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In Defense of Brandenburg: The ACLU and Incitement Doctrine in 1919, 1969, and 2019

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In Defense of *Brandenburg*

THE ACLU AND INCITEMENT DOCTRINE IN 1919, 1969, AND 2019

Emerson J. Sykes[†]

INTRODUCTION

In the United States, full-throated advocacy—even advocacy of violence—is protected by the First Amendment of the Constitution.[1] Few other countries are as protective of speech generally, and speech about violence or other unlawful activity specifically. I have seen this difference in approach firsthand. For nearly six years, I worked as an international legal advisor helping governments throughout Africa to improve their laws governing association, assembly, and expression. In nearly every country in which I worked, the prospect of allowing individuals and organizations to openly advocate for criminality was a non-starter. But the consequences of this more restrictive approach were real. For example, in Uganda[2] and elsewhere,[3] organizations focused on protecting the rights of LGBTQIA+ people were prohibited from registering with the government because their objectives contravene existing law. My belief that advocacy of unpopular, and even criminalized, ideas must be protected was forged in the offices of fearless activists whose governments use all means to silence them.[4] Now I work for the

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

[2] *See Civic Freedom Monitor: Uganda*, INT'L CTR FOR NOT-FOR-PROFIT L. (Aug. 20, 2019), http://www.icnl.org/research/monitor/uganda.html [https://perma.cc/5SN9-LGHV].

[3] *See, e.g.*, *Tanzania Suspends NGO for 'Promotion' of Gay Marriage*, NEWS24 (Oct. 21, 2017), https://www.news24.com/Africa/News/tanzania-suspends-ngo-for-promotion-of-gay-marriage-20171021 [https://perma.cc/3WQY-DCXN].

[4] *See Civic Freedom Monitor: Uganda*, *supra* note 2.

American Civil Liberties Union (ACLU), an organization that can take significant credit for the creation of modern free speech jurisprudence in the United States. As a First Amendment Staff Attorney, I know the power of free expression and I confront the difficulties that come from robust protections for controversial and even harmful speech.

The First Amendment keeps the government out of the business of deciding which messages are acceptable, because the government is not allowed to regulate speech on the basis of the viewpoints expressed.[5] This insistence that the government abstain from viewpoint discrimination can be hard to accept when the viewpoints expressed are abhorrent to some or many people. Even in the United States, though, not all speech is protected. Harassment, true threats, fighting words, and obscenity are categories of "unprotected" speech that we allow the government more leeway in regulating.[6] Incitement to lawlessness is another distinct category of unprotected speech.[7]

This essay focuses on incitement as a legal doctrine, which sometimes, but not always, involves hateful speech. Our legal system uses a limited definition of incitement, requiring that a speaker have intent to cause lawless action that is likely to occur imminently. This high bar for criminalizing speech that may incite others to violence—the "Brandenburg test"—was articulated by the Supreme Court in *Brandenburg v. Ohio*, an ACLU case. In that case, the Court struck down an Ohio state law that criminalized "mere advocacy" of violence.[8]

The defendant in that case was a complicated poster-child for protecting free speech rights—a literal hood-wearing member of the Ku Klux Klan who had been indicted based on a videotaped speech he delivered.[9] In 1968, at the height of the civil rights movement, the ACLU took on Clarence Brandenburg's case and argued on his behalf in the Supreme Court because it presented an opportunity to limit incitement doctrine and protect unpopular and fiery rhetoric.[10]

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[5] *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995).

[6] *See* United States v. Alvarez, 567 U.S. 709, 717 (2012).

[7] "Hate speech" is not a category recognized in our legal system because it would require the government to discriminate based on viewpoint. *See* Matal v. Tam, 137 S. Ct. 1744, 1764 (2017). For examples of how problematic hate speech laws can be, see Glenn Greenwald, *In Europe, Hate Speech Laws Are Often Used to Suppress and Punish Left-wing Viewpoints*, INTERCEPT (Aug. 29, 2017, 11:42 AM), https://theintercept.com/2017/08/29/in-europe-hate-speech-laws-are-often-used-to-suppress-and-punish-left-wing-viewpoints/ [https://perma.cc/E4HQ-HMQB].

[8] Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam).

[9] *See id.* at 444–46.

[10] *See The Successes of the American Civil Liberties Union*, ACLU, https://www.aclu.org/successes-american-civil-liberties-union [https://perma.cc/D6DP-6D5V].

The decision to defend Brandenburg was controversial at that time, and the ACLU's defense of offensive speech continues to rankle many of its allies to this day.[11] Notably, the two ACLU lawyers on the Supreme Court brief were the long-time legal director Melvin Wulf, a Jewish man, and Eleanor Holmes Norton, a young black woman who would go on to work for decades in public service, including nearly thirty years as a Congressperson.[12] So what would have led a self-described civil rights advocate like Eleanor Holmes Norton to defend Clarence Brandenburg's right to spew racial and anti-Semitic hatred? As she recently explained:

> I relished those cases, because I knew that the left and civil rights activists were the primary users of free speech, so the racist cases made our principled arguments even stronger. My friends at SNCC, the Student Nonviolent Coordination Committee, were not always convinced by this approach because "what's sauce for the goose would not have the same flavor for the gander." But I knew we were winning all those cases because we were winning for both sides.[13]

Fifty years later, the ACLU is confronting new challenges to incitement doctrine, including some that have emerged online. The internet has created enormous platforms for the advocacy of violence, including violence in furtherance of hateful ideologies, especially via social media.[14] It may seem entirely reasonable for policymakers and law enforcement officials to try to prevent violence before it starts, but establishing a causal link between speech and violence can be a tricky proposition. According to the Brandenburg test, the government can only punish someone for speech that incites violence if it can prove that the speaker intended for unlawful violence to occur, that unlawful violence is likely to occur, and that the unlawful violence is imminent.[15] But what do "intent," "likelihood," or "imminence" mean in relation to a tweet or Facebook post? Is the *Brandenburg* test obsolete?

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[11] *See, e.g.*, Jeannie Suk Gerson, *Donald Trump, the A.C.L.U., and the Ongoing Battle over the Legitimacy of Free Speech*, NEW YORKER (Apr. 23, 2019), https://www.newyorker.com/news/our-columnists/donald-trump-the-aclu-and-the-ongoing-battle-over-the-legitimacy-of-free-speech [https://perma.cc/8BE9-FR64].

[12] *See Defender of Unpopular Causes*, EBONY, Jan. 1969, at 37, 37–38; *Landmark Case Set Precedent on Advocating Force*, FREEDOM F. INST., https://www.freedomforuminstitute.org/2009/06/09/landmark-case-set-precedent-on-advocating-force/ [https://perma.cc/LY2A-DAD7]; *Full Biography*, NORTON.HOUSE.GOV, https://norton.house.gov/about/full-biography [https://perma.cc/ZR3S-HKC9].

[13] Telephone Interview with Eleanor Holmes Norton, Congresswoman for Wash., D.C., U.S. House of Representatives (June 6, 2019) [hereinafter Interview with Eleanor Norton].

[14] *See, e.g.*, VICTORIA L. KILLION, CONG. RESEARCH SERV., R45713, TERRORISM, VIOLENT EXTREMISM, AND THE INTERNET: FREE SPEECH CONSIDERATIONS 2 (2019); Cass Sunstein, *Is Violent Speech a Right?*, AM. PROSPECT (Dec. 19, 2001), https://prospect.org/justice/violent-speech-right/ [https://perma.cc/T6BR-EC7D].

[15] Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam).

In this essay, I argue that the guiding principles established by *Brandenburg* have served us well and should not be abandoned. This position is argued from the perspective of a practitioner. While the views and experiences expressed here are my own, it should not be surprising that nothing in this essay deviates from the ACLU's long-standing policy position regarding incitement, a doctrine the organization played a key role in creating.[16]

In Part I, the *Brandenburg* case is put in context within the ACLU as it existed at the time, highlighting the experience of Eleanor Holmes Norton. Part II traces the legacy of *Brandenburg* and the application of incitement doctrine over the last fifty years through a sampling of cases litigated by the ACLU and others. Part III addresses the new challenge to incitement doctrine posed by online speech. Part IV draws lessons from Africa that illuminate the risks associated with alternate approaches.

I. THE ACLU AND *BRANDENBURG*

A. The ACLU at (Almost) Fifty

In 1968, when the *Brandenburg* case came through the door, the ACLU was approaching its fiftieth year. The organization was founded in 1920 by Roger Baldwin, Crystal Eastman, and Albert DeSilver to address the government's repression of dissent after the United States entered World War I.[17] The ACLU's earliest causes were defending radicals and non-interventionists who were prosecuted under the Espionage Act of 1917.[18] Under this law, "obstruct[ion]" of the war effort was criminalized.[19] The Department of Justice interpreted the law to prohibit almost any speech critical of U.S. war strategy.[20] Pamphlets spreading anti-war and radical labor messages were prohibited by the Post Office, including mailers sent by the Civil Liberties Bureau, a precursor to the ACLU.[21] Socialist Party leaders, including Eugene Debs, Charles Schenck, and Elizabeth Baer were among the thousands

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[16] *See* Laura Weinrib, *Rethinking the Myth of the Modern First Amendment*, *in* THE FREE SPEECH CENTURY 48, 54–59, 61–66 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

[17] *About the ACLU*, ACLU, https://www.aclu.org/about-aclu [https://perma.cc/6HCN-QA8C].

[18] *See ACLU History: Advocating for Justice at the Supreme Court*, ACLU, https://www.aclu.org/other/aclu-history-advocating-justice-supreme-court [https://perma.cc/N837-RMUQ]; Espionage Act of 1917, ch. 30, 40 Stat. 217, 218-19 (codified as amended at 18 U.S.C. §§ 792-799).

[19] Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219 (1917).

[20] Sam Walker, *Conscientious Objectors*, ACLU (June 28, 2019), https://www.aclu.org/issues/conscientious-objectors [https://perma.cc/64L2-M9SM].

[21] *Id.*

that were tried and convicted under the law.[22] In this era, the Supreme Court supported the government's right to prosecute these radicals, creating the "clear and present danger" standard for analyzing speech in wartime.[23]

In 1969, the United States was again at war, this time in Vietnam, and "radical speech" was again perceived as a threat to the government. The ACLU remained committed to its founding principles and took up the fight to expand First Amendment rights to protect controversial speech. At the time, the vast majority of "ACLU cases" were litigated by volunteer lawyers, and the national legal staff consisted of just two full-time attorneys, Melvin Wulf, the Legal Director, and Eleanor Holmes Norton, the Assistant Legal Director.[24] Aryeh Neier, who would go on to co-found Human Rights Watch and serve as president of the Open Society Institute, was the executive director,[25] and Norman Dorsen, who argued landmark civil rights cases before the Supreme Court[26] and went on to become a law professor at New York University, was the president of the board of directors.[27]

Eleanor Holmes Norton stood out in several ways—she was the youngest of the group, the only woman,[28] and the only African American. She had argued and won a First Amendment case in the Supreme Court the previous year, *Carroll v. President &*

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[22] *See* Debs v. United States, 249 U.S. 211, 212–13 (1919); Schenck v. United States, 249 U.S. 47, 49 (1919).

[23] The Court in *Schenck v. United States* defined the standard as follows:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. 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.

Schenck, 249 U.S. at 52.

[24] *See* ACLU Annual Report 1964-65 (on file with the author). Today, by comparison, there are more than one hundred attorneys on the National ACLU legal staff and hundreds more at affiliates in all fifty states. *See ACLU History*, ACLU, https://www.aclu.org/about/aclu-history [https://perma.cc/7MY3-F989].

[25] *Aryeh Neier*, OPENGLOBALRIGHTS, https://www.openglobalrights.org/aryeh-neier/ [https://perma.cc/9BFH-7QAF].

[26] *See In re Gault*, 387 U.S. 1, 3–4 (1967) (juvenile due process); Levy v. Louisiana, 391 U.S. 68, 68–69 (1968) (equal protection for out-of-wedlock children); United States v. Vuitch, 402 U.S. 62, 63–64 (1971) (first abortion case in Supreme Court).

[27] Susan N. Herman, *Remembering Norman Dorsen*, ACLU (July 21, 2017), https://www.aclu.org/blog/remembering-norman-dorsen [https://perma.cc/3FA2-X9B2].

[28] Ruth Bader Ginsburg, the founder of the ACLU's Women's Rights Project, did not join the organization until 1972, seven years after Eleanor Holmes Norton arrived. *See Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU WOMEN'S RTS. PROJECT, https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg [https://perma.cc/BBW8-CWY8].

Commissioners of Princess Anne.[29] In that case, the Court held unanimously that government officials could not prohibit a political rally without giving the organizers notice and an opportunity to appeal the decision.[30] In many ways it was a classic ACLU case, rooted in a deep suspicion of government overreach.[31] But the ACLU's client was not a leftist like the organization's earliest clients.[32] In *Carroll,* Norton was representing Joseph Carroll and his National States Rights Party, a white supremacist group.[33]

For her part, Norton says it was not hard for the ACLU to decide to represent these clients, nor was it hard for her as a black woman to work on the "racist cases."[34] In 1968, Aryeh Neier approached Norton about representing segregationist Alabama Governor George Wallace in his bid to secure a permit to hold a rally at Shea Stadium for his presidential campaign. In her memoir she describes the exchange like this:

> Neier: "Eleanor, how would you like to go out and represent George Wallace in court on Monday?"
>
> Norton: "Great."
>
> Neier: "I was only joking!"
>
> Norton: "I'm not."[35]

Norton did go on to represent Governor Wallace—and she won.[36] At about the same time, the ACLU took on the representation of another avowedly racist client, Clarence Brandenburg.

B. Brandenburg v. Ohio—*an "ACLU case"*

Eleanor Holmes Norton did not argue *Brandenburg v. Ohio* at the Supreme Court, but her name appears on the briefing papers along with her colleagues Melvin Wulf and Norman Dorsen, as well as Allen Brown, an ACLU cooperating attorney from Cincinnati who had litigated the case in state court.[37] The defendant Clarence

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[29] *See* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175, 175, 185 (1968). Audio of the argument is available at: Oyez, www.oyez.org/cases/1968/6 [https://perma.cc/4BNE-FFUG] (found by clicking oral argument under "Media" heading).

[30] *Carroll*, 393 U.S. at 180–82, 185.

[31] *See About the ACLU*, *supra* note 17 ("[T]he ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach.").

[32] *See* Walker, *Conscientious Objectors*, *supra* note 20.

[33] *Carroll*, 393 U.S. at 176.

[34] Interview with Eleanor Norton, *supra* note 13.

[35] JOAN STEINAU LESTER, FIRE IN MY SOUL: THE LIFE OF ELEANOR HOLMES NORTON 141–42 (2003).

[36] *See* Rupp v. Lindsay, 293 N.Y.S.2d 812, 813–14 (N.Y. Sup. Ct. 1968).

[37] *See* Brief for Appellant at 33, Brandenburg v. Ohio, 395 U.S. 444 (1969) (No. 492), 1969 WL 136813 [hereinafter ACLU Brief]; *Free Speech on the Docket:*

Brandenburg, a virulently racist and anti-Semitic Ku Klux Klan member, was convicted under the Ohio Criminal Syndicalism Statute, which criminalized

> 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 and . . . voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.[38]

The evidence in the case consisted of two videos filmed by a local television reporter on June 28, 1964.[39] The first video featured ten to twenty hooded Klansmen in a field on a private farm, many carrying guns, shouting racist and anti-Semitic slurs and phrases, including "Bury the n*ggers[!]" and "Send the Jews back to Israel[!]"[40] A leader, later identified as Brandenburg, addressed the group saying:

> The Klan has more members in the State of Ohio than does any other organization. We're not a revengent [sic] organization, but if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken.
>
> We are marching on Congress July the Fourth, four hundred thousand strong.[41]

The second video, shot indoors, shows six Klansmen, some of whom are armed, shouting similarly intolerant words and includes a slightly different version of the speech by the hooded leader.[42]

Brandenburg was convicted in the Court of Common Pleas, the state trial court of general jurisdiction, in Hamilton County, Ohio, of violating the "advocacy" and "assembly" provisions of the criminal syndicalism statute.[43] On appeal, attorney Allen Brown

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Brandenburg v. Ohio, ACLU: OHIO, https://www.acluohio.org/archives/cases/brandenburg-v-ohio [https://perma.cc/HW2L-HTG8].

[38] *Brandenburg*, 395 U.S. at 444–45 (alterations in original) (internal quotation marks omitted) (quoting OHIO REV. CODE ANN. § 2923.13 (1919)).

[39] *See id.* at 445–47; ACLU Brief, *supra* note 37, at 4.

[40] ACLU Brief, *supra* note 37, at 4–5. It is as hard for author to write these words, as it may be for the audience to read them. I include the details of Clarence Brandenburg's speech so as not to shy away from its ugliness and hatefulness.

[41] *Id.* at 6.

[42] *Id.*

[43] *Id.* at 1, 8. In a coincidence of First Amendment history, the trial judge was Simon Leis, Sr., whose son, Simon Leis, Jr., served as a county prosecutor and won a conviction of Larry Flynt on obscenity charges. That conviction was overturned on appeal. The younger Leis eventually succeeded his father as a judge in the Court of Common Pleas. *See* Associated Press, *Ex-Prosecutor Who Took on Larry Flynt Retires*, TWIN CITIES (Sept. 15, 2011, 11:01PM), https://www.twincities.com/2011/09/15/ex-prosecutor-who-took-on-larry-flynt-to-retire/ [https://perma.cc/S98W-NKMW]; *Simon L. Leis Jr.*, REVOLVY, https://www.revolvy.com/page/Simon-L.-Leis-Jr. [https://perma.cc/9Z3N-KBTY].

argued that the statute was unconstitutional on its face and as applied because the two videos in question contained speech protected by the First Amendment, but his position was unavailing in state court.[44] The Court of Appeals of the First Appellate District of Ohio affirmed the conviction, and the Ohio Supreme Court dismissed a further appeal. Brown and the ACLU petitioned the Supreme Court of the United States and were granted *certiorari* for argument during the October 1968 term.[45]

In its brief to the Court, the ACLU argued that Ohio's statute was unconstitutional on its face because it covered "mere advocacy" of violence as an "abstract doctrine" without distinguishing that from "advocacy directed at promoting unlawful action."[46] The ACLU also argued that the statute criminalized peaceful "assemblage" without any intent requirement in violation of the First Amendment[47] and that the statute in question was vague, overbroad, and unconstitutional as applied to the defendants.[48]

At oral argument in the Supreme Court, Brown argued that Clarence Brandenburg's expression of "hyperbole self-evidently stupid and silly," was protected under the First Amendment.[49] Brown pointed out that Brandenburg's claims were ridiculous and not literal, including that "[h]e asserted that the Klan was the largest organization in the State of Ohio," and that "[h]e did not specify the 'revengeance [sic]'" he might take if certain conditions were met.[50] Brown also pointed to the jury instruction in the state trial court, which made "no attempt to give us . . . a line demarcation between . . . advocacy in a hypothetical sense" and unprotected speech.[51]

The State of Ohio argued that the prosecution was justified because the speech in the videos created "a clear and present danger at the time" because it was broadcast to a wide

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[44] ACLU Brief, *supra* note 37, at 8.

[45] *See* Brandenburg v. Ohio, 395 U.S. 444, 444 (1969) (per curiam).

[46] ACLU Brief, *supra* note 37, at 12 (second and third quoting Yates v. United States, 354 U.S. 298, 318 (1957)).

[47] *Id.* at 20.

[48] *Id.* While the bedrock principles argued in this case remain central to the ACLU's mission, the brief would be substantially different in tone if it were written today. Notably, in support of the as applied challenge, the brief argued that the KKK was an avowedly non-violent organization and quoted James R. Venable, the "attorney and Imperial Wizard (President) of the National Knights of the [KKK]." *Id* at 7.

[49] Transcript of Oral Argument at 3, Brandenburg v. Ohio, 395 U.S. 444 (1969) (No. 492), https://www.supremecourt.gov/pdfs/transcripts/1968/68-492_02-27-1969.pdf [https://perma.cc/2DG7-4XTS] [hereinafter Brandenburg Oral Argument].

[50] *Id.* at 3–4.

[51] *Id.* at 6. Neither the trial court nor either appellate court issued an opinion in this case, so the only record on appeal was the video, the indictment, and the jury instruction at trial. ACLU Brief, *supra* note 37, at 8.

audience.[52] In a memorable exchange, Leonard Kirschner, arguing on behalf of the State of Ohio, proposed a hypothetical to illustrate the inherent power of the words in question: "[I]f I were to run down Harlem, shall we say, and say, 'Bury the Negro. Send them back to black Africa.'"[53] Justice Thurgood Marshall interjected, "You wouldn't last very long[!]" to the amusement of the courtroom.[54]

In his closing, Brown deftly picked up on this exchange, arguing that Justice Marshall "is safe at the moment because the venue is in Washington, DC, but in Ohio [he] could be indicted for suggesting a violent reaction by the Negro community."[55] This drove home the point that a broad definition of incitement implicates vast amounts of speech that should be protected. Brown made clear at the end of the argument that just because he thought Brandenburg's speech should be protected, did not indicate that he supported the viewpoint expressed. He concluded with the disclaimer, "I should perhaps state for the sake of the record that counsel for the appellant in no way agrees with any of the appellant's positions. I will, however, take the Voltair[ian] position[56] in relation to the appellant."[57]

The Court, in a per curiam opinion, held that speech can be considered "incitement" and outside the protections of the First Amendment only under limited circumstances that go far beyond "mere advocacy" of violence.[58] The Court relied on the idea that:

> [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 [1] directed to inciting or producing [2] imminent lawless action and is [3] likely to incite or produce such action.[59]

This three-part test became the foundation for modern incitement doctrine in the United States, a high bar unmatched by other legal systems.[60] This should be a point of pride because our limited

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[52] *Id.* at 30.

[53] *Id.* at 31.

[54] *Id.*

[55] *Id.* at 36.

[56] Historian Evelyn Beatrice Hall, writing under a pseudonym, characterized the French philosopher, writer and historian Voltaire's "attitude" as, "I disapprove of what you say, but I will defend to the death your right to say it." S. G. TALLENTYRE, THE FRIENDS OF VOLTAIRE 198-99 (1906). The quote has become known as the "Voltairian position" and is often misattributed to Voltaire himself.

[57] Brandenburg Oral Argument, *supra* note 49, at 37.

[58] Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam).

[59] *Id.* at 447.

[60] Justice Douglas' concurrence makes clear that the Court's decision is a repudiation of the "clear and present danger" test established by the World War I sedition cases, *Schenck*, *Debs*, and *Abrams v. United States*. Justice Douglas quotes Justice Holmes'

interpretation of incitement has given a broad variety of social movements the freedom to breathe, as illustrated by several cases highlighted below.

II. THE LEGACY OF *BRANDENBURG*

A. The Brandenburg *Test*

1. Intent

Intent is the primary innovation in the *Brandenburg* test as compared to the "clear and present danger" doctrine, but the Court provided little guidance in the *Brandenburg* opinion for determining whether an actor has demonstrated the requisite intent for incitement.[61] The intent requirement of the *Brandenburg* test would certainly be satisfied if one "authorized, directed, or ratified specific tortious activity,"[62] but advocating unlawful action in the abstract is not enough.[63] Nor is failing to exercise "exquisite care"—the speech must actually be intended "to produce violent actions."[64] The Sixth Circuit has noted that "[t]he hostile reaction of a crowd does not transform protected speech into incitement,"[65] and scholars have asserted that the speaker must have "subjectively intended incitement."[66] Burning a cross, for example, is not enough, on its own, to satisfy the intent requirement, because the act is "not always intended to intimidate."[67]

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dissent in *Abrams*, writing "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country." *Brandenburg*, 395 U.S. at 451–52 (1969) (Douglas, J., concurring) (quoting Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting)).

[61] *See* Rice v. Paladin Enters., Inc., 128 F.3d 233, 264 (4th Cir. 1997) ("The short *per curiam* opinion in *Brandenburg* is, by any measure, elliptical."); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1049 (Wolters Kluwer ed., 5th ed. 2015) ("*Brandenburg* does not answer . . . how imminence and likelihood are to be appraised. . . . Nor does the Court in *Brandenburg* define 'intent' and what must be proved to establish it.").

[62] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982).

[63] *See* Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 450–51 (1974). The Sixth Circuit has referred to the "first *Brandenburg* factor" as "*specific* advocacy of violence." Nwanguma v. Trump, 903 F.3d 604, 610 (6th Cir. 2018).

[64] James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002); *see* Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam).

[65] Bible Believers v. Wayne County., 805 F.3d 228, 246 (6th Cir. 2015).

[66] RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.15(d), Westlaw (database updated May 2019) (emphasis omitted). The speech must also have "objectively" provoked imminent unlawful conduct. *Id.* (emphasis omitted).

[67] Virginia v. Black, 538 U.S. 343, 365–66 (2003); *see also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (an anti-bias ordinance violated the First Amendment because it punished expressive speech based on its content and viewpoint, and was not narrowly tailored). The Eighth Circuit reasoned that a defendant could have been convicted for

2. Likelihood

While the intent prong of the test is subjective, the other two prongs are objective. In order for speech to be considered "likely" to incite unlawful action under the *Brandenburg* test, there must be a "high probability" that the incitement will be effective.[68] It is not enough for violence to be foreseeable,[69] or for the idea expressed to be provocative.[70] However, exactly what a "high probability" means and how it is calculated is subject to considerable debate. Audience size seems to be a relevant factor for many judges.[71] That is, with a larger audience, the probability that someone will be incited is likely to rise. But if there is a mathematical probability that one in one million people might be incited by a statement, is that a "high probability" in an audience of five billion?[72] *Brandenburg* does not provide clear answers.

3. Imminence

The *Brandenburg* test requires that speech is intended to, and likely will, produce *imminent illegal action*,[73] which the Ninth Circuit has interpreted as "violence or physical disorder in the nature of a riot."[74] In order to meet the imminence requirement, the

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burning a cross if he had met each element of the *Brandenburg* test, namely if he had done so "with the intent to advocate the use of force or violence and if the burning was likely to produce such action," or if the intent was to threaten nearby residents, or cause them to "to reasonably fear the imminent use of force or violence." United States v. McDermott, 29 F.3d 404, 406 (8th Cir. 1994).

[68] Collin v. Chi. Park Dist., 460 F.2d 746, 753 (7th Cir. 1972).

[69] *See James*, 300 F.3d at 699 ("[I]t is a long leap from the proposition that [the defendant's] actions were foreseeable to the *Brandenburg* requirement that the violent content was 'likely' to cause [him] to behave this way.").

[70] *See* Texas v. Johnson, 491 U.S. 397, 408–09 (1989) (holding that flag burning is not likely to produce lawless action and the Supreme Court has "not permitted the government to assume that every expression of a provocative idea will incite a riot").

[71] Justices Douglas, Brennan, and Fortas all asked about the size of Clarence Brandenburg's audience in person and on television. Brandenburg Oral Argument, *supra* note 49, at 6, 8, 11, 15, 21.

[72] Thanks to Jon Callas for drawing my attention to this line of inquiry.

[73] Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam); *see also* United States v. Bell, 414 F.3d 474, 483 n.9 (3d Cir. 2005) ("[R]eliance on *Brandenburg* to justify an injunction banning 'materials designed to incite others to violate the law'—without reference to imminence—is erroneous.").

[74] White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000). In truth, incitement doctrine also applies to other illegal activity, such as tax evasion, but in those cases the analysis is usually closer to aiding and abetting or criminal conspiracy. *See, e.g.*, United States v. Buttorff, 572 F.2d 619, 624 (8th Cir. 1978) ("Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law and had the potential of substantially hindering the administration of the revenue. This speech is not entitled to first amendment protection and . . . was sufficient action to constitute aiding and abetting the filing of false or fraudulent withholding forms.").

lapse between speech and conduct must be shorter than "weeks or months"[75] and must amount to something "more than advocacy of illegal action at some indefinite future time."[76] The Third Circuit has held that three weeks was not imminent enough.[77] The Sixth Circuit has held, in reference to the psychological effects of violent media, that a "glacial process of personality development is far from the temporal imminence . . . required to satisfy the *Brandenburg* test."[78]

The speech and the unlawful conduct must also be directly connected to each other.[79] Words cannot be punished for having a "mere tendency . . . to encourage unlawful acts."[80] However, in *Holder v. Humanitarian Law Project*, the Supreme Court held that the federal material support for terrorism statute is constitutional even though it implicated non-profit organizations' efforts to teach conflict resolution to designated terrorist groups.[81] The case is noteworthy, as it represents the only time the Court has upheld a statute restricting political speech after applying strict scrutiny.[82] However, Justice Breyer's dissent, joined by Justices Ginsburg and Sotomayor, argues that the statute fails the *Brandenburg* test because:

> [T]he First Amendment protects advocacy even of *unlawful* action so long as that advocacy is not "directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action." Here the plaintiffs seek to advocate peaceful, *lawful* action to secure *political* ends; and they seek to teach others how to do the same. No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*.[83]

The Fourth Circuit has noted that the

> "imminence" requirement . . . generally poses little obstacle to the punishment of speech that constitutes criminal aiding and abetting,

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[75] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982).

[76] Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam); *see also* McCoy v. Stewart, 282 F.3d 626, 631 (9th Cir. 2002) ("[I]n *Hess v. Indiana*, the Court made explicit what was implicit in *Brandenburg:* a state cannot constitutionally sanction 'advocacy of illegal action at some indefinite future time.'" (citation omitted)).

[77] United States v. Fullmer, 584 F.3d 132, 155 n.10 (3d Cir. 2009) ("These events occurred a minimum of three weeks apart, which does not meet the 'imminence' required by the *Brandenburg* standard.").

[78] James v. Meow Media, Inc., 300 F.3d 683, 698 (6th Cir. 2002).

[79] *Claiborne*, 458 U.S. at 928.

[80] Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002); *see also Hess*, 414 U.S. at 109 ("[W]ords could not be punished by the State on the ground that they had a tendency to lead to violence." (internal quotation marks and citations omitted)).

[81] Holder v. Humanitarian Law Project, 561 U.S. 1, 7–8 (2010).

[82] EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEM, CASES AND POLICY ARGUMENTS 259 (Foundation Press, 4th ed. 2011).

[83] *Holder*, 561 U.S. at 43–44 (Breyer, J., dissenting) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)).

> because "culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes."[84]

B. Brandenburg *as Applied*

Prosecutions for incitement are relatively rare,[85] but the ACLU has used the *Brandenburg* test in numerous cases over the years. The ACLU and other First Amendment advocates have long argued that precedents set by representing objectionable clients can help hold the line for anyone who expresses views that are disdained by government.[86] Fourteen years after *Brandenburg*, the oft-maligned theory of trickle-down justice was on full display.

In *NAACP v. Claiborne Hardware Co.*, the Supreme Court considered whether civil rights organizer Charles Evers could be held liable for making an "impassioned plea for black citizens to unify" by boycotting white-owned businesses in Claiborne County, Mississippi.[87] According to witnesses, Evers said, "If we catch any of you going in them racist stores, we're gonna break your damn neck."[88] The Court held that "[t]he emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*."[89] Justice Stevens, writing for the Court, addressed some of the jarring language Evers' used, explaining that "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases."[90] He went on to state "[a]n advocate must be free to stimulate his audience with

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[84] Rice v. Paladin Enters., Inc., 128 F.3d 233, 264 (4th Cir. 1997) (quoting DEP'T OF JUSTICE, REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION, THE EXTENT TO WHICH ITS DISSEMINATION IS CONTROLLED BY FEDERAL LAW, AND THE EXTENT TO WHICH SUCH DISSEMINATION MAY BE SUBJECT TO REGULATION CONSISTENT WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION 37 (Apr. 1997)).

[85] *See When Hate Speech Leads to Violence*, RUSSELL SAGE FOUND. (Mar. 8, 2018), https://www.russellsage.org/news/when-hate-speech-leads-violence [https://perma.cc/FG85-CJP4] ("The record of prosecutions for incitement is relatively meager, and this results in part from the fact that the test for incitement is quite demanding and requires that the prosecution show that the defendant intended to directly advocate a crime and that crime was likely to occur imminently.").

[86] *See e.g.*, ACLU Board Policy #46 which reads, in part, "although the democratic standards in which the ACLU believes and for which it fights run directly counter to the philosophy of the Klan and other ultra-right groups, the vitality of the democratic institutions the ACLU defends lies in their equal application to all." ACLU CASE SELECTION GUIDELINES: CONFLICTS BETWEEN COMPETING VALUES OR PRIORITIES 2, https://www.aclu.org/sites/default/files/field_document/aclu_case_selection_guidelines.pdf [https://perma.cc/QVU5-B95E].

[87] NAACP v. Claiborne Hardware Co., 458 U.S. 886, 926–28 (1982).

[88] *Id.* at 902.

[89] *Id.* at 928.

[90] *Id.*

spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech."[91] In short, the Court held that if Clarence Brandenburg had the right to implore action to accomplish his unpopular aims, so must Charles Evers.[92]

More recently, three illustrative cases show how the *Brandenburg* test has been applied to protect opposing viewpoints. In March 2016, presidential candidate Donald Trump, in front of an audience of rowdy supporters, shouted "Get 'em out of here" in reference to protesters who were subsequently manhandled.[93] This would seem to be a tailor-made situation for passing the *Brandenburg* test, but Trump also told his supporters, "Don't hurt 'em," which led the ACLU to conclude in a blog post that Trump's words did not meet the "high bar" set by the court.[94] Eventually, the Sixth Circuit Court of Appeals ruled that the record did not include "a single word in Trump's speech that could be perceived as encouraging violence or lawlessness," and therefore his speech was protected under the First Amendment.[95]

In March 2019, the ACLU filed a facial challenge to South Dakota's so-called "riot boosting" laws.[96] This legislation is aimed at indigenous, environmental, and civil rights protesters who oppose the Keystone XL pipeline and other extractive industry projects.[97] The laws create special penalties for advocating for unlawful action, but contain none of the safeguards mandated by *Brandenburg*. Subjective intent is not required, nor is objective likeliness of the unlawful activity, nor is imminence a requirement.[98] In September 2019, the District Court granted a

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[91] *Id.*

[92] In *Claiborne*, the Court also held that nonviolent boycotts are a form of protected speech. *Id.* at 911. Support for this principle was the thrust of an ACLU *amicus* brief in the case. *See* Brief for ACLU as Amici Curiae Supporting Petitioners at 3, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (No. 81-202), 1981 WL 390220. This finding has been used to defend a wide variety of boycott advocates, including, most recently and prominently, Palestinian rights groups. *See* Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 763–64 (W.D. Tex. 2019) (granting a preliminary injunction against a Texas law prohibiting state entities from contracting with companies and independent contractors that boycott Israel because the boycott is protected speech under the First Amendment).

[93] Lee Rowland, *Donald Trump Has Free Speech Rights, Too*, ACLU (Apr. 20, 2017), https://www.aclu.org/blog/free-speech/donald-trump-has-free-speech-rights-too [https://perma.cc/VD48-L6XL].

[94] *Id.*

[95] Nwanguma v. Trump, 903 F.3d 604, 610–12 (6th Cir. 2018) (internal quotation marks omitted).

[96] Andrew Malone & Vera Eidelman, *The South Dakota Legislature Has Invented a New Legal Term to Target Pipeline Protesters*, ACLU (Apr. 1, 2019, 3:45PM), https://www.aclu.org/blog/free-speech/rights-protesters/south-dakota-legislature-has-invented-new-legal-term-target [https://perma.cc/7RDJ-HLH6].

[97] *Id.*

[98] *ACLU to Argue in U.S. District Court on Wednesday in Challenge to South Dakota Anti-Protest Laws*, ACLU (June 7, 2019), https://www.aclu.org/press-releases/

preliminary injunction blocking the laws from being enforced, finding the laws deficient on a number of grounds, including that "they fail to meet the *Brandenburg* requirements."[99] The District Court's ruling highlighted the constitutional infirmity of the riot-boosting laws and South Dakota subsequently signed an agreement precluding the state from enforcing them.[100] This was an important victory for the free speech rights of indigenous and environmental activists.

Finally, an important ongoing case involves DeRay Mckesson,[101] an activist associated with the Black Lives Matter movement.[102] In November of 2016, Mckesson was sued in the Middle District of Louisiana by an unnamed Baton Rouge police officer for injuries the officer suffered during a protest purportedly organized by Mckesson and Black Lives Matter that had occurred the previous July and included civil disobedience in the form of marching in a street without a permit.[103] During that protest, an unknown person threw an object, injuring the police officer. The complaint alleges liability on the part of Mckesson and Black Lives Matter on theories of negligence, arguing that violence against the police was a "foreseeable" consequence of leading protesters into the street; respondeat superior, implying that protesters were under the control of organizers to the extent that organizers could be held liable for protesters actions; and civil conspiracy, alleging without evidence that organizers were part of a concerted plan "to riot."[104] In September of 2017, the District Court dismissed the suit for failure to state a plausible claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court found that:

> The only public speech to which Plaintiff cites in his Complaint is a one-sentence statement that Mckesson allegedly made to *The New York Times*: "The police want protestors to be too afraid to protest." Mckesson's statement does not advocate—or make *any* reference to—violence of any kind, and even if the statement *did*, "mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment." This statement falls *far* short of being "likely to

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aclu-argue-us-district-court-wednesday-challenge-south-dakota-anti-protest-laws [https://perma.cc/2SUD-3YC2].

[99] Dakota Rural Action v. Noem, No. 5:19-cv-05026-LLP, 2019 WL 4464388, at *4, *13 (D.S.D. Sept. 18, 2019) (internal citation omitted).

[100] Stephen R. Groves, *South Dakota, ACLU Settle Lawsuit over 'Riot-Boosting' Laws*, AP NEWS (Oct. 24, 2019), https://apnews.com/8376dc9556c945eb9c8700b050ae2446 [https://perma.cc/7FF5-MPEB].

[101] Full disclosure: the ACLU is serving as co-counsel to DeRay Mckesson on a petition for certiorari in this case.

[102] *See* Doe v. Mckesson, 272 F. Supp. 3d 841, 844–45 (M.D. La. 2017), *aff'd in part*, *rev'd in part and remanded*, 922 F.3d 604 (5th Cir. 2019), *opinion withdrawn and superseded on reh'g*, *and aff'd in part*, *rev'd in part and remanded*, 935 F.3d 253 (5th Cir. 2019).

[103] *Id.*

[104] *Id.* at 845.

> incite lawless action," which Plaintiff would have to prove to hold Mckesson liable based on his public speech.
>
> Nor can Plaintiff premise Mckesson's liability on the theory that he allegedly "did nothing to calm the crowd." As the United States Supreme Court stated in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), "[c]ivil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence[.]"[105]

Officer Doe appealed the district court decision to the Fifth Circuit Court of Appeals. The appellate court reversed the lower court's decision in part, finding that the negligence claim against Mckesson should proceed.[106] Upon a panel rehearing, in August 2019, the Fifth Circuit doubled down on its previous opinion, finding that "Mckesson's conduct [,,,]was not necessarily protected by the First Amendment."[107] The Fifth Circuit did find that there were no alleged facts to support a "conspiracy 'to incite a riot/protest'" claim because Mckesson was not alleged to have "colluded with the unknown assailant to attack Officer Doe or knew of the attack and specifically ratified it."[108]

But the court also found that if, as alleged, Mckesson "intentionally led the demonstrators to block the highway"—a crime under Louisiana law[109]—it was "patently foreseeable" that the police would be required to respond to the "intentional lawlessness" by protestors by clearing the highway.[110] So, the court reasoned, "Mckesson should have known that leading the demonstrators onto a busy highway was most nearly certain to provoke a confrontation between police and the mass of demonstrators, yet he ignored the foreseeable danger to officers, bystanders, and demonstrators."[111] The court highlighted that *Claiborne* stands for the proposition that "[t]he First Amendment does not protect violence," and "*Claiborne Hardware* does not insulate the petitioner from liability *for his own negligent conduct* simply because he, and those he associated with, also intended to communicate a message."[112] The implications of this line of

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[105] *Id.* at 847–48 (alteration in original) (citations omitted).

[106] Doe v. Mckesson, 922 F.3d 604, 614 (5th Cir.), *opinion withdrawn and superseded on reh'g, and aff'd in part, rev'd in part and remanded*, 935 F.3d 253 (5th Cir. 2019).

[107] Doe v. Mckesson, 935 F.3d 253, 259 (5th Cir. 2019).

[108] *Id.* at 260–61. In a twist of historical irony, in considering Mckesson's vicarious liability, the Fifth Circuit relied on Louisiana Civil Code article 2320 that states that "[m]asters and employers are answerable for the damage occasioned by their servants and overseers." *Id.* at 259–60 (quoting LA. CIV. CODE ANN. art. 2320).

[109] *See* LA. STAT. ANN. § 14:97.

[110] *Mckesson*, 935 F.3d at 261.

[111] *Id.*

[112] *Id.* at 262–63 (alteration in original) (first quoting N.A.A.C.P v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)).

reasoning are dire for protests involving civil disobedience, since organizers might be held responsible for other protesters' unlawful conduct without any indication that the organizer was even aware of the conduct. This decision[113] is a stark departure from established incitement doctrine and should be corrected as soon as possible.

This brief sampling of cases demonstrates how a robust incitement doctrine can and should protect a variety of political speech. Of course, white supremacy, patriarchy and other forms of oppression and bias are endemic in our society and legal system, and First Amendment law is not exempt from this reality. The powerful will always be more successful at vindicating their rights. But incitement doctrine, and free speech more generally, has been a demonstrably vital tool for all social movements in the United States, including progressive messages that challenge state and corporate power.

III. THE *BRANDENBURG* TEST ONLINE

Some commentators have suggested that online speech is categorically different from traditional forms of speech and therefore incitement doctrine needs to be fundamentally reconsidered.[114] These commentators generally point to horrific violence that was carried out after perpetrators discussed their ideas and plans online.[115] The thinking generally goes that fewer protections for hateful and incendiary speech might lead to less violence.[116] While there is far too much violence and suffering in our world, it fair to say that there is no epidemic of online incitement to violence or lawlessness.[117] Data shows that in relation to most of human history,

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[113] On December 16, 2019, the Fifth Circuit withdrew its revised opinion and issued a new opinion with the same ruling, along with a dissent by Judge Willets. Sarah Lustbader, *A Conservative Judge Changes His Mind*, APPEAL (Dec. 19, 2019), https://theappeal.org/a-conservative-judge-changes-his-mind/ [https://perma.cc/EZE2-9XDQ]

[114] *See, e.g.*, John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 428, 466 (2002); Scott Hammack, Note, *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, 67 (2002).

[115] *See e.g.*, Andrew Marantz, *Free Speech Is Killing Us: Noxious Language Online Is Causing Real-World Violence. What Can We Do About It?*, N.Y. TIMES (Oct. 4, 2019), https://www.nytimes.com/2019/10/04/opinion/sunday/free-speech-social-media-violence.html [https://perma.cc/RNB2-U954].

[116] *Id.*

[117] In India and Myanmar, among other places, social media has been used to amplify calls for violence, but taking into account the vast amount of communication that takes place online, violence is rare. *See* Timothy McLaughlin, *How WhatsApp Fuels Fake News and Violence in India*, WIRED (Dec. 12, 2018), https://www.wired.com/story/how-whatsapp-fuels-fake-news-and-violence-in-india/ [https://perma.cc/AH2X-Y4PP]; Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y.

we live in exceptionally peaceful times.[118] But the basic principles at the foundation of modern incitement doctrine remain even in the digital age. A fundamental commitment to equal rights, combined with a healthy skepticism of governmental authority, requires speech be protected, even if it is distasteful and even if it is online. Intent, imminence, and likelihood are still central tenets for a just doctrine. As Daniel Kobil has argued, "evaluating provocative Internet speech under a standard that is more relaxed than *Brandenburg* is simply not justified by the 'new dangers' posed by this powerful medium."[119] So what does the *Brandenburg* test look like as it has been applied to online speech?

A. Intent

While the Supreme Court has not considered intent in an incitement case involving online speech, it has analyzed intent in the closely analogous context of true threats. In *Elonis v. United States*, Anthony Elonis posted a long series of publicly accessible messages on Facebook listing several things he said would be illegal, such as "Did you know that it's illegal for me to say I want to kill my wife?" and more specific descriptions of how someone could kill his wife, framed in the same "it would be illegal for me to say" structure.[120] When his wife saw the post she became "extremely afraid" and she was granted a protective order against Elonis.[121] Elonis went on to discuss his desire to carry out a school shooting.

The FBI became aware of his posts and charged him with multiple counts, including making threats of violence. In the district court, the jury was instructed that it need only consider whether Elonis intentionally made the statements, not whether he intended to make a threat.[122] Elonis argued that the prosecution was unconstitutional because the government should have been required to prove actual intent to make a threat.[123] In its amicus brief, the ACLU cited *Brandenburg* and *Claiborne* arguing that the specific intent requirement from

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TIMES (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html [https://perma.cc/M7CE-UFBG].

[118] *See generally* STEPHEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED (2011) (arguing that data indicates that violence has decreased over time globally, despite widespread perceptions to the contrary).

[119] Daniel T. Kobil, *Advocacy on Line:* Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. TOL. L. REV. 227, 250 (2000).

[120] Elonis v. United States, 135 S. Ct. 2001, 2005 (2015).

[121] *Id.* at 2006.

[122] *Id.* at 2006–07.

[123] *Id.* at 2007.

incitement doctrine should be applied to threats.[124] Eventually, the Supreme Court ruled that the First Amendment requires prosecutors to prove that the defendant intended to issue threats or knew that communications would be viewed as threats, because "wrongdoing must be conscious to be criminal."[125] *Elonis* was an important decision because online speech is characteristically free-wheeling and sarcastic, so discerning actual intent is all the more important before criminalizing speech. At a minimum, the intent requirement should apply with equal force online. In the case of Anthony Elonis, the Third Circuit Court of Appeals eventually ruled his actual intent was clear and therefore the faulty jury instruction was a harmless error and his conviction was upheld.[126]

B. Likelihood

The likelihood prong of the *Brandenburg* test has also been criticized for being ill-fitted to the internet, especially given the unpredictable audience for online speech.[127] Likelihood is primarily about how any listener would respond, but courts can, and do, consider the size of the audience. Concerning online speech, the potential, though distinctly unlikely, audience may be billions of people. But likelihood analysis and the related inquiry about potential audience need not change based on the mode of communication the speaker uses. As technology changes, courts need simply to consider the likelihood of unlawful conduct in context. Any new rule that relaxes the likelihood requirement with regard to online speech would weaken the required nexus between speech and unlawful action. Such a rule would swallow the intent and imminence standards and chill vast amounts of speech for fear of an unlikely future action by another person.

C. Imminence

Proving imminence may be a more complicated prospect with online speech, but critics tend to overstate the novelty of the problem. The "Nuremburg Files" case is illustrative.[128] In that case, the American Coalition of Life Activists (ACLA), an anti-

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[124] Brief of ACLU et al. as Amici Curiae Supporting Petitioner at 20–21, Elonis v. United States, 135 S. Ct. 2001 (2015) (No. 13-983), 2014 WL 4215752.

[125] *Elonis*, 135 S. Ct. at 2012 (quoting Morissette v United States, 342 U.S. 246, 252 (1952)).

[126] United States v. Elonis, 841 F.3d 589, 591–92 (3d Cir. 2016).

[127] Cronan, *supra* note 114, at 452.

[128] *See generally* Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1062 (9th Cir. 2002).

abortion group, posted a list of abortion providers' names and personal information on a website that made no direct or explicit threats, but created the strong implication that the postings were a "hit list."[129] The Ninth Circuit, sitting en banc, found that the implied threat was enough to render the speech unprotected under the true threat doctrine.[130] While the majority did not deal explicitly with the question of imminence, separate dissenting opinions invoked *Brandenburg* and *Claiborne* to argue that ACLA's speech was abhorrent but protected.[131]

This case highlights the relationship between the speaker and audience online, where there might be a long delay between when a message is sent and when it is received, and people can communicate across vast distances. Perhaps the most compelling speech-protective recommendation made by critics of current doctrine is that the imminence analysis should take into account the perspective of the listener.[132] That is, it should not matter only when a post was published, but also when it was read in relation to the unlawful activity.[133] This adaptation could preserve the principle of the imminently responsive audience behind *Brandenburg,* while accounting for massive telecommunication advances. The risk that people might become liable for the delayed impact of years-old posts is mitigated by the fact that it would likewise be difficult to prove intent with sufficient specificity years later. Still, the impact of such a change requires further consideration.

IV. LESSONS FROM AFRICA

Free speech protections are uniquely robust in the United States. Provocative and controversial political views on all sides are protected from government intervention, even when expressed with fiery language. For anyone who has ever disagreed with the government, this is a very good thing. But our approach can undoubtedly lead to some undesirable outcomes. Violent and often hateful rhetoric can spread without government impediment and shape national debate in ugly and harmful ways. Society is not without tools of redress short of official prohibition, though: Social ridicule by private actors for objectionable ideas is protected by the First Amendment, as is denial of access to private spaces.[134]

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[129] *Id.* at 1088.

[130] *Id.* at 1086.

[131] *See id.* at 1090, 1092 (Kozinski, J., dissenting); *id.* at 1111, 1121 (Berzon, J., dissenting).

[132] *See, e.g*, Cronan, *supra* note 114, at 455.

[133] *Id.*

[134] Social media platforms, as private entities, are not beholden to the First Amendment which only applies to government action. The wisdom of comprehensive

While working as a legal advisor on freedom of association, assembly, and expression in Africa, I saw what happens when governments have broad authority to prohibit speech. In Rwanda, in reaction to the 1994 genocide during which kill orders were issued via radio, Paul Kagame's government passed laws criminalizing incitement to, and denial of, genocide in broad terms.[135] In practice, anyone who challenges the government's narrative of the genocide or any other issue is subject to arrest. Countless opponents of the government have been charged under this law, and Rwandans have come to understand that the only way to stay safe is to stay silent.[136]

Anyone who thinks, "That could never happen here," fails to appreciate how quickly and deeply norms can change. In 2015, Tanzania, a country that had become a regional model of democratic governance and tolerance,[137] passed a Cybercrimes Law that banned a broad range of online speech.[138] Ostensibly designed to address incitement, child pornography, misinformation, financial fraud, and cyber bullying, the law has been used to crack down on criticism of the government. In 2017 a private citizen was convicted under the Cybercrimes Act for calling the president an "imbecile" on social media.[139] Independent media outlets and journalists have also been arrested and penalized under the law.[140] Tanzania went from a burgeoning democracy to a closed political system in the space of less than five years.

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monitoring and censorship on privately run platforms is a topic of vibrant debate, but it falls outside of this analysis of the First Amendment's incitement doctrine. For its part, the ACLU has sounded a warning about trusting private social media platforms to fairly police speech. *See* Vera Eidelman, *Facebook Shouldn't Censor Offensive Speech*, ACLU (July 20, 2018), https://www.aclu.org/blog/free-speech/internet-speech/facebook-shouldnt-censor-offensive-speech [https://perma.cc/BS8K-VEPW].

[135] *See* Yakare-Oule (Nani) Jansen, *Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws*, 12 NW. J. INT'L. HUM. RTS., 194, 195–97 (2014).

[136] *See id.*

[137] Tanzania's ratings in Freedom House's annual "Freedom in the World" report peaked between 2011-15 when it was rated 3.0 (1 being most free, 7 being least free). Since 2015, the country's rating has consistently declined and in 2019 was 4.5. *See Freedom in the World*, FREEDOM HOUSE, https://freedomhouse.org/report-types/freedom-world [https://perma.cc/43FR-GGHX].

[138] Ndesanjo Macha, *Tanzania's Cybercrime Act Makes It Dangerous to "Insult" the President on Facebook*, ADVOX: GLOBAL VOICES (Apr. 18, 2016), https://globalvoices.org/2016/04/17/tanzanias-cybercrime-act-makes-it-dangerous-to-insult-the-president-on-facebook/ [https://perma.cc/5RF3-7QSN].

[139] *Id.*

[140] *See* FIDH, TANZANIA: FREEDOM OF EXPRESSION IN PERIL 2 (Aug. 2017), https://www.fidh.org/IMG/pdf/joint_position_note_tanzania_fidh_lhrc.pdf [https://perma.cc/X9XQ-WE6P].

CONCLUSION

Protecting speech we do not like is not easy. For a century, ACLU attorneys have understood both how hard it can be to represent people with loathsome views, and how important it is to have a doctrine that protects fiery political rhetoric no matter the speaker. Eleanor Holmes Norton's friends asked her, "Don't you know that what's good sauce for the goose doesn't taste the same for the gander?"[141] But as clearly as she understood the deep scourge that racism had wrought in our country, she also understood that neutral rules are necessary to protect marginalized voices.[142] Hateful speech, so long as it does not rise to the level of incitement or other unprotected categories, is not prohibited under our legal system in large part because we do not trust the government to regulate unpopular views.

If we were to concede that online speech is a special kind of problem that requires additional government intervention to curb harmful rhetoric, it is not hard to imagine how such a principle might be enforced by a government—here or abroad—that does not respect universal human rights or norms of democratic discourse. Brandenburg's speech was horrifying, but *Brandenburg* is good law and its underlying logic remains a just and democratic lodestar.

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[141] Interview with Eleanor Norton, *supra* 13.

[142] *Id.*