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## ESSAY: THE INTERNET AS MARKETPLACE OF MADNESS—AND A TERRORIST’S BEST FRIEND

*Thane Rosenbaum\**

Imagine the old days—pre-9/11, when there was no Department of Homeland Security because the United States, due to favorable geography and peaceable neighbors, had no special reason to fear for the security of its homeland, when terrorism was something largely for Israelis to worry about, and when airline passengers barely took notice of airport security officers, and vice-versa.

And, of course, there was no internet—before cell phones became smart, handheld computers, and also deadly detonation devices. The words “social” and “network” were never found in the same sentence because they are oxymoronic when positioned together, notwithstanding the bonds of friendship and socialization promised on Facebook. Indeed, it’s difficult nowadays to recall a time preinternet when such a word sounded more like the “interstate,” evoking long cross-country drives rather than the grander but sunless open frontier of the digital highway.

The panel I was assigned to, for this distinguished gathering of scholars at Fordham Law School, where I had previously been a professor for twenty-three years, was given the name, “Caution Against Overreaching.” Overreaching and the caution it occasions, in this case, refer to the First Amendment, a uniquely American absolutist, legalistic obsession. For many who fixate on such matters, the government must never be allowed to trample upon the unfettered free speech rights guaranteed under America’s first, and most favorite, Amendment.

So, let me state categorically, right at the outset, that when it comes to the boundaries of the First Amendment—both its limits and extreme excesses—I am not in favor of exercising caution to avoid overreach. Overreach and overinclusiveness do not carry the same stigma outside of the academy. The Patriot Act, for instance, receives a more favorable hearing in the public

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sphere. Constitutional interpretation that allows for overreach may save lives. Surely if the goal is to catch the bad guys, and there are such people scheming in lairs far below the ivory tower, where such mischief is not merely an academic exercise, and where coconspirators or lone wolves speak not abstractly, hypothetically, or for argument's sake, but definitively, then overreach can become an unqualified lifesaver.

If that sort of thing matters to you.

I do not believe that the Free Speech Clause of the First Amendment is untouchable and sacrosanct, simply beyond the realm of reasonable, sensible government regulation. It's a short amendment, glorious in its intention, to be sure, but imperfect in application, too. For those who regard the First Amendment as holy, like a page from the Gospels, Torah, or Koran, I respectfully suggest speaking with people who have been harmed by immoderate, recklessly delivered and, at times, deadly speech. It wouldn't be the first time when violence arises from the slavish, reflexive devotion to a holy book. And the First Amendment is a secular religion of sorts. When the exercise of free speech results in injury to another human being and, even more crucially, as with the global War on Terror, the inevitable loss of life, it's best to ask the simple question: What would George Washington do? Isn't that, appropriately, what a First Amendment fundamentalist should ask?

Ironically, First and Second Amendment absolutists, on ideological and cultural grounds, appear to have nothing in common, except for one unpleasant feature: they are both natural, incurable hysterics—psychotic cousins, if you will. In the mind of a gun owner for whom the Second Amendment is ardently first in his heart, regulating the sale or possession of assault rifles is the slippery slope before the government takes away a deer rifle or a small handgun. Similarly, for the First Amendment absolutist, preventing neo-Nazis from marching in a hamlet of Holocaust survivors, or prohibiting cross burnings on the lawns of African Americans, or carving a zone of grief so a father can bury a son killed in action while serving his country and not have his private moment interrupted by protestors opposing homosexuals in the military, is the slippery slope that instantly leads to government tyranny and the silencing of political dissent.

No, it's not. Only a zealot would draw that conclusion. When the religious hold too fast to the literal word on the page or parchment—refusing to allow for any deviation, fearing that anything less than an orthodox reading might unleash the end of days—secular people understandably register disgust. Why should the secular scripture of the Constitution, and its equally fervent adherents, not produce a similar skepticism?

“Slippery slope” thinking is one of those quaint but ultimately toxic artifacts of the law school experience that dulls the imagination and is all too frequently invoked as an excuse to avoid having to take righteous positions and engage in moral decision-making.

Terrorism is one excellent example where overreaching in the service of saving lives does not seem to be such a great departure from the origins and intentions of our constitutional democracy. Indeed, the Preamble to the Constitution itself suggests that forming “a more perfect Union,” securing

the “Blessings of Liberty” for “Posterity,” insuring “domestic Tranquility,” and providing “for the common defen[s]e” are what the Articles and Amendments were drafted to reinforce, and not the other way around.<sup>1</sup>

The First Amendment should not be read as a red-herring work-around to avoid having to defend the nation and secure its future. There is much pride that Americans take in the very first amendment to its founding charter. And it very much is richly emblematic of the rights of man and the realization of the democratic experiment. Yet, protecting the nation from foreign attack is no less a liberal and enlightened value. A perfect union does not materialize if the Constitution is exploited, its endowed purpose undermined, thwarted, and overridden. The Constitution is neither a “suicide pact,” in the words and estimations of Justices Arthur Goldberg and Robert Jackson, respectively,<sup>2</sup> nor is it an unworkable, maddening Rubik’s Cube of contradiction.

A strict adherence to the Constitution must always be consistent with the common defense. Otherwise our founding documents are mere booby traps, rife with legalistic pitfalls, drafted to weaponize America’s enemies, freely handing them the secret to cracking the code of our Constitution. Why would the framers have drafted a Preamble with such soaring declarative language to guard the gates of our newfound freedom if the enumerated rights were ultimately impediments to carrying out that duty? The Constitution can’t be expected to stand by as an obstacle to its own survival—more of a lifeless monument than a living document.

Yes, free speech is an inalienable right—but at what cost?

One can feel smug in demanding a rigid fidelity to constitutional guarantees. But then one can’t also complain if our democracy comes to an abrupt halt by zealots wearing suicide bomber’s vests, snickering at the thought that a constitutional zealot made their detonations possible. The reason we fear zealots is because they are out of control in their beliefs, unable to call attention to other values. We should not be playing favorites. First Amendment absolutists need to take a hard look at the world and ask why, when it comes to fighting extremism, America should be playing by different, more exacting rules. Does anyone doubt that the Founding Fathers, who waged a war and achieved an improbable win in pursuit of liberty, did not fully comprehend the obligation they imposed upon this new nation, as exemplified in the Constitution’s Preamble, to provide “for the common defen[s]e”?

The entire *Fordham Law Review* symposium is devoted to a discussion of *Terrorist Incitement on the Internet*, a provocative title because terrorism before the internet was a menace desperate for a search engine. The internet provided terrorism with the respectability and tactical advantage it lacked in the dark ages of easily traceable rotary-dialing phones and Xeroxed leaflets.

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1. See U.S. CONST. pmbi.; see also *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010).

2. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963); *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

How did terrorists gather together in those days? Where did they meet? How did they chat? Without the internet, terrorist cells had as much visibility as actual microorganisms. Without cyberspace, learning how to make a bomb from household detergents had the same degree of difficulty as traveling to outer space. Demented, demonic clerics preaching jihad from their bedrooms were essentially talking to the mirror until YouTube turned them into genocidal reality TV stars. It was the Wild West of terrorism before it all got imported from the Middle East—globalized and homegrown, all courtesy of the fast-moving traffic and lethal leverage of the digital divide.

So much has changed since those more tranquil times; so much chaos has been introduced into our ever more fragile world. Back then, nonstate actors with big dreams of caliphates and beholden to medieval doctrines inspired little fear. Airline hijackings were for wimps. This was the age of superpowers playing war games of mutually assured destruction. The missiles got ominously longer and the warheads carried more payload. But, fortunately, those with their fingers on the button were not out of their minds. The “War” was named “Cold” for a reason. Brinkmanship served as a substitute for dead bodies. The cloak-and-dagger intrigues of the CIA and KGB made for great movies but never reached the point of triggering fail-safe procedures. Nuclear Armageddon was a horrifying thought that never got past the planning stages and the occasional emergency drill in fallout shelters across the United States.

Anyone reading Learned Hand’s decision in *United States v. Dennis*<sup>3</sup> can feel the tension and appreciate the misguided wisdom of not wanting to be remembered as one of those “silly dupes” who didn’t fully anticipate the dangers of the communist menace.<sup>4</sup> The Bomb truly terrified; terrorism, however, seemed to be the province of buffoonish practitioners making little noise with nonexistent tradecraft.

And that’s perhaps why American courts have been more accommodating of domestic hate groups like the Ku Klux Klan and the neo-Nazis—allowing for “expressive” activities such as marching and cross burnings—than they were of communists with espionage on their minds.<sup>5</sup> Yet the Ku Klux Klan and the neo-Nazis were truly jayvee<sup>6</sup> when compared with ISIS and Al Qaeda, with those muscular varsity letters that have essentially become acronyms for fear. The First Amendment challenges they raised—freedom of assembly and freedom of speech—were primarily symbolic because the

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3. 183 F.2d 201 (2d Cir. 1950).

4. *Id.* at 213.

5. Compare *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379–80 (1992), and *Collin v. Smith*, 578 F.2d 1197, 1201–02 (7th Cir. 1978), with *Schenck v. United States*, 249 U.S. 47, 49–51 (1919).

6. See Peter Baker, *A President Whose Assurances Have Come Back to Haunt Him*, N.Y. TIMES (Sept. 8, 2014), <https://www.nytimes.com/2014/09/09/us/politics/a-president-whose-assurances-have-come-back-to-haunt-him.html> [https://perma.cc/T748-W2HB]. Ironically, for the most part, American neo-Nazis and the KKK are mainly interested in threatening and intimidating their targets, otherwise vulnerable groups, which should not be protected activity under the First Amendment, but at least they are unlike global Islamist extremists, for whom murder, not marches, is their tactical weapon of choice.

relative risks they posed were virtually nonexistent. America could afford a certain complacency. The First Amendment always proved to be a lively petri dish where the clinical trials of liberty's limits were best tested.<sup>7</sup> The harm was relatively contained to only a few precincts of vulnerable Americans.<sup>8</sup> For the most part, the Klan was never more than a fringe group dressed like a mattress sale, and the neo-Nazis were nothing like the originals from Germany. These Brownshirts looked like overgrown cub scouts, pathetic wannabees in a nation that had already defeated the Third Reich and now regarded the real Nazis as those clowns from *Hogan's Heroes* and *The Producers*.

What was America truly sacrificing by allowing these groups to exercise their constitutional rights, wear their doltish uniforms, parade around in lock goosestepp, burn a cross, or shout "*Heil Hitler*" under the protective banner of the First Amendment? Surely they have a right to an opinion, moronic though it may be. This is America, after all. Showing respect and tolerance to those who display antidemocratic, illiberal tendencies is a virtue of America's commitment to liberty. Even those who would instantly abolish the Constitution (should they ever come to power) are given the opportunity to free ride on our freedoms, avail themselves of our courtrooms, and speak openly and hatefully, regardless of how much harm they cause.

Yes, . . . but can we not at least agree that there is a qualified difference between the mass-murdering mayhem and unabashed barbarism of Al Qaeda, ISIS, Hamas, and Hezbollah, and the domestic hate groups that have frequently challenged the durability of the First Amendment? The former have no interest in testing our courts—they merely wish to blow them up. The latter were surprised to discover, thanks to liberal judges and sheltered law professors, that that they might have something of value to say that should be included in the marketplace of ideas. As to hate groups, such an allowance was a mistake, a misguided concession, an overextension that should be reexamined. Regarding terrorist incitement, however, the battle lines should be more confidently and starkly drawn: jihad is not an idea, it is bloodlust.

Beheadings, dismemberments, the torching of homosexuals, the stoning of women, and, of course, suicide bombings of the kind that greeted runners at the Boston Marathon and melted the Twin Towers on 9/11, are the calling cards of today's terrorist apparatus. It most certainly is not the expression of an idea that competes in a marketplace; it is the conduct of the criminally insane. The promoters of terrorism on the internet are not fostering a debate on matters of public concern. For them, it is solely about incitement—the raising of an army of disaffected, otherwise disconnected Muslims

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7. American courtrooms are like second homes to dissident groups testing the limits of the First Amendment. This is certainly true when compared with other liberal democracies around the world that do not extend such generous free speech guarantees to those engaged in racial, anti-Semitic, and homophobic bigotry and intimidation.

8. Skokie, Illinois, the setting for *Collin v. Smith*, 578 F.2d 1197, 1201–02 (7th Cir. 1978), was uniquely targeted by neo-Nazis because it was home to a disproportionately large number of Holocaust survivors.

brainwashed into regarding the infidel as a universal boogeyman, seduced by a more active sex life in the afterlife, and jacked up with the promise of paradise and the release from the futility of their present lives.

Thank you, Google, Facebook, and Apple, for making it possible to more easily unite the lustful, lonely, and murderous.

Regardless of what one might think of the twisted beliefs held by the Klan and neo-Nazis, their methods have been largely tame and confined to our courts. Inadvertently, perhaps, they have been giving Americans civics lessons, courtesy of the free legal services supplied by the American Civil Liberties Union. Where would First Amendment jurisprudence be without them?

By contrast, the widely available sermons on cyberspace by the Islamic cleric Anwar al-Awlaki influenced the shooter at Fort Hood and the bombers at the Boston Marathon.<sup>9</sup> Although an American citizen stashed away in Yemen, al-Awlaki was not seeking a permit to march. He was not challenging a prior restraint on his freedom to speak. He could care less about testing America's constitutional resilience. Indeed, he was ultimately assassinated without the Constitution mattering in his defense.<sup>10</sup> Yet, his own expressive conduct and unencumbered speech had been deadly—and it still is. It is one thing to tolerate the legal shenanigans of domestic hate groups; it is quite another to apply the same principles of liberal lenience to allow the likes of an al-Awlaki to operate unhindered.

And, yet, why should even a tamer version of terrorism thrive in the form of mundane hate groups? All throughout Europe—in other Western democracies that purportedly share our values in governance for the common good—these racist, anti-Semitic spectacles are prohibited. In Germany and Austria, espousing Third Reich ideals or adorning Nazi symbols and paraphernalia warrants a prison sentence or a fine.<sup>11</sup> In France, the anti-Semitic rantings of a low-rent comic<sup>12</sup> or the avowedly racist expressions of a soccer hooligan are criminal acts. Perhaps, given that the Holocaust seared on their side of the Atlantic, Europeans are more painfully aware that such symbolic demonstrations can easily morph into book burnings, Nazi rallies, and death camps, which scarred their continent for an eternity. Paradoxically, the United States fought a civil war over slavery and somehow the residue of racism that carried over into the postbellum South, in the sadistic form of lynchings and cross burnings, did not evoke the same level of revulsion.

What do we know about free speech that these equally democratic societies apparently do not understand? Why are they more fearful of becoming this

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9. See Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES (Aug. 27, 2015), <https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html> [<https://perma.cc/T9VV-CFJM>].

10. See *id.*

11. See Alexander Tsesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729, 773 n.332 (2000).

12. See Maia de la Baume, *A French Jester Who Trades in Hate*, N.Y. TIMES (June 22, 2012), <http://www.nytimes.com/2012/06/24/movies/dieudonne-french-comic-behind-the-anti-semite.html> [<https://perma.cc/QJC6-JJJK>].

year's model of "silly dupes" than are we?<sup>13</sup> We all signed similar social contracts that were conceived by enlightened philosophers of exceptional eighteenth-century intellectual diversity: Locke, Rousseau, Hume, Jefferson, and Kant. Yes, these are all white men from the Western world. But the democratic ideal was their invention. Liberty and autonomy were their signature achievements. And, yet, given that America was present at the launch of these revolutionary ideas, why do Americans regard free speech so differently? Why do they take it more seriously than the other Western governments that share a common democratic ancestry?

For reasons that have never been found to be persuasive, the United States has a high tolerance, if not a death wish, for almost anything that comes out of a lunatic's mouth. It is far too easy to have almost any utterance qualify as expressive speech. A mere germ of an idea apparently deserves protection rather than what is routinely done with ordinary germs.

Nazis march in Skokie, Illinois; crosses are burned in Minnesota and Virginia; and the funeral of a dead marine is disrupted and desecrated in Maryland, all on account of America's outlier approach to free speech guarantees.<sup>14</sup> The latter example went before the U.S. Supreme Court in *Snyder v. Phelps*.<sup>15</sup> Eight of the nine Justices found that the First Amendment protected the display of placards that read, "God Hates Fags," positioned near a funeral where a father said his final goodbye to a son killed in action.<sup>16</sup> Such extreme accommodation of a twisted attempt at speech and a colossal violation of human decency oddly unites both Democrats and Republicans.<sup>17</sup> Aside from their agreement on the taking of such free speech liberties, and their apparent capacity to endure coarsened behavior on a limitless scale, they seem to agree on little else.

Given our predisposition to contort the Constitution in ways that apparently less limber but equally democratic societies would not, what should be done with the special circumstances of terrorist incitement on the internet? Even the most resolute free speech defenders recognize that some expressive conduct should not benefit from free speech protection. "[F]alsely shouting fire in a [crowded] theater,"<sup>18</sup> for instance, which is deemed unprotected nonspeech, made Justice Oliver Wendell Holmes immortal. These sensible words of judicial wisdom are no less apparent today.

Surely there is a present-day Supreme Court Justice who can see the tragic analogy. Enabling terrorist incitement online is the equivalent of shouting fire in the most jam-packed, stampeding, chaotic theater of all: the internet. In *Schenck v. United States*,<sup>19</sup> the Court faced a challenge to the Espionage Act, which criminalized false statements or false reports made with the intent

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

14. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379–80 (1992); *Collin v. Smith*, 578 F.2d 1197, 1201–02 (7th Cir. 1978).

15. 562 U.S. 443 (2011).

16. See *id.* at 448, 454–55.

17. The First Amendment's Free Speech Clause is perhaps the only provision of the Bill of Rights that crosses party lines and receives widespread bipartisan support.

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

19. 249 U.S. 47 (1919).



to jeopardize the success of the American military or promote the success of its enemies.<sup>20</sup> Holmes established the groundwork for the incitement doctrine by requiring courts to examine the very nature of the words being used to determine whether the language or expressive conduct created a “clear and present danger,” especially in times of war, “that Congress has a right to prevent.”<sup>21</sup>

The “clear and present danger” test is applicable to these even more perilous times. The War on Terror is fought, to a large degree, online. Terrorist incitement on the internet, with its recruiting of volunteers and providing of information, undoubtedly promotes the success of America’s enemies. The use and abuse of the internet for these purposes presents a clear and present danger, and *is* the “substantive evil[.]”<sup>22</sup> that Congress rightly should prevent.

This symposium issue of the *Fordham Law Review*, and Professor Alexander Tsesis, should be commended for having assembled these important voices to jump-start an important conversation. Perhaps this will be the final First Amendment frontier because terrorism provides the truest test or the ultimate challenge of what we really believe about the First Amendment. In the ongoing saga of balancing civil liberties against national security, global terrorism reduces the former to an indulgence, while the latter screeches like a never-ending siren—even though the guardians of free speech make their own loud noise. Terrorism places the “fighting words” doctrine from *Chaplinsky v. New Hampshire*,<sup>23</sup> the incitement “to imminent lawless action” language in *Brandenburg v. Ohio*,<sup>24</sup> and the “true threats” doctrine from *Virginia v. Black*,<sup>25</sup> on red alert.

Is terrorism the Rubicon of First Amendment jurisprudence? At the very least, it should inspire a renewed understanding that the usual rationale for privileging speech over harm may not be appropriate when confronting Islamic extremism. We may, indeed, be getting closer to a new reality.

In *Holder v. Humanitarian Law Project*,<sup>26</sup> the Supreme Court heard a constitutional challenge to the Providing Material Support to Terrorists Act.<sup>27</sup> The statute criminalized the incitement of coordinated conspiracies to give material assistance to terrorist organizations.<sup>28</sup> Humanitarian Law Project, among other nonprofit organizations, wished to give legal advice to a number of designated terror groups.<sup>29</sup> Some of these groups also had a charitable arm.<sup>30</sup> This was not a case that presented imminent lawlessness or true threats. The Court recognized, however, that providing material support

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20. *Id.* at 51–52.

21. *Id.* at 52.

22. *Id.*

23. 315 U.S. 568, 573 (1942).

24. 395 U.S. 444, 447–48 (1969) (per curiam).

25. 538 U.S. 343, 359–60 (2003).

26. 561 U.S. 1 (2010).

27. See 18 U.S.C. § 2339B(a) (2012).

28. See *id.*, see also *Humanitarian Law Project*, 561 U.S. at 8–9.

29. *Humanitarian Law Project*, 561 U.S. at 10.

30. *Id.*

is not tantamount to harmless political advocacy—especially when the party has knowledge that the group is a designated terrorist organization.<sup>31</sup> In this case, which directly involved terrorism, the Court was in no mood to excuse the threat away.

It is unlikely, however, that the majority's reasoning in *Humanitarian Law Project* will one day lead to the creation of a separate, categorical terror-related free speech exception that would add a modern context to the *Chaplinsky* list. It would be a credit to the Constitution, and to common sense. But it is anathema to any reading of constitutional jurisprudence. Yet, it might one day become a moral necessity even if it causes legal overreach concerns.

Terrorism, after all, is “fighting words” on crack. And treating acts of terror as a uniquely singular category of proscribed speech would set a benchmark, causing many a judge to fall off their benches, and throw down the gauntlet in reclaiming some First Amendment sanity. It is simply not true that we have more to fear from virtually any compromise in civil liberties than we do from the people who actually blow things, and themselves, up.

Let's be clear as to what constitutes the specific types of dangers that terrorism presents on the internet. Curtailing or stifling political advocacy is not the aim of this regulatory impulse. This is solely about the government's obligation to save lives and not allow the Constitution to become a plaything of sophistry and manipulation. As introduced by Professor Tsesis in a timely and pivotal law review article about terrorism on the internet,<sup>32</sup> there is a propaganda component where a favorable message about the murderous aims of terrorism are communicated to a susceptible audience. The message is used to recruit volunteers. Those new recruits become indoctrinated into jihadist ideology. And those who choose to pursue the madness of martyrdom end up relying on the internet for access to instructional videos on how to make jihad real.

That's what this is about. If someone wants to build a website where the virtues of Islam are being expounded without reference to caliphates, fatwas, calls to martyrdom, jihad, and fighting words doused in lighter fluid aimed at infidels, good luck and enjoy your First Amendment privileges. Anything less, however, anything aimed at propaganda, recruitment, indoctrination, and instructions, are unqualified terrorist crimes, and should be prosecuted without any hindrance from First Amendment oversight.

Without the internet, this entire terrorist enterprise, with its Stone Age mentality, goes back to the Stone Age. The internet has become a terrorist's best friend, which, ironically, makes strange bedfellows of Islamic extremists and porn addicts. Both have benefitted enormously from the vast encyclopedic resources and stimulations of the online universe. And the activities of both, strangely given their otherwise disparate habits, raise First Amendment concerns: What smut is being made available on the internet

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31. *See id.* at 37–38.

32. Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 654 (2017).

that satisfies *Chaplinsky's* "lewd and obscene" disqualification from First Amendment protection?<sup>33</sup>

And what mischief lurks online for a terrorist to consume that constitutes either "fighting words," the "incitement of imminent lawlessness," "true threats," or poses a "clear and present danger" to Western civilization?<sup>34</sup>

The answer to the first question is generally more objectionable to First Amendment court watchers than the answer to the second. Pornography can't seem to catch an intellectual break,<sup>35</sup> whereas terrorism masks deeper expressive, ideological, political speech commitments that, in the minds of many, should receive First Amendment cover.

Nevertheless, before the internet, a terrorist's day was seldom busy, his or her head was less cluttered with the romance of jihad, and he or she was without an easily assembled gathering of like-minded friends. And that's what makes terrorism and the internet such a toxic, incitement-spiked brew.

What of content neutrality? Isn't this classic viewpoint-based discrimination: the criminalizing of Muslims in conversation about their religion—freedom of speech and religion trounced under the same regulatory hammer? With a president in the Oval Office continually threatening a Muslim immigration ban, there is now greater sensitivity to keep the Constitution, and the balance of powers, in check; to not allow any precipitous movements that will make it more difficult to find our way back to constitutional normalcy.

"Let's leave the First Amendment alone," is a familiar patriotic chant.

Except we can't pretend that terrorism is not the beneficiary of irrational First Amendment absolutism. Terrorist incitement is not what the First Amendment was ever meant to safeguard; moreover, terrorist incitement is most decidedly *not* speech. Propaganda, recruitment, indoctrination, and instructional videos do not involve the debating of ideas in some imaginary marketplace. Those who log on to these websites are not casual connoisseurs of bloodlust. They are not surfing for something interesting to bookmark in between purchases with Amazon Prime. They have already reached their conclusions about infidels; those already predisposed to join a cause so incompatible with Western values have already made up their minds. Would-be terrorists are not looking for chatrooms as confessionals where they can express their ambivalence if not profound regret as to how Islam became both a religion of peace and also a prodigious killer of Muslims.

As for the marketplace of ideas that Justice Holmes envisioned in his dissenting opinion in *Abrams v. United States*,<sup>36</sup> many assumptions are made

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33. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1968).

34. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003), *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (per curiam); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

35. See generally *Miller v. California*, 413 U.S. 15 (1973) (holding that obscene pornographic material was not protected by the First Amendment). *Miller* established a test for determining obscenity, which is "utterly without socially redeeming value," *id.* at 21–22, and lacks "serious literary, artistic, political, or scientific value," *id.* at 23. No such legal test has been conceived that condemns global terrorism to a similar purgatory of social disapproval.

36. 250 U.S. 616 (1919).

about such an intellectual souk, and it may actually exist in the abstract, but only when there are mutually reinforcing commitments among the makers and tradesmen in ideas.<sup>37</sup> To succeed in such an enterprise, there must be faith in the free exchange of ideas. And the good faith that all traders see themselves as stakeholders in the venture. Finally, there must be a baseline acceptance that all have consented to a competitive market where those with the winning ideas get to go home alive.

I know of no terrorist who has ever agreed to those terms or is willing to play under that set of rules. When it comes to terror, ideas have no currency in any known marketplace. The only known coin of the realm is violence.

Ironically, the internet *is* the ultimate marketplace. The valuations for Amazon and PayPal prove it; ecommerce will soon convert brick-and-mortar retail establishments into electric-charging stations for Teslas. But the internet is not always an efficient marketplace—what with the trolls, Twitter wars, Facebook defriending, cyberbullying, slut-shaming, the posting of sex tapes, and overall lack of appetite for government oversight and regulation. Amid this cyber circus, efficiency is not expected, and terrorists take full advantage of the obscuring chaos.

These terrorist websites are not harmless flirtations. They are acts of war and should not be dignified as echo chambers of intellectual or religious curiosity. They have the appearance of speech, but they lack the legal particles and moral entitlement of protected speech. At bottom, they are at the lowest level of speech, truly guttural communication, and therefore nakedly without constitutional protection.

The story of how we got to this place in First Amendment jurisprudence is well known, and legal scholars still battle over the meaning and continued relevance of the Supreme Court case that made an otherwise short amendment seem to read much longer and with greater complexity. The *Chaplinsky* Court proscribed categories of unprotected speech that all essentially shared the same deficiency: such speech represents “no essential part of any exposition of ideas” and possesses “such slight social value as a step to [the] truth that any benefit that may be derived from [its expression] is clearly outweighed by the social interest in order and morality.”<sup>38</sup>

*Chaplinsky* is rightly remembered for introducing the “fighting words” doctrine, which, of course, has some relevance on the matter of terrorist language being openly posted on the internet. But *Chaplinsky* may have had an even greater influence in drawing a distinction between high- and low-value speech. Yes, there are gradations of speech; qualitative standards with earned valuations. Not all attempts at expression make the grade. “A rose by any other name would smell as sweet” may be true of roses, but terrorism, and the words terrorists use to communicate their message, are not so easily interchangeable. A terrorist is aptly named. And remember: Romeo dies in the end. His actual name mattered, too.

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37. *See id.* at 630 (Holmes, J., dissenting).

38. *Chaplinsky*, 315 U.S. at 572.

Regulating low-value speech raises no constitutional infirmity even if the content of the speech—its viewpoint and what it has to say—provides the censoring impulse behind the government’s action. That’s how little respect is afforded to speech that deserves none. What matters more is its social value, whether the manner of expression is consistent with and respectful of the norms of social engagement.

If the speech descends from the gutters, the Ground Zero of low-value speech, then it isn’t granted the privilege afforded to speech that aspires to actually say something meaningful and in a form that demonstrates a desire to be heard. The intention behind the speech can’t be to harm, but to contribute to the public discourse; the advancement of democratic ideals; and the pursuit of such higher virtues as truth, beauty, science, and morality.

Redeeming social and intellectual value has a place in the First Amendment conversation. Judges should not live in fear of drawing lines and keeping score. Otherwise, free speech is really about begrudgingly awarding the privilege to the most disparaging and uncivilized among us. It doesn’t make America stronger to strengthen the hand of those who have no regard for social order—or America, for that matter. It actually makes America less free when a hateful few conflate terror and speech as a ploy to terrorize our lives, restrict our movements, and upend our inner peace. Permitting them to do so does not preserve freedom, nor is it a sign of virtue. It’s the quiet surrender of a hostage.

Specifically, *Chaplinsky* defined “fighting words” not merely as speech likely to result in a breach of the peace but also as language that violated the fundamental standards of decency and civility—“the social interest in order and morality.”<sup>39</sup>

*Chaplinsky* should be read as allowing the government to treat terrorism on the internet as low-value speech that has no content-based implications. Terrorism is about fomenting terror—it is meant solely to terrorize. It is threatening in word and deed, and by its own evil design. Under the Court’s ruling in *Virginia v. Black*,<sup>40</sup> “true threats” also fall into the category of low-value speech because they threaten a “fear of violence.”<sup>41</sup> The engendering of “fear” is precisely what terrorist incitement on the internet seeks to accomplish: making fear operational.

Terrorism poses a serious threat of violence and a danger to America’s national security. The internet, a dubious marketplace of ideas, is a breeding ground for budding terrorists and an incubator of incitement. The punishment and regulation of such low-value speech poses no constitutional infirmity.

In addition to making arrests of suspected terrorists and prosecuting crimes, the government should shut down websites, freeze bank accounts, conduct surveillance, and create “No Fly Lists.” Life should be made much harder to live online with a terrorist agenda. The barriers to entry that once

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39. *Id.*

40. 538 U.S. 343 (2003).

41. *Id.* at 359–60.

made incitement to violence that much more difficult in the days before the internet should be resurrected in our cyberspace. Not only is America an outlier in its reluctance to prosecute hate crimes, it is a laggard on “incitement” generally—all because of a pathological fear of offending the First Amendment. Meanwhile, the rest of the Western world takes precautions, is far more comfortable regulating hate speech and prosecuting terror, and yet still celebrates its democratic ideals and liberal character.

Perhaps they don’t wish to be remembered as “silly dupes?”