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## E-Incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs

Hannah Steinblatt  
*Fordham University School of Law*

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## **Cover Page Footnote**

J.D. Candidate, Fordham University School of Law, May 2013; B.A., Queens College, 2009. I would like to thank the editors and staff of the Fordham IPLJ for all of their hard work and valued input on this Note, as well as Professor Thomas H. Lee for his guidance and encouragement. Thank you to my family and friends for their support. A special thank you to my husband, Scott Topiel, for inspiring the topic of this Note, and for his continual love and patience.

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Hannah Steinblatt\*

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## INTRODUCTION

Social gatherings that began as innocuous mass pillow fights in parks or choreographed break-dancing in local shopping malls are now raising serious First Amendment questions. A ubiquitous international phenomenon known as the “flash mob” debuted in 2003.<sup>1</sup> At the start, “[a] group of people would arrange to meet in a public place at a particular time and would perform a song or a dance number or some other form of entertainment very suddenly and without warning.”<sup>2</sup> In recent months, however, “the term ‘flash mob’ has rapidly come to mean something else.”<sup>3</sup> People are “using social media and other forms of communication to coordinate shocking large scale crimes” such as robberies,<sup>4</sup> that often result in serious violence. Sometimes these groups are involved in mass shoplifting or looting, and are even “committing random acts of violence.”<sup>5</sup> Young people have convened to “attack people both in public but also on private property, acts which have resulted in serious physical and psychological trauma, and even murder.”<sup>6</sup> These mobs have been “organized through

<sup>1</sup> Alexander Baron, Op-Ed., *The Man Who Monitors Violent Flash Mobs*, DIGITAL JOURNAL (Sept. 17, 2011), <http://www.digitaljournal.com/article/311622>.

<sup>2</sup> *Flash Mob Epidemic*, AM. DREAM (Aug. 16, 2011), <http://endoftheamerican.dream.com/archives/flash-mob-epidemic>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Baron, *supra* note 1; see also Ian Urbina, *Mobs Are Born as Word Grows by Text Message*, N.Y. TIMES, Mar. 25, 2010, at A1, available at <http://www.nytimes.com/2010/03/25/us/25mobs.html>. The New York Times reported a particularly bad flash mob incident in Philadelphia, noting that the teenagers involved participated in “a ritual that is part bullying, part running of the bulls: sprinting down the block, the teenagers sometimes pause to brawl with one another, assault pedestrians or vandalize property.”

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technological means—either on social media networks like Facebook and Twitter, or through text message or email.”<sup>7</sup>

Regulatory responses to this electronically orchestrated violence have varied.<sup>8</sup> While the violent criminal acts themselves are clearly punishable, what remains unclear is how to legally penalize digital speech—tweets, alerts, Facebook status updates—that brings about the mobs in the first place. Following a violent flash mob incident at a town fair this summer, the city of Cleveland passed a law intended to bar “improper use of social media to violate ordinances on disorderly conduct, public intoxication and unlawful congregation by promoting illegal flash mob activity.”<sup>9</sup> This issue has also arisen in England: following a rampage of criminal conduct in London and other English cities, British Prime Minister David Cameron said he was considering legislation to “stop people communicating via these websites . . . when we know they are plotting violence, disorder and criminality.”<sup>10</sup>

Quelling such violence is a desirable goal, but criminalizing the speech that leads to it may amount to a First Amendment violation. In *Brandenburg v. Ohio*,<sup>11</sup> the Supreme Court developed the current test for when the government may proscribe advocacy speech, ruling that “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>12</sup> Laws criminalizing speech that incites flash mobs must thus be analyzed through the *Brandenburg* lens.

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<sup>7</sup> *What are Flash Mobs?*, INT’L BUS. TIMES (Sept. 12, 2011), <http://www.ibtimes.com/articles/212400/20110912/flash-mob-what-are-flash-mobs-haka.htm>.

<sup>8</sup> *See, e.g., id.* (discussing Cleveland’s city council decision to ban the use of cell phones to start a flash mob); Urbina, *supra* note 6 (explaining that Philadelphia is seeking assistance from the FBI to monitor electronic prompts).

<sup>9</sup> Floyd Abrams, *Flash Mob Violence and the Constitution*, WALL ST. J. (Sept. 7, 2011), <http://online.wsj.com/article/SB10001424053111904583204576544531039409522.html>

<sup>10</sup> *Id.*

<sup>11</sup> 395 U.S. 444 (1969).

<sup>12</sup> *Id.* at 447.

Lyle Denniston, a National Constitution Center adviser, indicated that “decisions such as *Brandenburg* . . . have set the bar pretty high.”<sup>13</sup> He has stated, “[a] Twitter or Facebook message . . . would have to say, ‘We will meet at Broad and Market Street tomorrow at 10:30 and begin an assault on City Hall. Bring your Uzis.’ If it’s not that explicit or direct, it would be very difficult to argue for regulation.”<sup>14</sup> If challenged, laws like the Cleveland Ordinance would be unlikely to pass constitutional muster due to facial vagueness, and would likely fail the *Brandenburg* analysis. The Cleveland Ordinance is vague with regard to “who would be open to prosecution or how police would determine whether social media caused” the criminal activity.<sup>15</sup> It is, nevertheless, possible for state and local governments to enact valid laws with the goal of deterring the violent acts that are often increasingly the result of flash mobs, without disturbing the Court’s speech-protective holding in *Brandenburg*, if the test is applied flexibly.

This Note will argue that content-based laws designed to punish organizers of criminal flash mobs will best serve the compelling goals of state and local governments to deter crime and violence. Part I reviews the origin of flash mobs and the current use of social media as a platform for organizing criminal activity. It then discusses the Supreme Court decisions that led to *Brandenburg*, as well as the Court’s development of the doctrines of vagueness and overbreadth, content neutrality, viewpoint neutrality, and time, place, or manner restrictions. Part II presents two approaches to regulating violent flash mobs: implementing laws that criminalize the speech that leads to flash mobs, and content-neutral, time, place, or manner laws aimed at deterring local violence. Part III demonstrates that, by enacting narrowly-tailored content-based ordinances, it is possible for state and city governments to enact constitutional laws that will punish and deter

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<sup>13</sup> John Timpane, *Flash-Mob Violence Raises Weighty Questions*, PHILA. INQUIRER (Aug. 14, 2011), [http://articles.philly.com/2011-08-14/news/29886718\\_1\\_social-media-flash-mob-facebook-and-other-services](http://articles.philly.com/2011-08-14/news/29886718_1_social-media-flash-mob-facebook-and-other-services).

<sup>14</sup> *Id.*

<sup>15</sup> Vince Grzegorek, *Cleveland’s ‘Flash Mob’ Law Fuzzy, Maybe Illegal*, SCENE MAG. (Jul. 26, 2011), <http://www.clevescene.com/scene-and-heard/archives/2011/07/26/clevelands-flash-mob-law-fuzzy-maybe-illegal>.

highly dangerous initiations of flash mobs without disturbing *Brandenburg*'s safeguard against chilling free speech. Part III also proposes a model flash mob speech ordinance.

## I. BACKGROUND: FLASH MOBS AND THE DEVELOPMENT OF THE FIRST AMENDMENT SPEECH DOCTRINE

Before evaluating the viability of content-based and content-neutral flash mob laws, it is necessary to explore the history of flash mobs and the recent violent and criminal activity associated with them, and to briefly review First Amendment speech jurisprudence, including the application of the *Brandenburg* test and intermediate scrutiny.

### A. Flash Mob Speech

#### 1. What Are Flash Mobs and How Are They Started?

As defined by the Concise Oxford English Dictionary in 2004, a flash mob is “a sudden mass gathering, unanticipated except by participants who communicate electronically.”<sup>16</sup> Flash mobs are generally organized through technological means.<sup>17</sup> Participants are told when and where to meet, and because they almost always use mobile devices to get in touch with each other, meeting places and times can change instantly and frequently. From the perspective of a bystander, “flash mobs appear suddenly and without warning.”<sup>18</sup> Contrary to their peaceful and humorous origins, flash mobs have “taken a darker twist as criminals exploit the anonymity of crowds, using social networking to coordinate everything from robberies to fights to general chaos.”<sup>19</sup> Flash

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<sup>16</sup> *Flash Mob Definition*, OXFORD DICTIONARIES, <http://oxforddictionaries.com/definition/flash+mob?region=us> (last visited Dec. 19, 2011).

<sup>17</sup> See *What are Flash Mobs?*, *supra* note 7.

<sup>18</sup> *Id.*

<sup>19</sup> Eric Tucker & Thomas Watkins, *More Flash Mobs Gather with Criminal Intent*, MSNBC.COM (Aug. 9, 2011), [http://www.msnbc.msn.com/id/44077826/ns/technology\\_and\\_science-tech\\_and\\_gadgets/t/more-flash-mobs-gather-criminal-intent/#.TsL4-2ASMU4](http://www.msnbc.msn.com/id/44077826/ns/technology_and_science-tech_and_gadgets/t/more-flash-mobs-gather-criminal-intent/#.TsL4-2ASMU4).



mobs have recently been used during riots in England and street protests in the Middle East.<sup>20</sup>

The first known flash mob took place in New York City on June 17, 2003.<sup>21</sup> The phenomenon's supposed creator is a man named Bill Wasik, who incited the mob by e-mailing approximately fifty people and asking them to gather at a store in downtown Manhattan.<sup>22</sup> When the store found out, Wasik canceled the initial mob but summoned the crowd for a second attempt.<sup>23</sup> After participants were instructed by "text messages, emails and blog banter, a crowd of approximately 100 people gathered in the home furnishing section of Macy's department store" and stood around a \$10,000 rug.<sup>24</sup> As instructed by Wasik, the participants told salespeople that they all "lived together in a free-love commune and that they wanted to purchase a 'love rug.'"<sup>25</sup> According to those who observed the incident, "the mob dispersed rapidly after spending ten minutes discussing the rug among themselves and with salespeople."<sup>26</sup>

Another early Manhattan flash mob involved hundreds of people perched on a stone ledge in Central Park making bird noises.<sup>27</sup> Large cities around the world quickly adopted the trend and hosted their own unique flash mobs.<sup>28</sup> On July 24 in Rome, "over 300 flash mobbers invaded a music and bookstore . . . spent several minutes asking employees for nonexistent books before applauding and dispersing."<sup>29</sup> In 2003 in Vancouver, Canada, "35

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<sup>20</sup> Scott McCabe, *Flash Mobs Started as Playful Experiment*, WASH. EXAMINER (Aug. 15, 2011), <http://washingtonexaminer.com/local/2011/08/flash-mobs-started-playful-experiment#ixzz1dovgWbqA>.

<sup>21</sup> Judith A. Nicholson, *Flash! Mobs in the Age of Mobile Connectivity*, 6 FIBRE CULTURE (2005), [http://www.fibreculture.org/journal/issue6/issue6\\_nicholson.html](http://www.fibreculture.org/journal/issue6/issue6_nicholson.html).

<sup>22</sup> See McCabe, *supra* note 20.

<sup>23</sup> See Nicholson, *supra* note 21.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Amy Harmon, *Ideas & Trends: Flash Mobs; Guess Some People Don't Have Anything Better to Do*, N.Y. TIMES (Aug. 17, 2003), <http://www.nytimes.com/2003/08/17/weekinreview/ideas-trends-flash-mobs-guess-some-people-don-t-have-anything-better-to-do.html>.

<sup>28</sup> See Nicholson, *supra* note 21.

<sup>29</sup> *Id.*

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people met up . . . at a major intersection and did the twist, to shouts and countershouts of “Chubby!” and “Checker!” . . . [S]everal minutes later, the dancing halted and the flash mobbers dispersed into the crowd of spectators that had gathered.”<sup>30</sup>

## 2. Violent Flash Mobs in Current Events

Recent years have seen the rise of violent, malevolent “flash mobs” in many cities across the United States and abroad.<sup>31</sup> Four examples of recent criminal flash mobs occurred in Cleveland, Philadelphia, suburbs of Maryland, and San Francisco.

### a) Cleveland

Cleveland Heights police were called to the Coventry Street Arts Festival in June 2011, after approximately 1500 flash mobbers “began rampaging, running, fighting, screaming, and yelling.”<sup>32</sup> The flash mob resulted in the arrests of fifteen mob participants for felony aggravated riot.<sup>33</sup> On July 4, 2011, Shaker Heights police faced similar circumstances when several fights involving hundreds of teenagers erupted at the city’s Independence Day fireworks display.<sup>34</sup> The nearly-1000 teenagers who turned up to the event to fight are believed to have mobilized through social networking sites.<sup>35</sup>

In August 2011, Cleveland rapper “Machine Gun Kelly” was arrested after attempting to incite a flash mob at South Park Mall.<sup>36</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> See David Downs, *The evolution of flash mobs from pranks to crime and revolution*, EXAMINER (Aug. 28, 2011), <http://www.sfexaminer.com/local/2011/08/evolution-flash-mobs-pranks-crime-and-revolution#ixzz1e5NkdAgX>.

<sup>32</sup> Robert O’Brien, *Violent Flash Mobs: Passing Fad or Here to Stay?*, POLICE MAG. (Aug. 19, 2011), <http://www.policemag.com/Blog/SWAT/Story/2011/08/Violent-Flash-Mobs-Passing-Fad-or-Here-to-Stay.aspx>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Associated Press, *Cleveland Flash Mob Fight Gathers Attention*, CHRONICLE ONLINE (Aug. 9, 2011), <http://chronicle.northcoastnow.com/2011/08/09/cleveland-flash-mob-fight-gathers-attention/>.

<sup>36</sup> Adam Rathe, *Machine Gun Kelly Arrested: Rapper Busted for Inciting Flash Mob in Cleveland Mall via Twitter*, N.Y. DAILY NEWS (Aug. 22, 2011), [http://articles.nydailynews.com/2011-08-22/gossip/29936931\\_1\\_flash-mob-mall-management-bad-boy-records](http://articles.nydailynews.com/2011-08-22/gossip/29936931_1_flash-mob-mall-management-bad-boy-records).

The entertainer took to his Twitter account around 2:00 p.m. the day of the mob and posted the following tweet: “Today we flash mob NO MATTER WHAT! 5pm at SouthPark [sic] mall in the foodcourt, [sic] wear disguises, dont move to [sic] you hear ‘Cleveland’ play then RAGE!”<sup>37</sup> Many fans heeded the rapper’s call and “raged” at the mall.<sup>38</sup> Although he was asked by the police department to refrain from standing on a table, Kelly did it anyway.<sup>39</sup> Kelly was charged with disorderly conduct for his actions at the mall, but not for inciting the mob.<sup>40</sup>

b) Philadelphia

Philadelphia’s flash mob problems began in the summer of 2009, and took a turn for the worse when thousands crowded the South Street area on a March 2010 weekend, leading to injuries and vandalism.<sup>41</sup> The Philadelphia police, tipped off by “some alert and responsible parents,” thwarted a potential flash mob riot on South Street.<sup>42</sup> The teens, organized through Twitter, descended on South Street around 9:00 p.m.<sup>43</sup> A witness to the incident recalled: “[t]here was a crowd of people all running . . . on both sides of the street and in the street. Not really listening to the cops, who were trying to control everyone. And everyone was angry and yelling.”<sup>44</sup> The police needed reinforcements to control the mob.<sup>45</sup> Multiple fights broke out, and police made several arrests.<sup>46</sup> By midnight, the police had prevailed and the mob dispersed.<sup>47</sup> During the episode, “businesses on South Street locked their doors, trying to keep their legitimate customers

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<sup>37</sup> *See id.*

<sup>38</sup> *See id.*

<sup>39</sup> *See id.*

<sup>40</sup> *Machine Gun Kelly Arrested After Inciting Flash Mob*, HUFFINGTON POST (Aug. 23, 2011), [http://www.huffingtonpost.com/2011/08/21/machine-gun-kelly-arrested\\_n\\_932390.html](http://www.huffingtonpost.com/2011/08/21/machine-gun-kelly-arrested_n_932390.html).

<sup>41</sup> Vernon Odom, *Police Contain Flash Mob on South Street*, 6ABC.COM (Mar. 22, 2010), <http://abclocal.go.com/wpvi/story?section=news/local&id=7341962>.

<sup>42</sup> *Id.*

<sup>43</sup> *See id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See id.*

<sup>46</sup> *See id.*

<sup>47</sup> *See id.*

safe.”<sup>48</sup> One Philadelphia resident explained that the retailers “had to lock their doors because their patrons were afraid to leave.”<sup>49</sup>

In February 2010 on a weekday afternoon in Center City, “[a]s many as 100 teens from three area high schools descended upon The Gallery at Market East.”<sup>50</sup> When mall security quickly tried to remove the teens, the crowd split up and became chaotic.<sup>51</sup> The groups swarmed Market Street approaching City Hall, with “some starting a large snowball fight on the building’s grounds while others began fighting on street corners.”<sup>52</sup> On their way to City Hall, “the teens darted through traffic and knocked strangers to the ground.”<sup>53</sup> Some of the teens entered a Macy’s department store, where they damaged store property and stole clothing.<sup>54</sup> One witness estimated that between forty and fifty kids ransacked the store.<sup>55</sup> During the altercation, one teenage victim was kicked in the head and taken to the hospital with head injuries.<sup>56</sup> The authorities believed that the incident had been coordinated using Facebook or Twitter.<sup>57</sup>

On July 29, 2011, another incident occurred where approximately thirty teenagers gathered near City Hall and severely beat two people, leaving one unconscious and the other with a badly broken jaw.<sup>58</sup>

### c) Montgomery County and Silver Spring, Maryland

In August 2011, more than two-dozen teenagers rushed into a 7-Eleven convenience store in Germantown, Maryland “and stole

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Vince Lattanzio, *Teen Mob Attack in Center City*, NBC 10 PHILA. (Feb. 17, 2010), <http://www.nbcphiladelphia.com/news/local/Huge-City-Hall-Snowball-Fight-Lands-Teens-in-Jail-84517507.html>.

<sup>51</sup> *See id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> *See id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* Daniel Tovrov, *Will Philadelphia’s Flash Mob Curfew be Effective?*, INT’L BUS. TIMES, (Aug. 15, 2011), <http://www.ibtimes.com/articles/198282/20110815/philadelphia-flash-mob-2011-curfew-michael-nutter.htm>.

snacks, drinks and other items.”<sup>59</sup> Like the violence in Center City, Philadelphia, Germantown police also suspected that Facebook and Twitter, or perhaps other social media, had been used to organize the mob.<sup>60</sup> Starks, a spokesman for the Germantown police force said, “the store clerk pressed the silent alarm when he belatedly realized there was a robbery in progress, and a police cruiser responded in under a minute. But by then, the mob was gone.”<sup>61</sup>

A near-identical incident took place in Silver Spring in November 2011, when fifty teenagers stormed a 7-Eleven at around 11:20 p.m. on a Saturday night.<sup>62</sup> The teens stole drinks and snacks and fled the scene before police arrived.<sup>63</sup>

#### d) San Francisco

In the San Francisco Bay Area, Bay Area Rapid Transit (BART) security has recently encountered mob behavior like never before.<sup>64</sup> According to BART spokesman Linton Johnson, “[t]he difference between 10 years ago and now is massive . . . [t]echnology has just made it easier to organize faster.”<sup>65</sup> In August 2011, Johnson received word that a group had organized under “instructions to carry masks, wear black and converge en masse to foment chaos at specific times and places” with the intent to disrupt BART train service as a form of protest.<sup>66</sup> BART security responded by shutting off its underground cell phone service.<sup>67</sup>

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<sup>59</sup> Edecio Martinez, *Flash Mob Robs Maryland 7-Eleven*, CBS NEWS (Aug. 16, 2011), [http://www.cbsnews.com/8301-504083\\_162-20092862-504083.html](http://www.cbsnews.com/8301-504083_162-20092862-504083.html).

<sup>60</sup> Jack Cloherty, *Flash Mob Loots 7-11 Store in Germantown, Maryland*, ABC NEWS (Aug. 16, 2011), <http://abcnews.go.com/Blotter/flash-mob-turns-felony-germantown/story?id=14316655#.TsW6-2ASMU4>. The incident was caught on security cameras and the frightening video can be seen at the link.

<sup>61</sup> *Id.*

<sup>62</sup> *Police Investigate Silver Spring 7-Eleven Mass Theft*, ABC2NEWS.COM (Nov. 21, 2011), <http://www.abc2news.com/dpp/news/police-investigate-silver-spring-7-eleven-mass-theft>.

<sup>63</sup> *Id.*

<sup>64</sup> *See* Downs, *supra* note 31.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

*B. The Difficulty of Preventing and Controlling Flash Mobs*

Violent and criminal flash mobs are on the rise in American cities. The mobs are particularly hard for police to control because of their secretive, spontaneous and fleeting nature.

Criminal flash mobs are an increasingly common threat to the police force and to society. The increasing violent flash mob problems have been described as “waves of rampaging flash mobs running, stealing, assaulting, and robbing innocent people and businesses.”<sup>68</sup> Dangerous “flash robs” show no sign of slowing down in the near future. The New York-based brokerage unit of Marsh & McLennan noted that “thieves that take advantage of flash mob techniques to organize and overwhelm stores present a risk during the holiday shopping season.”<sup>69</sup> Marsh noted that ten percent of retailers surveyed by the National Retail Federation in the summer of 2011 reported “being victimized by at least one criminal flash mob event over the previous 12 months.”<sup>70</sup> Those mobs often resulted in “injuries to customers or employees, theft and property damage.”<sup>71</sup>

Moreover, flash mobs are spontaneous, anonymous, and difficult to stop. Marsh further stated, “using social media, criminals can direct large groups of individuals to specific locations to disrupt business and traffic, with the chaos that sometimes results escalating to a level that can’t be controlled by loss prevention, mall security or police.”<sup>72</sup> Joe La Rocca, spokesperson for the National Retail Federation, said that “[t]hese incidents can turn violent, they can injure customers, they can damage the store and then there’s the financial losses the retailers suffer.”<sup>73</sup> In most cases of this sort, “by the time the police arrive,

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<sup>68</sup> O’Brien, *supra* note 32, at 1.

<sup>69</sup> Rodd Zolkos, *Flash Mobs Pose Threat to Retailers: Marsh*, BUSINESSINSURANCE.COM (Nov. 17, 2011), <http://www.businessinsurance.com/article/20111117/NEWS06/111119902?tags=%7C59%7C338%7C69%7C71%7C340%7C302%7C83>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Cloherty, *supra* note 60, at 1.

the mob is long gone, making for a long arduous process to identify and prosecute the culprits.”<sup>74</sup>

*C. History of Constitutional Speech Protection in the United States*

Before examining the First Amendment issues presented by violent flash mobs and related laws, it is necessary to review the history of the Supreme Court’s application of the First Amendment in speech cases, and to examine the background principles that govern laws that allegedly violate the First Amendment. Speech that organizes flash mobs falls under the category of “incitement speech” and laws that purport to regulate that speech must be evaluated under the speech-protective *Brandenburg* test.<sup>75</sup> Laws that regulate only the time, place or manner of activity are evaluated under a less-stringent intermediate scrutiny analysis; that is, they will be permitted if they serve a “substantial” or “significant” governmental interest, and leave open “ample alternative channels for communication of the information.”<sup>76</sup>

1. The Boundaries of First Amendment Protections

The First Amendment to the United States Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.”<sup>77</sup> The First Amendment’s guarantees of freedom of speech, press, religion, assembly, and petition are among “the most cherished” fundamental rights of Americans.<sup>78</sup>

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<sup>74</sup> *See id.*

<sup>75</sup> *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 999 (3rd ed. 2006).

<sup>76</sup> *See id.* at 1131.

<sup>77</sup> U.S. CONST. amend. I.

<sup>78</sup> 1 RODNEY A. SMOLLA & MELVILLE NIMMER, ON FREEDOM OF SPEECH § 1:1 (3d ed. 1996).

## 2. Protecting Speech and the Development of the “Clear and Present Danger” Test

The Supreme Court first addressed First Amendment speech concerns in *Schenck v. United States*,<sup>79</sup> demonstrating a very weak level of speech protection.<sup>80</sup> Schenck, a Socialist Party official, distributed a leaflet opposing United States participation in World War I and was indicted under the Espionage Act for conspiracy to cause insubordination in the armed forces and to obstruct the recruitment and enlistment of soldiers.<sup>81</sup> In upholding Schenck’s conviction, Justice Holmes articulated what would later become the “clear and present danger” test, stating that 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.”<sup>82</sup> The Court found that Schenck’s leaflet created a clear and present danger, placing it outside of the First Amendment’s protective coverage.<sup>83</sup> It is important to note the low shield of political speech depicted in *Schenck*. The leaflet at issue merely advocated that citizens exercise their right to assert opposition to the draft, and did not call for any violence, yet still, the Court found no First Amendment protection.<sup>84</sup>

The following week, the Court confirmed *Schenck*’s low level of speech protection in *Debs v. United States*.<sup>85</sup> Like Schenck, Debs was a Socialist Party leader convicted under the Espionage Act.<sup>86</sup> His crime was a speech made to an audience at a Socialist Party convention, which predicted the ultimate success of Socialism.<sup>87</sup> Referring to the ultra-low level of protection afforded in the opinion, American legal scholar Harry Kalven, Jr. referred to the *Debs* decision as “a low point in the Court’s performance in

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<sup>79</sup> 249 U.S. 47 (1919).

<sup>80</sup> *See id.*

<sup>81</sup> *See id.* at 48–49.

<sup>82</sup> *Id.* at 52. Justice Holmes concluded that “[i]t is a question of proximity and degree.”

<sup>83</sup> *See id.* at 52.

<sup>84</sup> *See id.* at 51–53.

<sup>85</sup> 249 U.S. 211 (1919).

<sup>86</sup> *See id.* at 212.

<sup>87</sup> *See id.* at 212–16.



speech cases.”<sup>88</sup> Subsequent to its decisions in *Schenck* and *Debs*, the Supreme Court continued to affirm similar convictions under the Espionage Act. In *Abrams v. United States*,<sup>89</sup> the Court upheld the convictions of two defendants who distributed leaflets denouncing the American participation in the Russian revolution.<sup>90</sup> Interestingly, however, in his dissent in *Abrams*, Justice Holmes (who authored the majority opinions in *Schenck* and *Debs*) advocated for a more stringent application of the “clear and present danger” test, finding that neither the danger nor the intent prong was met in *Abrams*.<sup>91</sup>

The Court briefly retreated from the application of the “clear and present danger” test in the mid-1920s in its decisions in *Gitlow v. New York*<sup>92</sup> and *Whitney v. California*.<sup>93</sup> In *Gitlow*, the Court upheld the conviction of members of the Socialist Party for their publication of the Left Wing Manifesto under a New York state statute criminalizing the advocacy of anarchy.<sup>94</sup> The Court found the statute to be constitutionally valid pursuant to a state’s right to “punish utterances endangering the foundations of organized government and threatening its overthrow by unlawful means.”<sup>95</sup> Justice Holmes again dissented, advocating for application of the “clear and present danger” test and finding that the published manifesto was a non-threatening statement of political theory.<sup>96</sup>

Similarly, in *Whitney*, the Court upheld the conviction of a Communist Labor Party member for violating the California Criminal Syndicalism Act.<sup>97</sup> Anita Whitney was charged with helping to establish a group devoted to advocating for the

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<sup>88</sup> HARRY KALVEN, JR., A WORTHY TRADITION 136 (1988) (“[I]f Eugene Debs can be sent to jail for a public speech, what, if anything, can the ordinary man safely say against the war?”).

<sup>89</sup> 250 U.S. 616 (1919).

<sup>90</sup> *See id.*

<sup>91</sup> *See id.* at 628 (Holmes, J., dissenting) (“It 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.”).

<sup>92</sup> 268 U.S. 652 (1925).

<sup>93</sup> 274 U.S. 357 (1927).

<sup>94</sup> *See Gitlow*, 268 U.S. at 655, 670.

<sup>95</sup> *Id.* at 667.

<sup>96</sup> *Id.* at 672–73 (Holmes, J., dissenting).

<sup>97</sup> *See Whitney*, 274 U.S. at 359, 371.

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overthrow of the United States government.<sup>98</sup> Upholding *Gitlow*, the Court held that California had the power to punish those who abuse their rights to speech “by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means.”<sup>99</sup>

a) *Dennis v. United States* and the Solidification of “Clear and Present Danger”

During the 1930s and 1940s, the Court re-embraced the “clear and present danger” standard. In *Dennis v. United States*,<sup>100</sup> the majority affirmed the convictions of Communist Party organizers under the Smith Act.<sup>101</sup> A plurality applied Justice Hand’s interpretation of the “clear and present danger” test, formulated in the lower court: “In each case courts must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>102</sup> The Court found that Dennis’s advocacy of communist ideas constituted a clear and present danger threatening the existence of the United States government.<sup>103</sup>

b) *Brandenburg v. Ohio* and the Per Se Constitutionality of Advocacy Speech

The Court decidedly repudiated the “clear and present danger” test in its 1969 decision in *Brandenburg v. Ohio*.<sup>104</sup> Clarence Brandenburg, a Ku Klux Klan leader in rural Ohio, organized a filmed rally that showed several men in robes and hoods, some carrying firearms, first burning a cross and then making speeches.<sup>105</sup> One of the speeches referred to the possibility of taking “revengeance” against niggers, Jews, and those who

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<sup>98</sup> See *id.* at 359–63.

<sup>99</sup> *Id.* at 371.

<sup>100</sup> 341 U.S. 494 (1951).

<sup>101</sup> See *id.* at 516–17.

<sup>102</sup> *Id.* at 510 (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

<sup>103</sup> See *id.* at 516–17.

<sup>104</sup> 395 U.S. 444 (1969).

<sup>105</sup> See *id.* at 445–46.

supported them.<sup>106</sup> Another speech proclaimed that, if “our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race,” then a march on Washington would take place on the Fourth of July.<sup>107</sup> Brandenburg was charged with advocating violence under Ohio’s criminal syndicalism statute for his participation in the rally and his speech.<sup>108</sup> In relevant part, the statute prohibited “advocat[ing] . . . the duty, necessity, or propriety of violence as a means of accomplishing industrial or political reform” and “voluntarily assembl[ing] with a group formed to teach or advocate the doctrines of criminal syndicalism.”<sup>109</sup> The Court held that the law proscribed the advocacy and teaching of doctrines while ignoring whether or not that advocacy and teaching would actually incite imminent lawless action.<sup>110</sup> The failure to make this distinction rendered the law overly broad and in violation of the Constitution.<sup>111</sup> The Court reversed Brandenburg’s conviction, holding that the government cannot punish “mere abstract” advocacy of force or violation of the law.<sup>112</sup>

In its *per curiam* opinion, the Court declined to apply the “clear and present danger” test, using instead the language “imminent lawless action” to articulate a new test.<sup>113</sup> In drawing the line of constitutional censorship to cover only speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action,” *Brandenburg* completely abrogated *Whitney’s* central holding.<sup>114</sup> The Court held that “mere advocacy” of any principle or ideology, including one that assumed the necessity of violence or illegal action, was *per se* constitutionally protected speech.<sup>115</sup> The Fourth Circuit has interpreted the

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<sup>106</sup> See *id.* at 446–47.

<sup>107</sup> *Id.* at 446.

<sup>108</sup> See *id.* at 444–45.

<sup>109</sup> *Id.* at 448 (quoting OHIO REV. CODE ANN. § 29231.13 (West 2012)).

<sup>110</sup> See *id.* at 448–49.

<sup>111</sup> See *id.* at 447–49.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 447.

<sup>114</sup> See *id.*

<sup>115</sup> See *id.* at 448–49; see also *Rice v. Paladin Enters. Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998).

*Brandenburg* decision as having established an inherent right to advocate lawlessness.<sup>116</sup>

The *Brandenburg* test is comprised of three distinct elements: intent, imminence, and likelihood.<sup>117</sup> It is now necessary for the government to consider not only the presence of a danger, but also the proximity of the danger to the speaker's intent to provoke that danger.<sup>118</sup> The test is more speech-protective than the "clear and present danger" test, making it difficult for states to proscribe advocacy speech in most instances. However, it is still not entirely clear if "imminence" requires immediacy in the context of First Amendment speech.<sup>119</sup>

Four years later, the Court applied the *Brandenburg* test in *Hess v. Indiana*,<sup>120</sup> where it overturned the conviction of a defendant who declared, "[w]e'll take the fucking street later," to a crowd at an antiwar demonstration while the sheriff and deputies were attempting to clear the street.<sup>121</sup> The Court held that the defendant could not be punished under *Brandenburg* because his words did not have "a tendency to lead to violence," primarily because they were not directed at a specific person or group of people and because they called for illegal action only "at some indefinite, future time."<sup>122</sup> This indicates that speech that is directed at particular individuals or a group and calls for illegal action at a specified time may pass the *Brandenburg* hurdle and can be subject to regulation, even if it does not tend to produce, or actually produce, *immediate* lawless action.

*D. Prior Restraint, Vagueness and Overbreadth, and the Difference Between Content-Based and Content-Neutral Laws*

In its First Amendment speech jurisprudence, the Supreme Court has presumed the invalidity of laws that either restrict

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<sup>116</sup> See *Rice*, 128 F.3d at 443.

<sup>117</sup> See CHEMERINSKY, *supra* note 75, at 999.

<sup>118</sup> See *id.* at 998–99.

<sup>119</sup> See *id.* at 999–1000. In relation to homicide committed in self-defense, the term "imminent danger" means "immediate danger." BLACK'S LAW DICTIONARY 750 (6th ed. 1990).

<sup>120</sup> 414 U.S. 105 (1973).

<sup>121</sup> See *id.* at 106–07.

<sup>122</sup> See *id.* at 108–09.

expression prior to its publication or are facially vague or overbroad.<sup>123</sup> The Court has also differentiated between “content-based” and “content-neutral” restrictions on speech, applying different levels of constitutional scrutiny in evaluating the validity of such laws.<sup>124</sup> Content-based laws and regulations punish certain kinds of speech based on their subject matter or message.<sup>125</sup> Content-neutral restrictions regulate speech because the speech creates secondary effects, such as violence or immorality, or is being uttered in a proscribed time, place or manner.<sup>126</sup>

### 1. Prior Restraint

The Court has imposed a heavy presumption against the validity of laws that ban expression of ideas prior to their publication.<sup>127</sup> In *Near v. Minnesota*, the Court struck down a state law that permitted public officials to seek an injunction to stop publication of any “malicious, scandalous and defamatory newspaper, magazine or other periodical.”<sup>128</sup> The majority called the results of the law “the essence of censorship” and declared it unconstitutional.<sup>129</sup> While prior restraints are invalid, as a general matter, the restriction is not absolute; for example, the rule does not prevent governments from prohibiting publication of detailed information that would threaten national security in a time of war.<sup>130</sup>

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<sup>123</sup> See generally *Near v. Minnesota*, 283 U.S. 697 (1931); CHEMERINSKY, *supra* note 75.

<sup>124</sup> See CHEMERINSKY, *supra* note 75, at 932.

<sup>125</sup> See *id.* at 936–39.

<sup>126</sup> See *id.*

<sup>127</sup> See generally *Near*, 283 U.S. 697.

<sup>128</sup> *Id.* at 701.

<sup>129</sup> *Id.* at 713.

<sup>130</sup> See, e.g., *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 101–02 (1979) (holding that “sanction[s] for publishing lawfully obtained, truthful information” require the “highest form of state interest to sustain . . . [their] validity,” and noting that “prior restraints have been accorded the most exacting scrutiny in previous cases.”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

## 2. Vagueness and Overbreadth

The doctrines of vagueness and overbreadth are “closely related” and laws that regulate speech are often challenged on both grounds.<sup>131</sup> Both claims involve facial constitutional challenges to existing laws.<sup>132</sup> However, it is important not to conflate the two concepts because while a law may be both vague and overbroad, it can also be overbroad, but not vague, or vague, but not overbroad.<sup>133</sup> According to legal scholar Peter Poulos, “the primary purposes of the vagueness and overbreadth doctrines are: (1) to prevent a ‘chilling effect’ on generally innocent or constitutionally protected activity, and (2) to prevent the arbitrary and discriminatory enforcement of laws.”<sup>134</sup>

### a) Unconstitutional Vagueness

The vagueness doctrine “emanates from the Due Process Clauses of the Fifth and Fourteenth Amendments . . . [and] requires[:] (1) that a law give people of ordinary intelligence notice of what is prohibited, and (2) that a law provide explicit standards to law enforcement officers in order to avoid arbitrary and discriminatory enforcement.”<sup>135</sup>

A law that affects speech, therefore, is unconstitutionally vague if a reasonable person cannot tell what speech the law prohibits and what speech the law allows.<sup>136</sup> Courts worry about possible chilling effects of too-vague laws on constitutionally protected

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<sup>131</sup> See CHEMERINSKY, *supra* note 75, at 948.

<sup>132</sup> *See id.*

<sup>133</sup> See, e.g., *Bd. of Airport Com'rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (finding a law restricting all First Amendment activity at an airport overbroad, but not vague).

<sup>134</sup> Peter W. Poulos, Comment, *Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws*, 83 CALIF. L. REV. 379, 383 (1995).

<sup>135</sup> *Id.* at 382.

<sup>136</sup> See, e.g., *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926) (explaining that a law is unconstitutionally vague if people “of common intelligence must necessarily guess at its meaning and differ as to its application . . .”); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”).

speech.<sup>137</sup> In order to avoid being penalized for breaking the law, “some people may choose to limit the things they say and express to a higher degree than the law intended.”<sup>138</sup> The Court highlighted this concern in *NAACP v. Button*,<sup>139</sup> where it held that narrow tailoring is necessary “[b]ecause First Amendment freedoms need breathing space to survive.”<sup>140</sup> For example, in *Smith v. Goguen*,<sup>141</sup> the Court held that a state law prohibiting “contemptuous” treatment of a flag was unconstitutionally vague because it “fail[ed] to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not.”<sup>142</sup> The Supreme Court has thus invalidated laws regulating speech on vagueness grounds when they are “so ambiguous that the reasonable person cannot tell what expression is forbidden and what is allowed.”<sup>143</sup>

A law is also unconstitutionally vague if it does not prevent officers from arbitrarily and discriminatorily enforcing it.<sup>144</sup> For example, in *City of Houston v. Hill*,<sup>145</sup> the Court found unconstitutional a city ordinance that criminalized the interruption of police officers in the performance of their duties.<sup>146</sup> The Court held that the law was not narrowly tailored to proscribe only disorderly conduct or fighting words, which likely would have made the ordinance constitutional.<sup>147</sup> The Court instead found that the Houston law “effectively grant[ed] police the discretion to make arrests selectively on the basis of the content of the speech.”<sup>148</sup>

In the context of criminal law, including a criminal intent requirement is one way to avoid invalidity due to vagueness. If a

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<sup>137</sup> Dr. Jonathan Mott, Ph.D., *First Amendment: Speech*, THISNATION.COM, <http://thisnation.com/textbook/billofrights-speech.html> (last visited Feb. 17, 2012).

<sup>138</sup> *Id.*

<sup>139</sup> 371 U.S. 415 (1963).

<sup>140</sup> *Id.* at 432–33 (citations omitted).

<sup>141</sup> 415 U.S. 566 (1974).

<sup>142</sup> *Id.* at 574.

<sup>143</sup> CHEMERINSKY, *supra* note 75, at 942.

<sup>144</sup> *See Smith*, 415 U.S. at 574.

<sup>145</sup> 482 U.S. 451 (1987).

<sup>146</sup> *See id.*

<sup>147</sup> *See id.* at 482 n.15.

<sup>148</sup> *See id.*

criminal statute or ordinance does not require criminal intent to qualify for punishment, it is likely to be deemed unconstitutionally vague.<sup>149</sup> In *City of Chicago v. Morales*,<sup>150</sup> the Court held that where vagueness permeates the text of a criminal law that “contains no *mens rea* requirement and infringes on constitutionally protected rights,” the law is subject to facial attack.<sup>151</sup> The Supreme Court has thus recognized that “the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.”<sup>152</sup>

Though there is no bright-line test to determine whether a law is unconstitutionally vague on its face, the Court has made it clear that speech-restrictive laws need to be narrowly drawn, and that they require particularly sharp precision in their language.<sup>153</sup> Statutes and ordinances can and will be invalidated unless they provide adequate notice to constituents of what is illegal and what is not.<sup>154</sup>

#### b) Unconstitutional Overbreadth

A law may also be invalidated on grounds of overbreadth. A law is unconstitutionally overbroad if it regulates substantially more speech than the constitution permits to be regulated.<sup>155</sup> The person raising an overbreadth claim need not be affected directly by the restriction; rather, a person to whom the law can be constitutionally applied can argue that the same law would be unconstitutional as applied to others.<sup>156</sup> The doctrine provides that

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<sup>149</sup> See *City of Chicago v. Morales*, 527 U.S. 41 (1999).

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 55 (invalidating an ordinance that required a police officer, upon observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made the failure to obey such an order promptly a violation of the ordinance, for unconstitutional vagueness).

<sup>152</sup> *Colautti v. Franklin*, 439 U.S. 379, 395 (1979); see also *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 434–46 (1978); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1972); *Boyce Motor Lines v. United States*, 342 U.S. 337, 342–43 (1952).

<sup>153</sup> See CHEMERINSKY, *supra* note 75, at 943.

<sup>154</sup> See *id.* at 932.

<sup>155</sup> See *id.*

<sup>156</sup> See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (“Embedded in the traditional rules governing constitutional adjudication is the principle that a person to



somebody “whose speech is unprotected by the First Amendment and who could constitutionally be punished under a more narrow statute may argue that the law is [altogether overbroad] because of how it might be applied to third parties not before the Court.”<sup>157</sup>

For example, the Court invalidated a city ordinance prohibiting all live entertainment as overbroad in *Schad v. Borough of Mount Ephraim*.<sup>158</sup> In that case, an adult bookstore that featured live nude dancers succeeded in challenging the ordinance, because it outlawed *all* live entertainment—not just nude dancing.<sup>159</sup> The bookstore’s claim was successful, in part, because of how the ordinance would regulate the constitutional speech of third persons not party to the case.<sup>160</sup>

### 3. Content-Based Restrictions

The Supreme Court has held that the core of First Amendment speech protection is the protection from government regulations based on the content of the speech.<sup>161</sup> The Court has declared content-based regulations to be “presumptively invalid.”<sup>162</sup> In *Turner Broadcasting System, Inc. v. Federal Communications Commission*,<sup>163</sup> the Court made clear that content-based regulations must meet strict scrutiny to be upheld, while content-neutral regulations need only meet intermediate scrutiny.<sup>164</sup> The *Turner* Court explained that “[g]overnment action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential [First Amendment] right” and continued by noting that

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whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.”).

<sup>157</sup> See *CHEMERINSKY*, *supra* note 75, at 943–44.

<sup>158</sup> 452 U.S. 61 (1981).

<sup>159</sup> *See id.* at 73.

<sup>160</sup> *See id.* at 66.

<sup>161</sup> *See* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>162</sup> *See* *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 882 (1992).

<sup>163</sup> 512 U.S. 662 (1994).

<sup>164</sup> *See id.*; *see also* *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 815 (2000) (“We have made clear that the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech.”).

the First Amendment “does not countenance governmental control over the content of messages expressed by private individuals.”<sup>165</sup>

In order to survive strict scrutiny, content-based speech restrictions must be “narrowly tailored to serve a compelling state interest.”<sup>166</sup> Only a few specifically defined categories of content-based speech are unprotected or less protected by the First Amendment<sup>167</sup>: incitement (as defined by the Court in *Brandenburg*), illegal activity, obscenity,<sup>168</sup> child pornography,<sup>169</sup> and defamation.<sup>170</sup>

#### a) Content and Viewpoint Neutrality

In order to constitutionally regulate speech, government laws may not discriminate based upon the viewpoint of the speaker.<sup>171</sup> The principal inquiry in determining content neutrality in First Amendment speech cases is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.<sup>172</sup> A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.<sup>173</sup> In *United States v. O'Brien*,<sup>174</sup> the Court established a four-factor test to

<sup>165</sup> *Id.* at 641.

<sup>166</sup> *See, e.g.,* *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990); *Burson v. Freeman*, 504 U.S. 191, 198 (1992) (plurality); *Boos v. Barry*, 485 U.S. 312, 334 (1988) (plurality); *Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

<sup>167</sup> *See* CHEMERINSKY, *supra* note 75, at 933.

<sup>168</sup> The modern test regarding obscenity is “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” *Roth v. United States*, 354 U.S. 476, 489 (1957).

<sup>169</sup> Unprotected child pornography involves “works that *visually* depict sexual conduct by children below a specified age.” *New York v. Ferber*, 458 U.S. 747, 764 (1982).

<sup>170</sup> To be classified as unprotected defamation, the First Amendment requires that a defamation plaintiff prove actual malice or reckless disregard of the truth when the plaintiff is a public official or public figure. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>171</sup> *See* *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784–85 (1978); *see also* 1 RODNEY A. SMOLLA & MELVILLE NIMMER, ON FREEDOM OF SPEECH § 8:5 (3d ed. 1996).

<sup>172</sup> *See* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984).

<sup>173</sup> *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 791–92 (1989).

<sup>174</sup> 391 U.S. 367 (1968).

determine the constitutionality of content-neutral speech restrictions:

[1] if it is within the constitutional power of government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression, and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>175</sup>

Later, a fifth factor was added in *City of Ladue v. Gilleo*<sup>176</sup>: whether the restriction “leave[s] open ample alternative channels for communication.”<sup>177</sup> The current test, akin to an “intermediate scrutiny” analysis, can be articulated as follows: government regulation of expression is deemed content-neutral if it can be “justified without reference to the content of the regulated speech” and is “narrowly tailored to serve a significant governmental interest,” while leaving open “ample alternative channels for communication of the information.”<sup>178</sup> Content-neutral regulations, therefore, are evaluated under an “intermediate scrutiny” analysis. This means that the government cannot regulate speech based on its viewpoint or subject unless the regulation passes strict scrutiny.<sup>179</sup>

However, the Supreme Court has indicated that a regulation that is facially content-based may be deemed content-neutral if it is motivated by a permissible content-neutral purpose.<sup>180</sup> In *Renton v. Playtime Theaters, Inc.*,<sup>181</sup> the Court upheld an ordinance that prohibited adult movie theaters from being located within 1,000 feet of certain designated areas.<sup>182</sup> Though the ordinance was content-based on its face as it applied only to those theaters that

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<sup>175</sup> See *id.* at 377.

<sup>176</sup> 512 U.S. 43 (1994).

<sup>177</sup> See *id.* at 56 (quoting *Clark*, 468 U.S. at 293).

<sup>178</sup> *Clark*, 468 U.S. at 293.

<sup>179</sup> See, e.g., *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994).

<sup>180</sup> *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986).

<sup>181</sup> *Id.*

<sup>182</sup> See *id.*

showed adult films, the Court treated the regulation as content-neutral because the government was motivated by a desire to control the secondary effects of the existence of these theaters, such as crime, and not a desire to control the speech itself.<sup>183</sup> Thus *Renton* clarified that courts must look at the justification of the law, and not its plain terms, when making content-neutrality determinations.<sup>184</sup>

b) Public Forums and the Time, Place, or Manner Test

Time, place, or manner restrictions are a type of content-neutral speech regulation.<sup>185</sup> The concept of time, place, or manner restrictions refers to the government's ability to regulate speech in a public forum in a manner that minimizes disruption of a public space while still protecting First Amendment speech.<sup>186</sup> The Court in *Heffron v. International Society for Krishna Consciousness, Inc.*<sup>187</sup> held that reasonable time, place, and manner restrictions are valid "provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information."<sup>188</sup> For example, in *Clark v. Community for Creative Non-Violence*,<sup>189</sup> the Court upheld a federal regulation that prohibited sleeping in certain national parks over the objections of protesters who had camped out in a national park to draw attention

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<sup>183</sup> See *id.* at 48.

<sup>184</sup> See CHEMERINSKY, *supra* note 75, at 937. The author notes that the holding in *Renton* has been strongly criticized by commentators because it "permits an end run around the First Amendment: The government can always point to some neutral, non-speech justification for its actions." Indeed, the Court has distinguished *Renton* in subsequent cases.

<sup>185</sup> See generally 16B C.J.S. *Constitutional Law* § 828.

<sup>186</sup> See *id.* at 1131.

<sup>187</sup> 452 U.S. 640 (1981).

<sup>188</sup> *Id.* at 648 (upholding a regulation at the Minnesota State Fair that prohibited the distribution of literature or the soliciting of funds except at booths. The regulation was content-neutral because *all* literature and solicitations were regulated regardless of speaker, viewpoint, or subject-matter. The governmental purpose was justified because of its important interest in controlling pedestrian traffic at the fair. Finally, the Court found that the Krishna had alternate ways to reach the fair's attendees, both off grounds and at the fair booths.).

<sup>189</sup> 468 U.S. 288 (1984).

to the plight of the homeless.<sup>190</sup> The Court found that the regulation was not aimed at suppressing symbolic speech, because it applied to everyone in the park, and not just the protesters involved in the case.<sup>191</sup> The Court further noted that the regulation was reasonably designed to further the substantial government interest in conserving the national parks, a public space, by minimizing the wear and tear that can be caused by campers.<sup>192</sup> Finally, the Court found that it was a valid time, place, or manner regulation because sleeping in the park was not banned generally, but only prohibited in certain designated areas.<sup>193</sup>

Time, place or manner restrictions give the government the power “to regulate speech in a public forum in a manner that minimizes disruption of public place while still protecting freedom of speech.”<sup>194</sup> Time, place, and manner restrictions accommodate public convenience and promote order by regulating for example, noise,<sup>195</sup> flow of pedestrian traffic,<sup>196</sup> speech activities within 100 feet of the entrance to any healthcare facility,<sup>197</sup> and demonstrations within 15 feet of doorways, parking lot entrances, and driveways.<sup>198</sup> The Court has held that nobody may “insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly.”<sup>199</sup>

Time restrictions regulate “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”<sup>200</sup> Manner restrictions impact how speech can be delivered; for example, regulating the volume of the

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<sup>190</sup> *See id.* at 288.

<sup>191</sup> *See id.* at 298.

<sup>192</sup> *See id.* at 299.

<sup>193</sup> *See id.* at 295.

<sup>194</sup> CHEMERINSKY, *supra* note 75, at 1131.

<sup>195</sup> *See id.* at 107–08.

<sup>196</sup> *See Heffron*, 452 U.S. at 654.

<sup>197</sup> *See Hill v. Colorado*, 530 U.S. 703 (2000).

<sup>198</sup> *See Schenck v. Pro-Choice Network of Western N. Y.*, 519 U.S. 357 (1997).

<sup>199</sup> *Cox v. Louisiana*, 379 U.S. 536, 554–55 (1965) (stating that “Governmental authorities have the duty and responsibility to keep their streets open and available for movement.”).

<sup>200</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

particular presentation.<sup>201</sup> Place restrictions regulate where individuals may express themselves. The Court has recognized three forums of public expression: traditional public forums, “designated” public forums, and nonpublic forums.<sup>202</sup>

Traditional public forums are government properties that have historically been available for the dissemination of information and the communication of ideas, such as municipal streets and parks.<sup>203</sup> Under First Amendment doctrine, the government may not close traditional public forums to speech, but may place reasonable restrictions on their use.<sup>204</sup> The government may, however, regulate speech in public forums under certain circumstances;<sup>205</sup> but a content-based regulation still must pass strict scrutiny.<sup>206</sup> Importantly, the Court has ruled that government regulation of speech in traditional public forums need not use the *least* restrictive alternative, but the restriction must always be narrowly tailored to the “government’s legitimate, content-neutral interests.”<sup>207</sup>

Designated, or limited, public forums are “place[s] that the government could close to speech, but that the government voluntarily, affirmatively opens to speech.”<sup>208</sup> The Court has held, for example, that public schools and universities can become limited public forums if they allow student and community groups

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<sup>201</sup> See, e.g., Jennifer L. Lambe, *The Structure of Censorship Attitudes*, 13 COMM. L. & POL’Y 485, 490 (2008); Lee Ann W. Lockridge, *The Myth of Copyrights Fair Use Doctrine as a Protector of Free Speech*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 31, 52 n.94 (2007).

<sup>202</sup> See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678–79 (1992) (holding an airport operated by the Port Authority is a non-public forum, and therefore the Port Authority’s ban on solicitation there need only satisfy a reasonableness standard).

<sup>203</sup> See 16B C.J.S. *Constitutional Law* § 841 (2011).

<sup>204</sup> See *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 45–46 (1983).

<sup>205</sup> See *id.*

<sup>206</sup> See *id.*

<sup>207</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (upholding a New York City requirement that any concert using the Central Park Naumburg Bandshell had to use city sound engineers and equipment, despite the fact that the city could have achieved its goal of noise reduction through a less-restrictive means, such as limits on decibel levels).

<sup>208</sup> See CHEMERINSKY, *supra* note 75, at 1137.

to use their property.<sup>209</sup> As long as the government chooses to allow speech in such a place, the rules regarding traditional public forums apply.<sup>210</sup>

The third category—non-public forums—consists of those “government properties that the government can close to all speech activities.”<sup>211</sup> Airline terminals,<sup>212</sup> the area outside jailhouses,<sup>213</sup> and military bases<sup>214</sup> have all been deemed nonpublic forums under the First Amendment. A lower level of scrutiny is applied when the regulation involves a non-public forum because the government may constitutionally prohibit or restrict speech in non-public forums “so long as the regulation is reasonable and viewpoint-neutral.”<sup>215</sup>

## II. HOW TO EFFECTIVELY AND CONSTITUTIONALLY REDUCE FLASH MOB VIOLENCE: CONTENT-BASED VERSUS CONTENT-NEUTRAL LAWS

It is clear that local governments must act in order to prevent and penalize the organization of criminal flash mobs. Two possible ways to regulate violent and criminal flash mobs are: (1) content-based laws that prohibit the speech that incites mobs, and (2) content-neutral laws, such as curfews, that target speech only secondarily.

### A. *Regulations Related to Content of Flash Mob Advocacy Messages*

Content-based laws aimed at regulating digital speech that incites flash mobs would be evaluated under the *Brandenburg* test. To avoid being deemed unconstitutional, such laws would need to be drafted with particularity to avoid vagueness and overbreadth.

#### 1. Laws Regulating Incitement Speech Must Pass the

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<sup>209</sup> *See id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.* at 1139.

<sup>212</sup> *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992).

<sup>213</sup> *See Adderley v. Florida*, 385 U.S. 39, 47 (1966).

<sup>214</sup> *See Greer v. Spock*, 424 U.S. 828, 836–37 (1976).

<sup>215</sup> CHEMERINSKY, *supra* note 75, at 1139.

### Brandenburg Test

In order to pass constitutional muster, any law that regulates the incitement of flash mobs would have to meet the requirements set out in *Brandenburg*, that the speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>216</sup> First, the *Brandenburg* test would require the speaker to have intended to incite an “imminent” criminal flash mob. The imminence requirement is a temporal one, but need not be interpreted as “immediacy.”<sup>217</sup> Rather, “imminence” can be understood to mean “predictability.”<sup>218</sup> If flexibly applied, the *Brandenburg* test merely requires the regulated speech to be directed at inciting lawlessness at a concrete, predictable time.<sup>219</sup> Second, a law would have to be very clear about the type of speech that is likely to incite or produce such action. Under such a law, a speaker would not be punished for inciting a flash mob unless the mob occurred, was violent or criminal in nature, and at least one person was arrested for committing a crime associated with the mob.

#### 2. Avoiding Vagueness and Overbreadth

To avoid failure for vagueness or overbreadth, and to meet the first prong of the *Brandenburg* test, a content-based regulation of flash mob speech would require evidence of criminal intent. For example, in order to punish the speech, a showing of actual intent “to incit[e] or produc[e] imminent lawless action,”<sup>220</sup> such as larceny or vandalism, would be required.

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<sup>216</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>217</sup> See David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 59–60 (1994).

<sup>218</sup> See *id.* (“If imminence were interpreted instead to mean simply the immediacy in time of the result, the *Brandenburg* test would not make sense. We should no more regard the First Amendment as an excuse for a contract murder, for example, merely because the conspirators scheduled it for a future date, than we should excuse a murder accomplished by a time bomb. The time bomb causes “imminent” harm in the sense that once it is triggered, harm is highly likely and closely related. So does the contract murder. To read *Brandenburg* otherwise would be to reach a result that the Supreme Court could not possibly have intended.”).

<sup>219</sup> See *id.*

<sup>220</sup> See *Brandenburg*, 395 U.S. at 447.



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A constitutional regulation would require the speech to contain an explicit delineation of the time and place of the planned flash mob in order to be punishable. The email, social media message, or text message in question must contain particular, predetermined “tip off” words to demonstrate criminal intent, such as “rob,” “loot,” “rage,” “attack,” or “mayhem,” and may not be as general or innocuous as “gathering,” “meeting,” or “party.”

The statutory language of a flash mob law must also be very specific about types of speech and social media that will be subject to the regulation in order to provide adequate notice to potential violators and to protect against unlimited and arbitrary police discretion. A constitutional ordinance would require a clear listing of devices and means by which potential violators broadcast their message. For example, a law could proscribe calls for flash mobs made via email, social media message, blog post, text message, BlackBerry message, or Twitter.

In order to provide notice to potential violators and to provide clear guidance for law enforcement, a constitutional regulation must have specific application criteria. Flash mob participants would only be subject to punishment for speech organizing the mob if one or more persons were arrested for crimes committed as part of the mob. A law might also include a minimum number of people summoned to qualify as a flash mob. For example, a speech-restrictive law could require that a message be distributed to at least four people before triggering the flash mob law.

A law must clearly provide the penalties associated with its violation. A successful content-based ordinance would categorize violations as misdemeanors, and would impose only fines as punishment, in order to be attractive to local legislatures.

Thus the law must be specific about the speaker’s intent, what language is included in the messages, the means by which those messages can be sent, the particular characteristics of the mob and mob activity, and what the penalties are for engaging in flash mob incitement.

### 3. Examples of Content-Based Regulations

The Cleveland, Ohio city council recently sponsored a proposal for a content-based regulation that aims to punish the use of social media to organize unlawful flash mob activity.<sup>221</sup> Additionally, Great Britain's Prime Minister David Cameron has voiced a possible need for similar legislation in reaction to the recent flash mob riots in London.<sup>222</sup>

#### a) Cleveland

The Cleveland city council approved a flash mob ordinance in July 2011; however in August 2011, Mayor Frank Jackson vetoed the law.<sup>223</sup> He cited several constitutional issues, including the danger of overbreadth, because "it would impact law-abiding citizens and wrongdoers alike."<sup>224</sup> Mayor Jackson was also concerned about the "vague definition of 'social media.'"<sup>225</sup> The July law would have prohibited the "improper use of social media to violate ordinances on disorderly conduct, public intoxication and unlawful congregation by promoting illegal flash mob activity."<sup>226</sup> First offense violations "would have resulted in a misdemeanor charge and a fine of \$100."<sup>227</sup>

In a second effort to enforce a flash mob law, the city council proposed an amended set of ordinances, the goal of which was to expand existing city laws so that people who use technology to

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<sup>221</sup> See Zack Reed & Jeff Johnson, *Opposing View: Stop Criminal Flash Mobs*, USA TODAY, Sept. 15, 2011, at 8A, available at <http://www.usatoday.com/news/opinion/story/2011-09-14/flash-mobs-Cleveland-ordinance/50406092/1>.

<sup>222</sup> See J. David Goodman, *In British Riots, Social Media and Face Masks are the Focus*, LEDE (Aug. 11, 2011), <http://thelede.blogs.nytimes.com/2011/08/11/social-media-and-facemasks-are-targets-after-british-riots>.

<sup>223</sup> See *Cleveland: "Flash Mob" Law Vetoed by Mayor Jackson*, WKYC.COM (Aug. 4, 2011), <http://www.wkyc.com/news/article/200798/3/Cleveland-Flash-mob-law-vetoed-by-Mayor-Jackson>.

<sup>224</sup> See *id.*

<sup>225</sup> See Amanda Garrett, *Mayor Frank Jackson Quashes New Social Media Ordinance Aimed at Killing Flash Mobs*, CLEVELAND.COM (Aug. 4, 2011), [http://blog.cleveland.com/metro/2011/08/mayor-frank-jackson-quashes\\_ne.html](http://blog.cleveland.com/metro/2011/08/mayor-frank-jackson-quashes_ne.html).

<sup>226</sup> *Cleveland: "Flash Mob" Law Vetoed by Mayor Jackson*, *supra* note 221.

<sup>227</sup> *Id.*

create a public disturbance can be held accountable.<sup>228</sup> Councilman Jeffrey Johnson stated, “we want to send a message from Cleveland City Council beginning tonight that those who organize criminal flash mobs, that we’re not only going to respond to you, but we’re going to prosecute you.”<sup>229</sup> Councilman Michael D. Polensek said, “[w]e’ve been able to fashion three pieces that tighten up various definitions within the codified ordinances. We want to make the police have a little bit more power in their effort to deal with the potential flash mob situations.”<sup>230</sup> But Mayor Jackson refused to sign the law because he believed that it mirrored existing state law and would not change how flash mobs are regulated.<sup>231</sup> However, because the mayor took no affirmative action to approve or veto the law, a provision of the city charter permitted the council’s ordinance to become law.<sup>232</sup>

Three components of the new law are:

[1] Inciting to riot. No person shall knowingly engage in conduct designed to incite another to commit a riot. This supplement ordinance targets the individual(s) who organize a riot and would be a misdemeanor of the first degree.

[2] Riot. No person shall participate with four or more others in a course of disorderly conduct in violation of Section 605.03,<sup>233</sup> including but not limited to a community event, place of business, or any City of Cleveland property, facility, or

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<sup>228</sup> See Jessica Dabrowski, *Cleveland Councilmen Take Another Shot at Flash Mobs*, FOX 8 CLEVELAND (Oct. 3, 2011), <http://www.fox8.com/news/wjw-flash-mob-ordinances-city-council-jd-txt,0,2014818.story>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> See Pat Galbincea, *Flash Mob Ordinances Become Law in Cleveland Minus Mayor Frank Jackson’s Signature*, CLEVELAND.COM (Dec. 13, 2011), [http://blog.cleveland.com/metro/2011/12/flash\\_mob\\_ordinances\\_become\\_la.html](http://blog.cleveland.com/metro/2011/12/flash_mob_ordinances_become_la.html).

<sup>232</sup> *See id.*

<sup>233</sup> This ordinance outlines acts that constitute disorderly conduct, a minor misdemeanor. CLEVELAND, OHIO, CODE OF ORDINANCES ch. 605, § 605.03 (2006), available at [http://www.amlegal.com/nxt/gateway.dll/Ohio/cleveland\\_oh/codifiedordinancesofthecityofcleveland?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:cleveland\\_oh](http://www.amlegal.com/nxt/gateway.dll/Ohio/cleveland_oh/codifiedordinancesofthecityofcleveland?f=templates$fn=default.htm$3.0$vid=amlegal:cleveland_oh).

recreation area. This amending ordinance focuses on the individuals participating in a riot and would be a misdemeanor of the first degree.

[3] Criminal tool. This ordinance includes “electronic media device” as part of the listing of criminal tools under section 625.08<sup>234</sup> of the Codified Ordinances of Cleveland. This amending ordinance would be a misdemeanor of the first degree.<sup>235</sup>

Councilman Jeffrey Johnson argues that the new approach is constitutional because it “does not find fault in the use of social media to express an opinion, but rather considers the organizer’s words as proof of criminal intent.”<sup>236</sup> James Hardiman, legal director for the American Civil Liberties Union of Ohio, whose group has opposed both flash mob ordinances, said “he would have preferred Jackson to veto the ordinances because ‘it will cause more problems than it will ever solve.’”<sup>237</sup> He added concerns about the potential for illegal police searches and seizures and discrimination as “the law will target minorities.”<sup>238</sup>

#### b) London

Young rioters in the United Kingdom have utilized Blackberry’s Messenger Service (“BBM”) to organize flash mobs.<sup>239</sup> One BBM broadcast sent during riots in the city in

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<sup>234</sup> This ordinance lists and defines criminal tools. CLEVELAND, OHIO, CODE OF ORDINANCES ch. 625, § 625.08 (2011), available at [http://www.amlegal.com/nxt/gateway.dll/Ohio/cleveland\\_oh/codifiedordinancesofthecityofcleveland?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:cleveland\\_oh](http://www.amlegal.com/nxt/gateway.dll/Ohio/cleveland_oh/codifiedordinancesofthecityofcleveland?f=templates$fn=default.htm$3.0$vid=amlegal:cleveland_oh).

<sup>235</sup> Jen Steer, *New Cleveland City Council Proposal Pushes for Ban on Flash Mobs . . . Again*, NEWSNET5.COM (Oct. 3, 2011), [http://www.newsnet5.com/dpp/news/local\\_news/cleveland\\_metro/New-Cleveland-City-Council-proposal-pushes-for-ban-on-flash-mobs-again](http://www.newsnet5.com/dpp/news/local_news/cleveland_metro/New-Cleveland-City-Council-proposal-pushes-for-ban-on-flash-mobs-again).

<sup>236</sup> Anita Ramasastry, *To Honor First Amendment Rights, Cleveland and Other Cities Should Focus on Flash Mob Violence, Not Instant Messaging*, JUSTIA.COM (Oct. 11, 2011), <http://verdict.justia.com/2011/10/11/to-honor-first-amendment-rights-cleveland-and-other-cities-should-focus-on-flash-mob-violence-not-instant-messaging>.

<sup>237</sup> Galbincea, *supra* note 229.

<sup>238</sup> *Id.*

<sup>239</sup> See Olivia Solon, *Why Has BlackBerry Been Blamed for the London Riots?*, WIRED.CO.UK (Aug. 9, 2011), <http://www.wired.co.uk/news/archive/2011-08/09/why-are-we-blaming-bbm-for-riots>.

August of 2010 read, “Everyone from all sides of London meet up at the heart of London (central) OXFORD CIRCUS!!, Bare SHOPS are gonna get smashed up so come get some (free stuff!!!) f\*\*k the feds we will send them back with OUR riot! >:O Dead the ends and colour war for now so if you see a brother... SALUT! if you see a fed... SHOOT!”<sup>240</sup> BBM activity occurs on a closed network, making it nearly impossible for officials to monitor.<sup>241</sup> British Prime Minister David Cameron is considering ways to give British police “the technology to trace people on Twitter or BBM or close it down.”<sup>242</sup> In response to the proliferation of riots in London, Cameron said he was working with police to consider laws banning rioters from using social media, considering “whether it would be right to stop people communicating via these websites and services when we know they are plotting violence, disorder, and criminality.”<sup>243</sup> Such regulations, if passed in the United States, would likely fall into the category of prior restraints and content-based restrictions.

*B. Content-Neutral Regulations Aimed at Containing Violence and Criminal Riots: Time, Place and Manner Restrictions*

The Supreme Court has stated, “regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny because in most cases they pose a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”<sup>244</sup> Time, place, and manner restrictions are constitutional if “they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for

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<sup>240</sup> Keith Lee, *Flash Mob Riots: Crime in the Age of Twitter*, LEXIS HUB FOR NEW ATTORNEYS (Aug. 9, 2011), <http://www.lexisnexis.com/community/lexishub/blogs/legal-technologyandsocialmedia/archive/2011/08/09/flash-mob-riots-crime-in-the-age-of-twitter.aspx>.

<sup>241</sup> See *id.* BlackBerry automatically encrypts messages sent to another person’s BlackBerry when using their PIN—this means that the messages cannot be intercepted by a government or mobile network. *Id.*

<sup>242</sup> Olivia Solon, *U.K. Prime Minister Suggests ‘Pre-Crime’ Blocking of Social Media*, WIRED (Aug. 11, 2011), <http://www.wired.com/epicenter/2011/08/uk-block-social-media>.

<sup>243</sup> *Id.*

<sup>244</sup> *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994).

communication of the information.”<sup>245</sup> Two types of time, place and manner restrictions could target flash mobs—curfews and permit requirements.

### 1. Curfews

Local governments have the option of imposing curfews for minors as a means of deterring flash mob violence by teenagers. A curfew law would be justified if it would decrease the likelihood of violence in the city in a way that does not discriminate based on expression of speech. A curfew would need to qualify as significantly related to the government’s interest in curbing violence and criminal activity, which could be proved through use of statistics relating to nighttime teen crime prevalence.<sup>246</sup> Finally, because a curfew law would only proscribe gatherings after a particular hour, such a law would leave open ample alternative times for communication of flash mob expression.

The mayor of Philadelphia recently enacted curfew requirements for teenagers<sup>247</sup> and Silver Spring, Maryland officials are considering doing the same in an effort to curb teen loitering and the proliferation of criminal flash mob activity.<sup>248</sup>

Philadelphia Mayor Michael Nutter responded to flash mob violence with measures including establishing a 9:00pm curfew for teenagers on Friday and Saturdays in parts of the city.<sup>249</sup> Nutter emphasized the need to punish young mob participants, as well as their parents.<sup>250</sup> Under the law, police will initially issue warnings to parents whose teenagers break the curfew.<sup>251</sup> After a warning

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<sup>245</sup> *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>246</sup> Flash mobs are heavily associated with black teenagers. See Patrik Jonsson, *Flash Mob Attacks: Rising Concern Over Black Teen Involvement*, CHRISTIAN SCI. MONITOR (Aug. 9, 2011), <http://www.csmonitor.com/USA/2011/0809/Flash-mob-attacks-Rising-concern-over-black-teen-involvement>.

<sup>247</sup> See Elizabeth Fiedler, *Officials in Phila. Plan Curfews to Curb Teen Violence*, NPR (Aug. 11, 2011), <http://www.npr.org/2011/08/11/139507252/officials-in-phila-plan-curfews-to-curb-teen-violence>.

<sup>248</sup> See Katie Kindelan, *Flash Mob Raids 7-11 Store in Silver Spring, Maryland*, ABC NEWS (Nov. 22, 2011), <http://abcnews.go.com/blogs/headlines/2011/11/flash-mob-raids-7-11-store-in-silver-spring-maryland>.

<sup>249</sup> See Fiedler, *supra* note 242.

<sup>250</sup> See *id.*

<sup>251</sup> See *id.*

has already been provided, the city will issue fines up to \$500.<sup>252</sup> Nutter said in response to the fine, “I don’t care what your economic status is in life, you do not have a right to beat somebody’s ass on the street.”<sup>253</sup> In September 2011, Mayor Nutter announced that he would continue to enforce the curfew because it has been successful; there have been no flash mob incidents since its inception in early August.<sup>254</sup>

Additionally, following the violent incidents that prompted the curfew, Philadelphia police have increased patrols.<sup>255</sup> The city is also working with the FBI to track criminal use of social media<sup>256</sup> and Police Commissioner Charles Ramsey has been communicating with other law enforcement superintendents around the county, brainstorming about other ideas to address this type of criminal conduct.<sup>257</sup>

Silver Spring officials proposed enacting “countywide bills that would enforce a curfew and attempt to curb suspicious loitering.”<sup>258</sup> Those who support the bills think that “the use of a curfew would be an effective way to keep teens from causing mayhem or misbehaving in the evening,” suggesting that those under the age of seventeen be off the streets by 11:00 p.m. on weekdays and by midnight on weekends.<sup>259</sup> The proposed loitering bill would prohibit people from remaining “in a public place or establishment at a time or in a manner not usual for law-abiding persons under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons in the vicinity.”<sup>260</sup>

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<sup>252</sup> *See id.*

<sup>253</sup> *Id.*

<sup>254</sup> *See* Kelly Bayliss, *No End to Teen Curfew*, NBC 10 PHILA. (Sept. 12, 2011), <http://www.nbcphiladelphia.com/news/local/No-End-to-Teen-Curfew-129648373.html>.

<sup>255</sup> *See* Fiedler, *supra* note 242.

<sup>256</sup> *See* Timpane, *supra* note 13.

<sup>257</sup> Fiedler, *supra* note 242.

<sup>258</sup> *A Flash Mob of 50 Tricky Teenagers Robs 7-Eleven*, DAILY MAIL (Nov. 22, 2011), <http://www.dailymail.co.uk/news/article-2064735/7-Eleven-robbed-flash-mob-50-tricky-teenagers-Silver-Spring-Maryland.html#ixzz1eRnZK9yh>.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

## 2. Permit Requirements

Governments also have the option to require permits in order to conduct activities on public grounds. A permit requirement law would be justified if it would decrease the likelihood of criminal flash mobs on public grounds without reference to flash-mob-related speech. A permit requirement would need to qualify as significantly related to the government's interest in curbing violence and criminal activity, which could be proved through use of statistics relating to the prevalence of criminal or violent activity on public grounds. Finally, because a permit law would only proscribe gatherings on public grounds without a permit, such a law would leave open ample alternatives for communication of flash mob expression on private grounds, as well as on public grounds if the permit is granted.

The town of Braunschweig, Germany has a permit requirement in place to allow for police review of plans for activity on public grounds.<sup>261</sup> The city recently increased its enforcement of an existing law requiring permits for events on public grounds due to flash mobs.<sup>262</sup> When permits are not secured, local law enforcement officials often station themselves in locations where they expect flash mobs to take place in order to prevent participation.<sup>263</sup> As an alternative to physically stopping them, the police attempt to establish contact with flash mob organizers ahead of time to avoid surprise and to cancel the event peacefully.<sup>264</sup>

In 2009, German artist Dirk Schadt organized a flash mob picnic at the city's central square, when a local office of the public order contacted him to tell him it is illegal to conduct such an event without a city permit.<sup>265</sup> The government office learned of Schadt's plan when an employee monitored a flash mob group on a

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<sup>261</sup> See Richard Picciuto, *Oct 01 . . . Flash Mobs*, RAP361 (Oct. 1, 2011), <http://rap361.com/?p=13434>.

<sup>262</sup> See Picciuto, *supra* note 244.

<sup>263</sup> See Heather Hamilton, *Flash Mobs: More than a Fleeting Idea*, NORTHERN LIGHT (Sept. 13, 2011), <http://www.thenorthernlight.org/2011/09/13/flash-mobs-more-than-fleeting-idea/>.

<sup>264</sup> See *id.*

<sup>265</sup> See *id.*



social networking site.<sup>266</sup> The official requested Schadt's email address from the website and contacted Schadt to tell him that his event would not be allowed.<sup>267</sup> A government official later noted that had Schadt gotten a permit, police intervention could have been avoided entirely.<sup>268</sup>

### III. CONTENT-BASED LAWS WILL BEST SERVE GOVERNMENT GOALS OF DETERRING CRIMINAL AND VIOLENT FLASH MOBS

Content-based regulations punishing the speaker who incites a criminal flash mob will be more effective in deterring and controlling violence and crime than content-neutral laws such as curfews and permit requirements. Content-neutral laws do not target the root of the problem, and curfew and permit laws are easy to circumvent. Carefully written content-based regulations will specifically punish and deter the creation of violent, criminal flash mobs without proscribing other, unrelated activities in the way that time, place and manner regulations would. Utilizing a carefully drafted content-based flash mob regulation, it is possible to pass the *Brandenburg* test and avoid penalizing those who incite and participate in "good" flash mobs, like those associated with the Arab Spring. An example of such an ordinance is included below.

#### A. *Content-Neutral Laws will Not Target the Real Problem*

Neither curfew laws nor permit requirements address the heart of the problem of criminal flash mobs. While curfew laws may limit criminal flash mobs composed of children under the statutory age and after the curfew time, they will not curb crime among those above age or those participating in mobs before the curfew time. "Flash robs" are not always conducted by minors and are not always conducted at night.<sup>269</sup> Moreover, curfew laws are subject

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<sup>266</sup> *See id.*

<sup>267</sup> *See id.*

<sup>268</sup> *See id.*

<sup>269</sup> *See* Annie Vaughan, *Teenage Flash Mob Robberies on the Rise*, FOX NEWS (June 18, 2011), <http://www.foxnews.com/us/2011/06/18/top-five-most-brazen-flash-mob-robberies/>; *see also* Johnny Custer, *Flash Mob = Flash ROB?*, MERCHANT ANALYTIC SOLUTION (Aug. 15, 2011), <http://www.merchantanalyticsolutions.com/flash-mob-flash-rob/>.

to intermediate scrutiny, and may be found impermissibly vague. Curfew laws are also often the target of equal protection and substantive due process claims.

Similarly, permit requirements are problematic because they only affect flash mobs set to occur on public grounds. Because many of the criminal flash mobs are robberies, they occur in shopping malls and private stores, areas that would not be subject to the permit restrictions.

*B. “Good Flash Mobs” Need Not Be Criminalized*

In light of recent political and social revolution in the Middle East, flash mob speech laws may be criticized for punishing the organization of all such events, without differentiating between those mobs formed to commit robberies, commit vandalism, or disturb the peace and those mobs formed to protest dictatorships, corrupt governments, and human rights violations. A way around this problem is to distinguish between politically motivated, subversive advocacy speech that, while often tending to promote violence, is spoken in order to promote political ideals and to organize protests, and incitement speech that is spoken for the purpose of inciting random, malicious criminal behavior.

*C. A Proposed Constitutional Ordinance*

The following language may be used by state and local governments to address the current trend in violent and criminal flash mob activity, while remaining in line with the Supreme Court’s First Amendment jurisprudence.

Inciting a criminal flash mob. No person shall knowingly engage in conduct designed to incite another to participate in a criminal flash mob. This ordinance targets only those individual(s) arrested for another crime or crimes committed as part of a criminal flash mob and who organized such mob by sending a message via an electronic media device or outlet including, but not limited to, SMS, Facebook, BlackBerry Messenger, and Twitter, specifically

calling for the recipients to “rob,” “loot,” “rage,” “attack,” “riot,” or engage in “mayhem” at a specified date, time, and place. The act of inciting a criminal flash mob is a misdemeanor of the first degree.

Criminal flash mob: Defined. A planned gathering of five or more people engaging in disorderly and/or criminal conduct, including but not limited to burglary, larceny, vandalism, arson, and battery, organized via electronic device or social media platform and with the primary purpose of committing crimes, misdemeanors, and/or disturbing community peace.

#### CONCLUSION

Due to the gravity of, and spike in, the number of criminal flash mobs in United States cities, local governments must be allowed to regulate the speech that ignites them. Content-neutral laws, such as youth curfews and permit requirements, may result in a temporary decrease in crime, but such laws are easy to maneuver around and will not get to the root of a growing problem. Instead, lawmakers should punish the incitement of criminal flash mobs through carefully drafted ordinances that assign liability only if one or more persons have been arrested for other flash mob-related crimes. Laws that require intent to incite a criminal flash mob, predictability of the flash mob’s occurrence, and the criminal flash mob’s actual occurrence will survive *Brandenburg* scrutiny and minimize chilling effects on free speech. Such content-based laws will best serve the government’s goal of deterring flash mob crime in that they will directly target and penalize those who start those mobs that actually result in criminal activity. It is important that governments stay within the limits of the longstanding and carefully developed First Amendment jurisprudence, and it is imperative that they take action to control and deter the violent, criminal behavior that is plaguing our cities.