegal action that is "intended to take place (and perhaps likely to take place) several hours (at most) in the future, that relatively minimal temporal relationship between speech and resulting harm did not satisfy the 'imminence' requirement of the *Brandenburg* test."⁵⁴

The Supreme Court also applied *Brandenburg* in *NAACP v. Claiborne Hardware Co.*, which involved a boycott by black citizens of white-owned businesses in Claiborne County, Mississippi and a variety of provocative statements by the leader of the boycott, Charles Evers.⁵⁵ Although some of Evers's statements appeared to threaten boycott violators, the Court found that his "emotionally charged rhetoric . . . did not transcend the bounds of protected speech set forth in *Brandenburg* An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause."⁵⁶

Although the Supreme Court has not had occasion to apply *Brandenburg* to internet advocacy, lower courts have, and in doing so have provided

⁵⁰ Daniel T. Kobil, *Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOLEDO L. REV. 227, 235 (2000) (emphasis added).

⁵¹ 414 U.S. 105, 107 (1973).

⁵² *Id.* at 108.

⁵³ *Id.* at 109 (internal quotation marks omitted) (emphasis added).

⁵⁴ Rohr, *supra* note 28, at 12.

⁵⁵ 458 U.S. 886, 900 (1982).

⁵⁶ *Id.* at 928.

more examples of how well the *Brandenburg* standard works in distinguishing between provocative but important advocacy and advocacy genuinely likely to produce harm. For example, in *United States v. Carmichael*, the government sought a protective order prohibiting a defendant charged with drug offenses from operating a website containing the names and photos of agents and informants involved in his case—all beneath the word “wanted” in large, red letters—as well as a request for information about them.⁵⁷ Although the defendant made no direct threats on the site, the government argued that the website encouraged viewers to harm the agents and informants depicted.⁵⁸ The District Court for the Middle District of Alabama rejected the argument, holding that Carmichael’s site did not satisfy “the imminency requirement of *Brandenburg*.”⁵⁹ The court also found the case analogous to *Claiborne Hardware*; like Charles Evers, Carmichael employed language with a threatening connotation, but absent evidence that he “authorized, ratified, or directly threatened acts of violence,” the speech was protected.⁶⁰

The court declined to reach a different result simply because the defendant used the internet, noting that under *Reno*, “speech on the internet is subject to no greater or lesser constitutional protection than speech in more traditional media.”⁶¹ Consistent with Greenawalt’s ideas discussed above, the court also noted that hostile speech disseminated to a broad audience should be treated as less threatening than speech directed to a specific person.⁶² Finally, the court made clear that the First Amendment protects the right to publicize governmental activity such as criminal trials, even when the publicity alarms or embarrasses the persons involved.⁶³

In *Sheehan v. Gregoire*, a plaintiff who operated a website critical of law enforcement challenged a state statute that barred the publication of personal information about police, corrections officers, or court employees with the intent to harm or intimidate.⁶⁴ The District Court for the Western District

⁵⁷ 326 F. Supp. 2d 1267, 1272 (M.D. Ala. 2004).

⁵⁸ *Id.* at 1286.

⁵⁹ *Id.* at 1287.

⁶⁰ *Id.* at 1288 (quoting *Claiborne Hardware*, 458 U.S. at 929).

⁶¹ *Id.* at 1288–89 (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

⁶² *Id.* at 1289 (citing *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058, 1099 (9th Cir. 2002) (Kozinski, J., dissenting) (“[S]tatements communicated directly to the target are much more likely to be true threats than those . . . communicated as part of a public protest.”); *United States v. Bellrichard*, 994 F.2d 1318, 1321 (8th Cir. 1993) (“[C]orrespondence . . . delivered to a person at home or at work is somewhat more likely to be taken by the recipient as a threat than is an oral statement made at a public gathering”)).

⁶³ *See id.* at 1290 (citing *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (“There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment.”); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605–06 (1982) (describing importance of public scrutiny of criminal trials); *United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987) (“The accused has a First Amendment right to reply publicly to the prosecutor’s charges, and the public has a right to hear that reply.”) (citation omitted)).

⁶⁴ 272 F. Supp. 2d 1135, 1139 (W.D. Wash. 2003).

of Washington first concluded that the mere release of such information, even for the purpose of intimidation, was not constitutionally proscribable as a “true threat.”⁶⁵ Nor, the court held, did such release constitute unlawful advocacy under *Brandenburg*.⁶⁶ The court stated that “putting [certain individuals] in harm’s way by singling them out for the attention of unrelated but violent third parties is [conduct] protected by the First Amendment.”⁶⁷ The court acknowledged the individuals whose names were released online might experience “the real fear of harm and intimidation,” but nevertheless concluded that “we live in a democratic society founded on fundamental constitutional principles. In this society, we do not quash fear by increasing government power, proscribing those constitutional principles, and silencing those speakers of whom the majority disapproves.”⁶⁸

III.

Reflecting on the forty years since the Supreme Court decided *Brandenburg*, it is hard to avoid concluding that the case has had a significant impact. In fact, it is not unreasonable to suggest that *Brandenburg* has played at least some small part in making our society a stronger and more tolerant one. Lee Bollinger argues that a critical, if little noted, justification for an expansive interpretation of the First Amendment so as to provide great toleration of extremist speech is that by doing so, we enable citizens to learn to respond to unwelcome or abhorrent utterances with greater self-control.⁶⁹ This in turn contributes to the creation of a society that responds to anti-social behavior with more self-control. In other words, a strong free speech principle creates a stronger citizenry.

On a less exalted level, the high degree of speech protection provided by the *Brandenburg* standard has likely led to the dismissal of criminal charges and the reversal of criminal convictions in cases where the government clearly targeted offensive speech rather than speech actually likely to cause harm. The *Brandenburg* standard also seems to have played a part in causing a decline in the number of criminal prosecutions focusing on advocacy. Although such prosecutions increased substantially in past times of widespread anxiety, such as the First Red Scare of the World War I era and the early years of the Cold War, that does not seem to be the case in the post-9/11 period.

Brandenburg has also had the salutary effect of forcing Congress to take the values underlying the First Amendment into consideration when enacting criminal statutes directed at advocacy. In 1981, when Congress enacted 18 U.S.C. § 373, criminalizing the solicitation of certain criminal acts, it made clear that it drafted the statute with *Brandenburg* in mind. In

⁶⁵ *Id.* at 1141.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1149 (quoting *Planned Parenthood*, 290 F.3d at 1063).

⁶⁸ *Id.* at 1150.

⁶⁹ LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 238 (1986).

its report on the bill that became § 373, the Senate Judiciary Committee discussed *Brandenburg* and other advocacy-related cases and noted that they required “a relatively high degree of proximity, probability, or seriousness in the evil the state seeks to prevent by the regulation of speech.”⁷⁰

The Committee further explained that the proof required to establish the elements of the § 373 offense would, in most cases, obviate potential First Amendment problems. The government would have to establish that the offender had the intent that another person commit a violent crime, and that the circumstances show that the actor was serious in his intention.⁷¹ The government also would have to establish that the defendant commanded, entreated, induced, or otherwise endeavored to persuade the other person to commit the crime of violence; Congress specifically rejected words such as “counsels,” “encourages,” or “requests” because these words suggest equivocation “too close to casual remarks.”⁷² The Committee concluded that because the typical case would involve activity such as an heir soliciting the murder of a relative from whom the heir expected an inheritance, a business owner importuning another to commit arson on his business to collect insurance money, or an organized crime boss directing a subordinate to kill a rival gang leader, First Amendment issues were unlikely to arise.⁷³ However, in the unusual case in which such issues would arise, the Committee understood that the First Amendment principles established in *Brandenburg* would “operate as supplementary restrictions on the applicability of the section.”⁷⁴

As previously indicated, however, a number of commentators contend that the internet should be governed by less speech-protective standards. They offer several arguments in support of this position. In our view, none are persuasive. First, proponents of an internet-specific standard argue that extremist advocacy on the internet is more dangerous than elsewhere because it may reach a larger audience.⁷⁵ But all previous advances in communications technology, including the printing press, the telegraph, and the telephone, allowed speakers to reach larger audiences.⁷⁶ Moreover, just as the internet allows a reader to access troubling content quickly and easily, he or she may obtain contrary information just as readily. Justice Brandeis’s

⁷⁰ S. REP. NO. 97-307, at 180 (1981).

⁷¹ *Id.* at 182.

⁷² *Id.*

⁷³ *Id.* at 181.

⁷⁴ *Id.* at 182; *see also* S. REP. NO. 98-225, at 309 (1983) (“[T]he Committee wishes to make it clear that what is involved is legitimately proscribable criminal activity, not advocacy of ideas that is protected by the First Amendment right of free speech.”).

⁷⁵ *See, e.g.,* Scott Hammack, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts’ Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 81 (2002).

⁷⁶ Of course, it is possible for a speaker to convey electronically a threat or inducement to an individual or select group. It is also true that certain online forums limit participation. In this piece, we focus primarily on publicly available internet speech.

famous comment that “the fitting remedy for evil counsels is good ones” remains sound advice.⁷⁷

Proponents of a less protective standard for internet speech also point to the speed with which individuals can disseminate extremist messages on the internet.⁷⁸ However, recipients of electronic communications must often decipher them “through the act of reading, a cognitive act that is of sufficient abstraction that we can assume any unlawful conduct that follows the speech is the product of reflection rather than of an unthinking reaction by the listener to the expression.”⁷⁹ Further, while *Brandenburg* may be “strict in theory,” it need not be “fatal in fact.”⁸⁰ Kobil suggests that an internet communication otherwise punishable under *Brandenburg* may be more likely to produce a conviction than would the same communication if disseminated in a more traditional way because the government could more easily satisfy the imminence requirement.⁸¹

Finally, those who advocate an internet-specific First Amendment standard cite the anonymity of online communications.⁸² But anonymous speech is not new. In the United States, it dates back at least to the Federalist Papers, and the Supreme Court has recognized that “an author’s decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.”⁸³ Further, as every defendant in an online solicitation or child pornography case can attest, law enforcement is far from helpless to determine the identities of those who use the internet unlawfully.

Even if we were inclined to weaken the constitutional protection afforded online speech, we would have to face the difficult task of identifying what speech would be subject to greater restriction and under what circumstances. Advocates of online censorship tend to underestimate this difficulty. Tsesis, for example, would outlaw “messages . . . likely to produce bias motivated malfeasance,”⁸⁴ or specified “intolerant diatribe”⁸⁵ as if it were self-evident what communications these descriptions might encompass. Moreover, as Robert Post explains, codes imposing restrictions on speech about specified minority groups have no logical stopping point.⁸⁶

Finally, it must be noted that laws criminalizing bias-motivated advocacy or action have often been used against the minority groups that these laws presumably were designed to protect. For example, the first person to be prosecuted under Wisconsin’s hate crimes law was Todd Mitchell, an Af-

⁷⁷ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁷⁸ See, e.g., Hammack, *supra* note 75, at 83.

⁷⁹ Kobil, *supra* note 50, at 244.

⁸⁰ *Id.* at 241.

⁸¹ *Id.* at 246.

⁸² See, e.g., Hammack, *supra* note 75, at 83–85.

⁸³ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

⁸⁴ Tsesis, *supra* note 6, ¶ 4.

⁸⁵ *Id.* ¶ 22.

⁸⁶ Post, *supra* note 17, at 316 (“In a large heterogeneous country populated by assertive and conflicting groups, the logic of circumscribing public discourse to reduce political estrangement is virtually unstoppable.”).

rican American.⁸⁷ And among the first books seized by Canadian customs officials under an anti-pornography law championed by feminist Andrea Dworkin were books written by Dworkin.⁸⁸

IV.

For much of the twentieth century the Supreme Court struggled to formulate a standard for evaluating advocacy under the First Amendment. In *Brandenburg*, the Court settled on a test that balances the genuine security needs of society with the need to maintain a public sphere open to all. Nothing about the internet requires a new test. We should resist letting fear of a new technology get the better of us. The First Amendment challenges posed by the twenty-first century are not really new.

⁸⁷ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

⁸⁸ Nadine Strossen, "Is *Minnesota Progressive?*" *A Focus on Sexually Oriented Expression*, 33 WM. MITCHELL L. REV. 51, 67 (2006).

