THE CLEAR AND PRESENT INTERNET:

TERRORISM, CYBERSPACE, AND THE FIRST AMENDMENT

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Many terrorist groups share a common goal with mainstream organizations and institutions: the search for greater efficiency through the Internet. This pursuit of on-line efficiency has spawned a First Amendment dilemma. The Internet's ability to link geographically dispersed individuals to changing data without the filtering provided by traditional media is a substantial asset for domestic and transnational networks, from violent white supremacist groups[1] to Al Qaeda.[2] However, much of the Web's terrorism-related content, including the abstract advocacy of violence, has manifest value as an exercise of free speech. Modern First Amendment jurisprudence protects extreme speech as a form of engagement in the polity, and responds to fears that unleashing the government on speakers will permit the targeting of groups outside the perceived mainstream.[3] Nevertheless, some Internet communications

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[1] *Cf*. BRUCE HOFFMAN, INSIDE TERRORISM 107 (1998) (noting that Internet is "favoured means of communication of militia members and other white supremacists").

[2] *See* 9/11 COMMISSION REPORT 266 (2004), *available at* www.9-11commission.gov/report/911Report.pdf (reporting that Mohamed Atta, the ringleader of the September 11 hijackers, used instant messaging as well as other methods to stay in touch with Al Qaeda superiors in the period immediately before the attacks); *cf*. Ronald J. Deibert & Janice Gross Stein, *Social and Electronic Networks in the War on Terror*, *in* BOMBS AND BANDWIDTH: THE EMERGING RELATIONSHIP BETWEEN INFORMATION TECHNOLOGY AND SECURITY 157, 171 (Robert Latham ed., 2003) (noting Al Qaeda's use of the Internet, while noting uncertainty about whether on-line communication is "fundamentally important" to network's survival and continued operations); Amy Waldman, *Arrested Qaeda Operative: Life of Degrees and Aliases*, N.Y. TIMES, Aug. 6, 2004, at A9 (reporting on background of alleged "facilitator of communications for Al Qaeda who posted messages by e-mail and on Web sites," possibly including detailed reconnaissance reports on financial institutions in the United States recovered from suspect's laptop); Lawrence Wright, *The Terror Web: Were the Madrid Bombings Part of a New, Far-Reaching Jihad Being Plotted on the Internet?*, NEW YORKER, Aug. 2, 2004, 40, 49-50 (noting appearance of Al Qaeda strategic documents on Web, as well as use of Internet as "tool of communication" by perpetrators of Madrid train bombing).

[3] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that state can criminalize as incitement only communications that the speaker intends to create imminent risk of illegal conduct, and that reasonably could create such a risk); *cf*. Robert Post, *Reconciling Theory and Doctrine in First*

intended for the mobilization and implementation of violence should forfeit protection. The difficulty lies in drawing lines that reach Internet communication the state can legitimately prohibit without chilling protected speech. Theorists of the Internet would be the logical candidates for resolving this dilemma. Unfortunately, most Internet theorists have touched on terrorism in ways that are perfunctory or incomplete. Even more seriously, many theorists argue for a descriptive model of Internet Exceptionalism, premised on qualitative distinctions between the Internet and earlier media, that would result in either over- or under-regulation of Internet communications. The Internet Exceptionalist model has produced two groups that draw sharply different normative conclusions: the celebratory and cautionary schools. Celebratory[4] and cautionary[5] approaches both invoke two attributes of the Internet:

Amendment Jurisprudence, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 152, 166 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (if "citizens in a democracy [must] experience their authorship of the state in ways that are anterior to the making of particular decisions ... a state [should] be constitutionally prohibited from preventing its citizens from participating in the communicative processes relevant to the formation of democratic public opinion"). Following the usage of First Amendment scholars, this article uses the term "modern First Amendment" to refer to the understanding reflected in *Brandenburg*.

[4] See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999) (advocating "digital commons" based on ideals animating development and implementation of open source software, and warning against government and corporate attempts to control cyberspace through changes in Internet architecture); SIVA VAIDHYANATHAN, THE ANARCHIST IN THE LIBRARY: HOW THE CLASH BETWEEN FREEDOM AND CONTROL IS HACKING THE REAL WORLD AND CRASHING THE SYSTEM (2004) (arguing for freer approach to exchange of information and other material on the Internet); cf. A. Michael Froomkin, *Habermas@Discourse.Net*, 116 HARV. L. Rev. 749, 782-97 (2003) (arguing that standards of Internet governance approximate Habermas's "ideal speech community"); see also David G. Post, *What Larry Doesn't Get: Code, Law, and Liberty in Cyberspace*, 52 STAN. L. REV. 1439 (2000) (praising Internet as arena for innovation and exercise of freedom, while arguing that Lessig's warnings about concentrated corporate control are overstated and simplistic); Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 568-76 (2003) (discussing "digital commons" approach as well as criticisms of the concept).

simultaneity and resistance to mediation.

Simultaneity leverages the Internet's speed and flexibility to allow people and groups to communicate readily and rapidly with others around the globe. Lack of mediation allows Internet users to articulate their perspectives and plans without the filters that shape messages in traditional media. Celebratory commentators laud simultaneity and resistance to mediation as virtues that boost creativity, enhance the flow of information, and promote interaction and dialog.[6] Cautionary scholars argue that the Internet can polarize populations and replace democratic discourse with the mere aggregation of consumer preferences.[7]

The invocation of simultaneity and absence of mediation has historically been a staple of the debate about new media, newcomers to America, and the application of the First Amendment in times

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[5] *See* CASS SUNSTEIN, REPUBLIC.COM (2001); *cf*. Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1607 (1999) (arguing that Internet's threat to privacy can also frustrate participation in governance); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosures*, 53 DUKE L.J. 967 (2003) (same).

[6] *See* LESSIG, *supra* note 4; Froomkin, *supra* note 4.

[7] *See* SUNSTEIN, *supra* note 5 (noting that the distinction between celebratory and cautionary approaches should not obscure their overlapping concerns). *See, e.g.*, A. Michael Froomkin, *The Death of Privacy*?, 52 STAN. L. REV. 1461 (2000) (discussing privacy issues on the Internet). In addition, Internet Exceptionalists have examined qualitative parallels between the Internet and earlier media. Celebratory theorists, for example, have considered these parallels to illustrate the short-sightedness of overbroad readings of intellectual property ownership rights. *See, e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 53-61 (2004) (discussing how disputes about piracy of intellectual property played out in earlier media such as radio and cable television). As is often the case with categories advanced by scholars, the differences here may reflect variations in tone and emphasis more than substance. For an approach that seeks to distill principles for a balanced analysis, *see* Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357 (2003) (arguing that disputes about Internet law often result from conflation of "external" perspective dealing with

of crisis. The World War I cases such as *Schenck*,[8] *Abrams*,[9] and *Frohwerk*[10] applied variants of the "bad tendency" test, which allowed the government to punish speech that tended to entice illegal acts, to limit the spread of dissent over America's involvement in World War I.[11] Government repression stemmed from concern about the simultaneity with which dissent could proliferate, aided by then relatively new technologies such as telegraph cable, motion pictures, and direct mail. Doubts about the loyalty of America's immigrant and working class population, perceived as simultaneously physically present in America but linked to enemy nations abroad, also played a crucial role.

Holmes's clear and present danger elaboration on the bad tendency test, with its compelling metaphor of fire in a crowded theatre,[12] illustrates the speed of dissent in a new technological age, and its immunity from tempering influences. Subsequent use of the clear and present danger test in

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cyberspace architecture and "internal" perspective dealing with understandings of Internet users).

[8] Schenck v. United States, 249 U.S. 47 (1919); *cf*. Kent Greenawalt, *"Clear and Present Danger" and Criminal Speech*, *in* ETERNALLY VIGILANT, supra note 3, at 97 (discussing implications of *Schenck* and progeny).

[9] Abrams v. United States, 250 U.S. 616 (1919).

[10] Frohwerk v. United States, 249 U.S. 204 (1919); *cf*. Debs v. United States, 249 U.S. 211 (1919) (upholding conviction of labor leader Eugene Debs for speech asserting that American involvement in World War I served the interests of the wealthy, and praising individuals who resisted draft).

[11] *See* Geoffrey R. Stone, *The Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 SUP. CT. REV. 411, 431-41 (discussing origins of the test and arguing that subsequent courts had misapprehended its meaning).

[12] Schenck v. United States, 249 U.S. 47, 52 (1919).

McCarthy Era cases such as *Dennis v. United States*[13] suggests an increasing concern over technological innovation and simultaneous loyalties. Even in the modern free speech area shaped by *Brandenburg v. Ohio* [insert cite], supposedly "neutral" legislation like the statute criminalizing the burning of draft cards upheld by the Court in *United States v. O'Brien*[14] seemed driven by distaste for the mass-media spectacle of draft-eligible young people burning their draft cards in opposition to the Vietnam War.[15]

In the Internet context, the cautionary view depicts on-line communication as a volatile, combustible space resembling Holmes' fire in a crowded theatre. This view could trigger the return of the repressive bad tendency test through the interpretation of neutral statutory provisions, such as the prohibition of material support of terrorist organizations or conspiracies.[16] It would also legitimize government use of such provisions to marginalize particular groups, such as Arabs, South Asians, or Muslims,[17] much as the World War I prosecutions targeted immigrants from Eastern and Central

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[13] Dennis v. United States, 341 U.S. 494 (1951).

[14] United States v. O'Brien, 391 U.S. 367 (1968).

[15] *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 328-31 (1989) (arguing that Court engaged in inappropriately deferential review of statute); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1202-05 (1996) (same).

[16] *See* Antiterrorism and Effective Death Penalty Act (AEDPA), 18 U.S.C. § 2339A(b) (2002); *cf*. Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 200-07 (2003) (discussing appropriate scope of material support provisions).

[17] *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERROR (2003); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (describing the marginalization of particular communities after September 11); Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, 2002 UTAH L.

Europe. In addition, a cautionary view would also permit suppression of on-line materials dealing with terrorist tactics or scientific knowledge, such as the ingredients for poison gas, that serve First Amendment values precisely because of their troubling content.[18] On the other hand, accepting the celebratory view, with its pervasive skepticism about government regulation, could facilitate use of the Internet to build capabilities for collective violence.[19] It could also permit domestic networks to use the Internet to threaten private persons, as in the case of the "Nuremberg Files" where individual doctors performing abortions were labeled as war criminals.[20]

REV. 481, 495-99 (same); Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INT'L L. & POL'Y 389, 404-08 (2004) (discussing how changes to United States immigration law could promote democratic change globally); *cf*. Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 394-98 (2004) (discussing threats to equality and integrity of legal system in war on terror); *see also* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 44-53 (2004) (arguing that detainees at Guantanamo Naval Base, virtually all Muslim in faith, were entitled to due process protections; anticipating Supreme Court decision in Rasul v. Bush, 124 S. Ct. 2686 (2004) (finding federal jurisdiction over Guantanamo detainees)).

[18] *Cf*. United States v. Progressive, Inc., 467 F. Supp. 990, 992 (W.D. Wis. 1979) (issuing injunction against publication of formula for hydrogen bomb).

[19] Celebratory theorists address issues of law and terrorism in passing, or display ambivalence. *See* LESSIG, supra note 7 at 111-12 (discussing availability on Internet of more comprehensive and eclectic coverage of September 11 attacks); VAIDHYANATHAN, supra note 4, at 173-75 (denying that Al Qaeda is a "network" in an information technology sense, while acknowledging the need for effective measures against terrorism consistent with constitutional principles). In the absence of sustained analysis of law and terrorism, the celebratory theorists' default position seems to be a suspicion of government regulation influenced by their perspective on the digital property wars. *See infra* notes 85-86 and accompanying text. While this perspective is instructive, it cannot dispose of every question regarding terrorism on-line.

[20] *See* Planned Parenthood v. American Coalition of Life Activists (ACLA), 290 F.3d 1058 (9th Cir. 2002) (publishing on-line and hard-copy "Wanted Posters" of individual doctors who performed abortions constituted "true threat" not entitled to First Amendment protection).

Responding to the inadequacies of Internet Exceptionalism, this article offers a participant-centered analysis of terrorism and the Internet under the First Amendment. The participant-centered view draws on the work of two thinkers, Louis Brandeis and Hannah Arendt, who argued both that engagement in civic discourse is crucial to democracy[21] and that new technology poses particular challenges for self-governance.[22] To promote participation, the participation-centered approach examines how proposed measures for regulating terrorist material on the Internet affect the level of civic

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[21] *See* Whitney v. California, 274 U.S. 357, 372, 375 (1927) (Brandeis, J., concurring) (arguing that the greatest danger to democracy is an "inert people"); HANNAH ARENDT, THE HUMAN CONDITION 198 (1958) (the political realm rises directly out of acting together, the "sharing of words and deeds"). The focus on participation has been a hall-mark of the revival of interest in civic republican thought, which stresses the importance of deliberation in the public sphere. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); *cf*. Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. Rev. 695 (1994) (incorporating civic republican perspective in narratives from poverty law); Peter Margulies, Review Essay: *Progressive Lawyering and Lost Traditions*, 73 TEX. L. Rev. 1139 (1995) (civic republican perspective on history of civil rights lawyering).

[22] HANNAH ARENDT, *The Concept of History, in* BETWEEN PAST AND FUTURE 41, 89 (Viking Compass 1968)(1961) (expressing wariness about totalitarian uses of new technology); Olmstead v. United States, 277 U.S. 438, 471, 473-77 (1928) (Brandeis, J., dissenting) (expressing similar concerns, in dissenting from holding that warrantless telephone tap did not violate Fourth Amendment). In their commitments to an active citizenry, both Brandeis and Arendt reflected a concern with modern threats to liberty and a fascination with the classical origins of democratic theory and practice. *See* ARENDT, HUMAN CONDITION, *supra* note 21, at 37 (discussing public-private distinction in Athenian "political consciousness"); John McGowan, *Must Politics Be Violent? Arendt's Utopian Vision, in* HANNAH ARENDT & THE MEANING OF POLITICS 263, 278 (Craig Calhoun & John McGowan eds., 1997) (discussing Arendt's vision of civic discourse as influenced by Greek polis); PHILIPPA STRUM, BRANDEIS: BEYOND PROGRESSIVISM 102-07 (1993) (discussing Brandeis's deep interest in Athenian democracy); Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 680-82 (1988) (discussing relationship of Brandeis's interest in Athenian democracy with his vision of the First Amendment).

engagement of both speaker and audience.

For the participant-centered view, civic engagement and the right to privacy are complementary. Efforts to promote participation should include protection of privacy as a refuge from what Arendt describes as the harsh and sometimes threatening "glare"[23] of the public realm. Under this view law should address the Internet's power to both connect and intrude.

To this end, the participant-centered account acknowledges that the Internet's reach holds unprecedented potential for global conversations and connections. In times of crisis, governments often regard this potential as a threat, and target the participation of newcomers or subordinated groups in new media.[24] In response, courts should interpret statutes, including purportedly "neutral" enactments that impose incidental burdens on speech, to preserve participation and guard against targeting of perceived outsiders. Courts should also scrutinize attempts by government and corporations to limit participation by monopolizing knowledge deemed too risky for distribution on the Internet. However, some Internet regulation is necessary to preserve participation from the chill of threats and to reach concerted illegality outside the realm of civic engagement. Law should curb terrorist networks' use of the Internet for communication about pending operations and acquisition of new resources for violence. Law should also limit the use of the Internet to intrude on privacy for purposes of intimidation.

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[23] *See* ARENDT, *The Crisis in Education*, in BETWEEN PAST AND FUTURE, *supra* note 22, at 172, 186.

[24] *See* Rafal Rohozinski, *Bullets to Bytes: Reflections on ICT's and "Local" Conflicts, in* BOMBS AND BANDWIDTH, supra note 2, at 215, 229 (asserting that Israeli Defense Force sought to dismantle Palestinians' Internet capability as part of its response to the Palestinian Second Intifada; author concedes that Israel had been target of cyber-attacks, but argues that "few if any of the attacks emanated from the West Bank and Gaza").

The article is in six Parts. Part I discusses the history of new media, newcomers, and the First Amendment. Part II discusses the development by courts and commentators of cautionary and celebratory perspectives on Internet Exceptionalism. Part III analyzes the Internet's implications for terrorist organizations and government policy after September 11, and discusses the perils of both over- and under-regulation of the Internet. Part IV presents the participant-centered view as an alternative to Internet Exceptionalism's over- or under-regulation. Part V applies the model to specific examples, including the prohibition of Internet-based "material support" to terrorist organizations and conspiracies, the publication on the Web of terrorist manuals or dangerous scientific processes, and the use of the Internet to circulate "true threats" against groups such as abortion providers. Part VI considers alternatives to the participant-centered model.

I. FIRST AMENDMENT VALUES, NEW MEDIA, AND NEWCOMERS TO AMERICA: A HISTORICAL PERSPECTIVE

The history of restrictions on free speech, like the history of free speech itself, is a story of legal attempts to cope with the rush of the "new". The "new" includes new technology, and also new demographic developments promoted by immigration.[25] Courts, legislators, and the executive branch,

[25] *See* COLE, *supra* note 17, at 111-12 (discussing persecution of immigrant dissenters after America's entry into World War I); BONNIE HONIG, DEMOCRACY AND THE FOREIGNER 101 (2001) (praising participation of immigrants such as the activist Emma Goldman, whom the government deported after her conviction on charges related to her dissent from America's intervention in World War I); *cf*. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 59 (1983) (arguing against discrimination against aliens regarding political participation); Linda S. Bosniak, *Membership, Equality, and the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1130-33 (1994) (arguing for greater First Amendment protections in immigration law).

as well as commentators, have focused on two overlapping phenomena linked with the new: simultaneity and absence of mediation.

Simultaneity involves the cultural ability to identify, empathize, and coordinate with other persons sharing cultural, national, or ideological backgrounds despite geographic dispersion. For the scholar Benedict Anderson, this conception of simultaneity emerged after the discovery of the "New World" of the Americas, fueled by "an accumulation of technological innovations" in shipbuilding, navigation, and printing.[26] Emigration from Europe to the Americas accelerated this notion of simultaneity, as settlers in the New World cultivated parallels with their countries of origin.[27]

Absence of mediation refers to the ability to bypass institutions that influence and temper thinking, feeling, and acting. Philosophers and social commentators confronting modernization in the late 19th Century were concerned that traditional sources of mediation would break down as more people concentrated in urban centers to take advantage of employment generated by technological innovation.[28] Mobility of people was disconcertingly matched by mobility in ideas, goods, and capital,[29]

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[26] *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 188 (rev. ed. 1991) (1983); *cf*. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 459-73 (2002) (discussing impact of Anderson's view of simultaneity and the cognitive and intellectual construction of nations across physical borders in the context of the Internet's impact on jurisdiction).

[27] *See* ANDERSON, supra note 26, at 187-88.

[28] *See* JAMES T. KLOPPENBURG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920, 152 (1986) ("Technology was transforming social structure and cultural values, but the shape of the society and culture that would replace them remained shrouded in doubt"); CHARLES TAYLOR, *The Direct-Access Society, in* MODERN SOCIAL IMAGINARIES 155, 160 (2004) (noting that modernity offers "an access unmediated by any... other allegiances or belongings").

which could move more quickly than the mediating structures that earlier had sufficed to contain them. Absence of mediation also reflects demographic movements. As Northern Europeans established their dominion in the Americas, they became concerned that immigration of poor people and people from Southern and Eastern Europe would result in resistance to established cultural and national traditions.[30] Regulation of new media occurred at the juncture of technological and demographic change.

A. *New Media, Newcomers, and Regulation*

To see the impact of these conceptions of simultaneity and absence of mediation on the development of doctrine and attitudes toward the First Amendment, it is useful to consider the history of government regulation of media and technology in the decades leading up to World War I. Many commentators of the period saw the need for greater government regulation to prevent abuses of an untrammeled market affected by new technology.[31] This trend affected books and printed matter, such

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[29] *See* KLOPPENBURG, *supra* note 28, at 152 (citing the philosopher Wilhelm Dilthey as noting the challenges of "industry which is world wide in scope").

[30] *See* COLE, *supra* note 17; HONIG, supra note 25. Transmuted into fear of immigrants from Latin America, the Caribbean, the Middle East, and South Asia, this dynamic continues today. See Daniel Kanstroom, *Dangerous Undertones of the New Nativism: Peter Brimelow and the Decline of the West*, *in* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI –IMMIGRANT IMPULSE IN THE UNITED STATES 300, 300-13 (Juan F. Perea ed., 1997) (analyzing concerns of immigration opponents such as Peter Brimelow, author of the book, "Alien Nation"); Volpp, *supra* note 17 (same); Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day after September 11*, 20.3 Social Text 101 (2002) (same); Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (same).

[31] *See* THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN 61-64 (1984) (discussing establishment of

as newspapers, which became cheaper because of falling paper prices and new printing technology, and more methodical and "scientific" marketing.[32] Devices such as the telegraph and the telephone enhanced simultaneity and resistance to mediation, and the railroads facilitation in the delivery of mail meant that media were "able to move... messages more quickly than in the past, breaking down barriers of distance and tying markets and other institutions more closely together."[33]

For progressives, decisions to leave ownership of the telegraph and the telephone, as opposed to the mails, in private hands, created concerns about overreaching and actions against the public interest.[34] Supporting greater regulation of new technology through the common law, Brandeis and Warren wrote about the role of these technological developments in making individual and private information readily available with a pace and absence of context hitherto unprecedented, thereby threatening privacy, dignity, and attributes of personhood.[35] In sum, for many in the Progressive Era, simultaneity and the erosion of mediating structures in the new media created not only opportunities, but also risks requiring regulation.

Interstate Commerce Commission and rise of federal regulation of transportation); *cf*. William J. Novak, *Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst*, 18 LAW & HIST. REV. 97, 125 (2000) ("By the late nineteenth and early twentieth century, the same legal and governmental powers of the state that bolstered and supplemented economic decision making came to be deployed as antagonistic checks on the excesses of market allocations").

[32] *See* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 148 (2004).

[33] *See id.* at 189.

[34] *Id.* at 188.

[35] *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193, 195 (1890-91).

New media created heightened anxiety when coupled with concerns over immigration.[36] In the early years of the 20th Century, the burgeoning popularity of motion pictures triggered concern because their makers and distributors, as well as their audience, included many immigrants.[37] The Supreme Court's insistence in *Mutual Films Corp. v. Industrial Com. of Ohio* that movies were not entitled to First Amendment protection exemplified this trend.[38] The Court cited what it viewed as the potential corruption of entire families, both adults and children, through the movies as a basis for this susceptibility to regulation.[39] For the Court, motion pictures were unmediated "spectacles... representations of events."[40] However, moviemakers intended them not as expressions of mediated opinion, but instead

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[36] In the late 1800's, the Supreme Court held that Congress had plenary power over immigration. *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889); *cf*. STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY 15-17 (1992) (discussing roots of the Chinese Exclusion Act in animus of white Californians toward Chinese immigrants); Richard P. Cole & Gabriel J. Chin, *Emerging from the Margins of Historical Consciousness: Chinese Immigrants and the History of American Law*, 17 LAW. & HIST. Rev. 325 (1999) (same); *see generally* Margulies, *Uncertain Arrivals*, supra note 17 (discussing distortions in political process encouraged by aliens' second-class status).

[37] See STARR, *supra* note 32, at 295 ("During their first two decades, the motion pictures in America had a primarily urban, working-class audience drawn heavily from new immigrant groups, and the movie industry itself... soon came under the control of immigrant entrepreneurs, most of them Jewish"); *cf*. MICHAEL ROGIN, BLACKFACE, WHITE NOISE: JEWISH IMMIGRANTS IN THE HOLLYWOOD MELTING POT 16 (1996) (noting role of Jewish immigrants in developing "twentieth-century mass culture in the United States," as well as interaction with African-Americans in culture and politics).

[38] *See* Mut. Film Corp. v. Indus. Comm'n. of Ohio, 236 U.S. 230 (1915).

[39] *Id*. at 242; *cf*. STARR, supra note 32, at 312 (analyzing case).

[40] *Mut. Film Corp*., 236 U.S. at 244; *see also* DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 174-75 (1997) (discussing early legal rulings on the motion picture industry).

as "a business pure and simple, originated and conducted for profit."[41]

The lack of mediation the courts perceived in movie production was echoed in the effect of movies on their audiences: motion pictures were "capable of evil... [and] insidious... corruption" because of their "attractiveness and manner of exhibition."[42] The unmediated character of the movies' content and audience, with children receiving messages directly, without the tempering influence of parental translation, exacerbated the risk of simultaneity. Movies could quickly and irreversibly inculcate audiences with undesirable sentiments and habits, much as diseases might spread through tightly packed immigrant communities.

Concern over the pernicious combination of new media and immigration attained currency not because of proof of causation, but because of the power of metaphor. When future Justice of the Supreme Court John Hessin Clarke noted in 1901 that he detested the "'philosophy' of the 'reds'... [that] should find no room for culture or spread"[43] in American society, the analogy to newly discovered bacteria was clear.[44] The metaphor of combustibility was also pervasive. Delivering explosives in the

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[41] *Mut. Film Corp*., 236 U.S. at 244.

[42] *Id*. at 242-244.

[43] *See* RICHARD POLENBERG, FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 206 (1987).

[44] *Cf*. Paul Rozin & Carol Nemeroff, *Sympathetic Magical Thinking: The Contagion and Similarity "Heuristics", in* HEUERISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 201 (Thomas Gilovich, et al. eds. 2002) (discussing development and possible origins of attributions of contagion in popular culture); *see generally* MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO 126-27, 139 (1966) (noting that in pre-modern societies intruders were often "suspect," and that "pollution" introduced by intruders "transmits danger by contact").

mail and in the public square was a tactic of violent political groups of the time.[45] Progressives had long perceived cities, with their substantial immigrant communities, as incubators of corruption.[46] Just as an explosion occurs because an explosive agent comes in contact with susceptible material, extreme speech under this metaphor reacts when it comes into contact with congested immigrant urban communities lacking personal, social, or institutional inhibitions. Explosive violence results. Perhaps the Progressives' interest in science and technology made them more willing to employ images drawn from science, such as injection of poison and the chain reaction, to justify greater government authority over the media and speech.[47]

B. *New Media, Newcomers, and Crisis: The World War I Cases and Their Progeny*

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[45] For example, groups made efforts to send bombs to politicians, prominent businessmen, and even judges. See POLENBERG, *supra* note 43, at 55-61 (discussing activities of New York City bomb squad).

[46] *See* Larry Walker, *Woodrow Wilson, Progressive Reform, and Public Administration*, 104 POL. SCI. Q. 509, 515 (1989).

[47] *See* RABBAN, *supra* note 40, at 227-28 (noting the philosopher John Dewey's commitment to the scientific method, and arguing that while Dewey recognized value of free speech for making sound policy, he did not display a comparable commitment to protecting speech that might be hateful, extreme, or in some fashion socially counter-productive); *cf*. Bradley C. Bobertz, *The Brandeis Gambit: The Making of America's "First Freedom," 1909-31*, 40 WM. & MARY L. REV. 557, 629 (1999) (quoting Progressive intellectual Walter Lippmann as arguing that "gathering and dissemination of information... should be controlled by government communications bureaus"); Robert M. Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349 (1981) (discussing cross-currents in First Amendment debates); *see also* Peter Margulies, *Public Interest Lawyering and the Pragmatist Dilemma*, *in* RENASCENT PRAGMATISM: STUDIES IN LAW AND SOCIAL SCIENCE 220, 223-25 (Alfonso Morales ed., 2003) (analyzing how instabilities in Dewey's pragmatist thought led to his failure to vigorously defend dissenters to America's intervention in World War I against government repression).

Progressive anxiety about the interaction of new media and immigration came to a head during the American involvement in World War I.[48] The Wilson Administration feared the role of modern technology such as submarine cable in spreading information abroad about American dissent,[49] and so encouraging wartime opponents.[50] For Wilson, the technologies of cable, inexpensive printing, and efficient mail delivery provided the means for "hyphenated groups" linked in real time with their ethnic brothers and sisters in enemy nations.[51] Opponents of the war, who believed that American involvement aided imperialist regimes and risked American lives, sometimes used technology that was

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[48] Of course, proponents of regulation during the Progressive Era included a spectrum of thinkers with varying priorities and perspectives. *Cf*. KLOPPENBURG, *supra* note 28, at 362-63 (discussing range of Progressive thinkers and activists, including opponents of business concentration, led by Woodrow Wilson; advocates of scientific administration linked to Teddy Roosevelt, and champions of social welfare, led by Croly, Lippmann, and Dewey). Each of these groups, however, to some degree bought into the naive hope that modern technologies of war could be harnessed to create a better world through American intervention in World War I, and accepted the importance of curtailing dissent associated with that effort. *Id*. *Cf*. HARRY N. SCHEIBER, THE WILSON ADMINISTRATION AND CIVIL LIBERTIES, 1917-1921, at 30 (1960) (quoting Roosevelt as criticizing wartime censorship); *id*. at 10 (noting "nativist" tone of Roosevelt's "bellicose campaign on behalf of [Republican Presidential candidate] Hughes" in 1916 election).

[49] *See* PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 75 (1979) (describing executive order of 1917 regarding cable and land telegraph lines that expanded censorship and gave the War Department power to censor overseas messages, including reports of domestic American news sent to foreign newspapers); STARR, *supra* note 32, at 223-25 (Progressive impulse toward regulation).

[50] *See* MURPHY, *supra* note 49, at 54 (quoting Wilson as criticizing those who would "divide our people into antagonistic groups and thus... destroy that complete agreement and solidarity of the people and that unity of sentiment and purpose so essential to the perpetuity of the Nation and its free institutions" and urging that "all men of whatever origin or creed who would count themselves Americans [should] join in making clear to all the world, the unity and subsequent power of America. This is an issue of patriotism").

[51] *See* SCHEIBER, *supra* note 48, at 7 (Wilson "denounced the foreign-born as responsible for 'the gravest threats against our national peace and safety'").

sophisticated for its day. One group used such a technology – targeted direct mail – to send leaflets opposing American involvement in World War I to 15,000 inductees.[52] In response, Wilson invoked images of contagion and toxicity, warning against those who would "inject the poison of disloyalty into our own most critical affairs."[53] To deal with the threat, the Wilson Administration developed a comprehensive program of monitoring, surveillance, and censorship.[54]

The Wilson Administration also wished to limit the impact of "propaganda" spread by Germany and alleged German sympathizers in the United States.[55] To counter this propaganda effort, George Creel, who ran Wilson's wartime information department, the Committee on Public Information, started his own propaganda machine. Creel took an active interest in the very new medium of motion pictures, and even provided scripts sending appropriate wartime messages to the motion picture industry.[56]

At the same time, the bad tendency test that dominated judicial treatment of First Amendment issues reflected the scientific rhetoric of simultaneity and unmediated risks. Here, too, perceptions of the risks of technology and immigration influenced outcomes. The court's basic premise stemmed from the

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[52] *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 359 (2003), discussing Schenck v. United States, 249 U.S. 47, 52 (1919).

[53] *See* MURPHY, *supra* note 49, at 54.

[54] *See* Stone, *Free Speech in Wartime*, *supra* note 11, at 412-13.

[55] *See* SCHEIBER, *supra* note 48, at 11-12 (quoting Wilson's Attorney General as urging legislation, ultimately passed as the Espionage Act of 1917, to address "the new conditions of warfare by propaganda").

[56] *See* MURPHY, *supra* note 49, at 108; *see also* GEORGE CREEL, HOW WE ADVERTISED AMERICA: THE FIRST TELLING OF THE AMAZING STORY OF THE COMMITTEE ON PUBLIC INFORMATION THAT CARRIED THE GOSPEL OF AMERICANISM TO EVERY CORNER OF THE GLOBE 117-32 (1972).

law of seditious and criminal libel, which allowed government to punish speech that possessed a tendency to encourage illegal acts. As interpreted by the courts, the bad tendency test relied on theories of group psychology that viewed crowds as easily susceptible to suggestion.[57] The Court was willing to defer to legislative views that the proliferation of media advocating offensive positions created a tendency to disobey the law.[58] In fact, concern over the tendency of immigrants to exploit the volatile moods of concentrated urban populations helped push the Court to uphold the conviction and deportation of John Turner, an English anarchist, under the Alien Immigration Act of 1903, which excluded from admission to the United States "anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States or of all government or of all forms of law."[59] For the Court, Turner's deportation had no implications for free speech, but rested instead on Congress's ability to limit "undesirable additions to our population."[60]

The dissent of political radicals, many of them immigrants, to American involvement in World War I heightened judicial reliance on images of simultaneity and unmediated risk. In *Frohwerk v. United States*,[61] Justice Holmes wrote for the Court upholding a conviction under the Espionage Act based on distribution of a circular protesting the war, deferring to the government's view that

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[57] *See* JEFFREY ROSEN, THE NAKED CROWD: RECLAIMING SECURITY AND FREEDOM IN AN ANXIOUS AGE 12-14, 75-76 (2004) (discussing theories of crowd behavior first popularized by social commentator Gustave Le Bon).

[58] *See* RABBAN, *supra* note 40, at 134.

[59] *Id*. at 135; United States ex rel. Turner v. Williams, 194 U.S. 279, 293 (1904).

[60] RABBAN, *supra* note 40, at 136, citing 194 U.S. at 293-95.

[61] Frohwerk v. United States, 249 U.S. 204 (1919).

"circulation of the paper was in quarters where a little breath would be enough to kindle a flame."[62] Most famously, in *Schenck v. United States*, Holmes upheld a conviction under the Espionage Act for the targeted direct mail campaign described above, even though the defendants never urged the inductees to refuse to report. Concerned that the bad tendency test was unduly restrictive of free speech,[63] Holmes nevertheless argued that in war-time the stakes might be so high that dissent, permissible at other times, would pose a "clear and present danger" of interference with the war effort.[64] While the "clear and present danger" test stressed the simultaneity of the speech and the evil it would produce, it also captured the unmediated nature of the risk that communities of immigrants and others open to suggestion would respond to dissent not with deliberation, reflection, or debate, but instead with lawlessness.[65] Illustrating his point, Holmes again invoked the combustibility metaphor, arguing that the First Amendment would not protect a person in "falsely shouting fire in a theatre and causing a panic."[66]

However, as Holmes argued a few months later, the tropes of simultaneity and absence of mediation also pose risks because of their ability to justify government overreaching. In *Abrams v. United States*, a case dealing with Jewish immigrants who circulated pamphlets, one written in

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[62] *Id*. at 209.

[63] *Cf*. Stone, *Free Speech in Wartime, supra* note 11, at 431-41 (discussing "bad tendency" test).

[64] Schenck v. United States, 249 U.S. 47, 52 (1919).

[65] 1 HOLMES-LASKI LETTERS 203-04 (Mark deWolfe Howe ed., 1953) (offering Holmes's rationale for the *Schenck* and *Debs* decisions upholding the conviction and imprisonment of wartime dissenters, while expressing some doubts about the continuation of the government's repressive course, particularly after the war's conclusion).

[66] *Schenck*, 249 U.S. at 52.

Yiddish,[67] criticizing America's efforts to send troops to Russia after the Russian Revolution, the majority followed the bad tendency test,[68] but Holmes dissented.[69] Holmes' view here, influenced by Prof. Chafee of Harvard, Judge Learned Hand, and Justice Brandeis,[70] was that ideas, including "opinions that we loathe," would compete for public acceptance. Action would not necessarily follow thought mechanically, but would result from a more mediated, deliberative process. For more extreme ideas, dissipation and dilution would be the most likely outcome of prolonged exposure.[71]

Unfortunately, new crises after World War II again precipitated resort to Holmes's "clear and present danger" test as a vehicle for addressing the simultaneity and unmediated risks posed by new technology and immigration. In *Dennis v. United States*,[72] a case upholding the Smith Act, which prohibited membership in the Communist Party, the Court again resorted to the combustibility image,

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[67] *See* POLENBERG, *supra* note 43, at 49-55.

[68] Abrams v. United States, 250 U.S. 616 (1919).

[69] *Id*. at 627-28.

[70] *See* Gerald GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 151-70 (1994) (discussing Hand's interaction with Holmes and his opinion in the *Masses* case, which foreshadowed the Supreme Court's turn toward a more speech-protective view of incitement under the First Amendment in *Brandenburg* some fifty years later); POLENBERG, *supra* note 43, at 236, 241 (discussing reactions of Brandeis, Chafee, Hand, and Holmes's long-time correspondent Harold Laski to Holmes's opinion); Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335, 341-45 (2003) (discussing background of *Masses* case).

[71] As Holmes put it, "[i]n the main I am for aeration of all effervescing convictions – there is no way so quick for letting them get flat." *See* HOLMES-LASKI LETTERS, *supra* note 65, at 204.

[72] Dennis v. United States, 341 U.S. 494 (1951).

justifying its decision by alluding to the "inflammable nature of world conditions"[73] and noting that, "[i]f the ingredients of the reaction are present, we cannot bind the government to wait until the catalyst is added."[74] The Court's language invoked not just a standard explosion, but the nuclear variety that had become all too familiar since the conclusion of the war.[75]

Picking up the absence of mediation theme, Justice Frankfurter in his *Dennis* concurrence also noted, in an echo of the Court's earlier *Mutual Film* case, that government could regulate new technology such as radio far more readily than traditional hard-copy sources, quoting a First Amendment scholar's argument that the radio "is not engaged in the task of enlarging and enriching human communication.... [but] in making money."[76] Focusing also on the descendants of immigrants who purportedly formed the backbone of the Communist Party in the United States, Frankfurter noted the threat of simultaneity by citing the Chinese Exclusion cases that held that such immigration could constitute a particularly insidious form of "foreign aggression and encroachment."[77] The opinion of the Court echoed this theme, noting the danger posed by "countries with whom petitioners were...

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[73] *Id*. at 511.

[74] *Id*.

[75] Justice Frankfurter echoed this view in his concurrence with his allusion to notorious atom spy Klaus Fuchs. *Id*. at 548 n.13. For background on the atomic espionage cases and their relationship to anti-Communist repression after World War II, *see* Michael E. Parrish, *Revisited: The Rosenberg "Atom Spy" Case*, 68 UMKC L. REV. 601 (2000).

[76] *Dennis*, 341 U.S. at 524 n.5 (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH 104 (1948)).

[77] *Id.* at 519-20.

ideologically attuned."[78]

C. *The Modern First Amendment and the End of History (Not)*

In 1969, the Court finally drained the vestiges of the bad tendency test from the standard for incitement, joining a demanding version of Holmes's clear and present danger test with a subjective element involving the speaker's intent. Under this "modern" understanding of the First Amendment, statements preceding acts of violence can constitute incitement only if the speaker intended violence to result and violence was an imminent and likely consequence of her statements.[79] Yet, *Brandenburg* reflects the Court's understanding that in times of crisis government will seek to exaggerate simultaneity and minimize the existence of mediation.[80]

However, the consensus surrounding the modern First Amendment does not herald the end of history for the jurisprudence of free speech. Doctrine has carved out a number of areas where the government can regulate communication, making *Brandenburg* less central.[81] Moreover, in the shadow

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[78] *Id.* at 511.

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

[80] *See* Eric M. Freedman, *A Lot More Comes into Focus When You Remove the Lens Cap: Why Proliferating New Technologies Make It Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech, and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 IOWA L. REV. 883, 907 (1996) (arguing that the strong speech-protective test in *Brandenburg* emerged because "experience with weaker formulations . . . had shown how easily the government could impoverish political dialogue by suppressing speech that it deemed subversive of the established order").

[81] The government can impose "incidental burdens" on speech that are content-neutral and narrowly tailored to serve important public objectives such as preservation of intellectual property rights, *see* Universal City Studios v. Corley, 273 F.3d 429, 449-53 (2d Cir. 2001) (upholding constitutionality

of September 11, law arising from new media such as the Internet retains the potential to disrupt the modern equilibrium.

II. SYNERGIES AND DISCONNECTS: CONCEPTIONS OF THE INTERNET

As a new medium, the Internet inherits the concerns about simultaneity and unmediated risk raised by earlier generations of media innovations.[82] At the same time, the growth in concern over terrorist networks since September 11 magnifies apprehensions about exploitation of the Internet's capabilities for violent purposes. This convergence of concern requires a nuanced treatment of the interaction between the Internet's capabilities and the nature of transnational terrorist networks. An unrestrained celebratory view of the Internet may discount synergies with terrorism, leading to under-

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of Digital Millennium Copyright Act), or disruption of the funding of transnational violent networks. *See* Antiterrorism and Effective Death Penalty Act (AEDPA), 18 U.S.C. §2339A(b) (2002) (barring "material support" to groups designated by the Secretary of State as terrorist organizations); *see also* Boim v. Quranic Literacy Inst. and Holy Land Found. For Relief and Development, 291 F.3d 1000 (7th Cir. 2002) (upholding constitutionality of prohibition on material support); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1135 (9th Cir. 2000), *cert. den. sub nom* Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001) (upholding statute, while holding that certain terms were vague as applied). The government can also regulate commercial speech. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561-63 (1980). In addition, threats of violence do not receive First Amendment protection. *See* Virginia v. Black, 538 U.S. 343 (2003) (cross-burning with intent to intimidate constitutes true threat unprotected by First Amendment). Criminal conspiracies are similarly unprotected. *See* United States v. Abdel Rahman, 189 F.3d 88, 116 (2d Cir. 1999) (holding that the federal seditious conspiracy statute, 18 U.S.C. §2384, does not violate First Amendment, the court noted that while "laws targeting 'sedition' must be scrutinized with care to assure that the threat of prosecution will not deter expression of unpopular viewpoints by persons ideologically opposed to the government... [t]he Government, possessed of evidence of conspiratorial planning, need not wait until buildings and tunnels have been bombed and people killed before arresting the conspirators").

[82] *See* Freedman, *supra* note 80, at 960 ("governments are haunted by the fear that the mechanisms of communications may be outrunning those of control").

regulation of the Internet. However, an overly cautionary approach may neglect the substantial benefits of the Internet for democracy, and lead to over-regulation, including the targeting of immigrants characteristic of the World War I cases.[83] This section analyzes theoretical and judicial conceptions of the Internet. In the process, it prepares the ground for a nuanced examination of the relationship between Internet capabilities and terrorist violence.

A. *Internet Exceptionalism*

Many prominent commentators embrace a view we can call "Internet Exceptionalism," which stresses distinctions between the Internet and earlier communications media such as books, newspapers, and broadcasts. Internet Exceptionalists cite a variety of the Internet's attributes, centering on the same simultaneity and absence of mediation that preoccupied courts and commentators with regard to previous technological innovations. For example, Internet Exceptionalists note how the Internet enhances consumers' ability to assemble an individualized collage of information from a variety of specialized and partisan sources, without the intercession of an intermediary, such as an editor, who may offer a broader perspective.[84]

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[83] *See supra* notes 8-15 and accompanying text.

[84] *See* VAIDHYANATHAN, *supra* note 4, at 43 (in describing the dynamic that encourages file-sharing and individual re-mixes of music, commentator notes that, "We share music in a circle... [w]e want to... mess with it, remake it. We want to make it ours and use what flows around us to build new music"). Some commentators argue that for particular legal purposes, such as resolving issues of jurisdiction, the Internet does not require special treatment. *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998) (rejecting view that jurisdiction over Internet requires novel legal approaches, while reserving analysis of substantive legal issues concerning Internet communications).

This descriptive view of the Internet does not lead to a uniform normative outlook. Within the Internet Excepionalist school we can identify two principal points of view. The first we can call the celebratory approach. Commentators taking this view celebrate the attributes of the Internet and argue that the technological and user interface attributes of the medium create a new imperative of user freedom. For these commentators, government regulation stands in the way of the full celebration of the Internet's advantages for the dissemination of information and the cultivation of innovation.[85] Lawrence Lessig, for example, argues that the application of copyright and other conceptions of intellectual property to the Internet can foster unhealthy government and corporate control.[86] Indeed, for celebratory commentators, government regulation is not only normatively inappropriate, it is futile, given the relatively free-flowing nature of current Internet architecture.

In contrast, another, perhaps less populous school of Internet Exceptionalists takes a cautionary view that accepts many of the premises of the celebratory school but draws far more dire normative

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[85] *See* VAIDHYANATHAN, *supra* note 4, at 43 (noting that "[t]he rise of peer-to-peer technology... threatened the powerful companies that invest billions in production, distribution, and marketing").

[86] *See* LESSIG, FREE CULTURE, *supra* note 4, at 157 (critiquing provisions of Digital Millennium Copyright Act (DMCA). For celebratory theorists, the cardinal story of the Internet is the conflict between the potential for freedom and creativity represented by the free-flowing nature of present Internet architecture, and the curtailment of fair use rights through licensing restrictions imposed by software manufacturers. *Cf*. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 22-23 (2004) (praising Internet's potential independence from mass media controlled by large corporations); James Boyle, *Governance of the Internet: A Nondelegation Doctrine for the Digital Age?*, 50 DUKE L.J. 5, 10 (2000) (expressing concern about concentration of control of the Internet).

conclusions.[87] This school would argue that a greater government role is necessary to curb the potential of the Internet for polarization and intellectual and civic fragmentation. One theorist has acknowledged that, "[p]eer-to-peer networks... don't do much to build new communities... few systems allow fans to deliberate about music or make connections and decisions collaboratively... [o]ften you find what you already know about."[88] On this cautionary view, mediation, although occasionally oppressive and inconvenient, can also allow consumers of information the opportunity to try something they might otherwise have rejected as inconsistent with their preconceptions. In the process, people's minds can change, their perspectives can evolve, and group-think and polarization become a little more difficult. This is the goal of core mediating institutions in a liberal society, such as universities.[89] Serendipity – the benefits of a surprise encounter with the unexpected or underestimated – is one of the virtues of this idea. Unfortunately, since many Internet searches reflect the predispositions of the user, cyberspace in practice offers "little opportunity for serendipity."[90]

The celebratory and cautionary Internet Exceptionalists focus on different bugbears: government and corporate control for the celebratory scholars, and polarization for the cautionary school. The

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[87] *See* SUNSTEIN, *supra* note 5, at 51-65 (discussing polarization on the Internet prompted by lack of traditional filters); PAUL VIRILIO, THE INFORMATION BOMB 8-12 (2000) (warning about threats to local traditions and governance embodied in growth of cyberspace).

[88] *See* VAIDHYANATHAN, *supra* note 4, at 60-61.

[89] *Cf*. Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding university admissions policies that take race into account to promote diversity in education); *but see* Dan Hunter, *Phillip.com Republic.com*, 90 CALIF. L. REV. 611, 638-40 (2002) (rejecting cautionary critique by arguing that individuals' choices regarding traditional media can also promote polarization, and that Internet provides filtering mechanisms).

[90] *See* VAIDHYANATHAN, *supra* note 4, at 61.

literature is rich, but an integrated approach addressing each of these perils has been elusive. As the next subsection demonstrates, courts confronting individual cases have similarly produced sharply varying results.

B. *Courts and the Internet*

Courts have been mixed in their treatment of the themes of simultaneity and absence of mediation on the Internet. Some decisions have taken a cautionary view, stressing the need to cabin the power of Internet to protect property rights or safeguard the public.[91] Other decisions have veered toward the celebratory view, asserting that the speed and flexibility of the Internet make regulation futile[92] and sometimes unfair. Decisions regarding intellectual property, on-line pornography, and criminal law all reveal this split.

For a classic example of the cautionary view, consider *Universal City Studios v. Corley*,[93] in which the court upheld as an incidental burden on speech a statutory prohibition on distributing software for the primary purpose of circumventing restrictions on viewing digital versatile disks (DVD's). The court asserted that codes distributed in this manner "*instantly* cause a computer to accomplish tasks

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[91] *See* Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001) (holding that websites containing computer code for evading manufacturers' use restrictions on digital products violate federal statute); *cf*. United States v. Kammersell, 196 F.3d 1137 (10th Cir. 1999) (holding that on-line bomb threat sent by defendant in Utah to girlfriend within state, but transmitted to and from Internet Service Provider's architecture in Virginia, constituted "interstate" threat under federal law).

[92] *But see* LESSIG, FREE CULTURE, *supra* note 4, at 124-30 (warning that changes in Internet architecture promoted by government and large corporations as response to simultaneity may create more restrictive and effective regulatory regime).

and instantly render the results...available throughout the world via the Internet."[94] Another court, in *DVD Copy Control Ass'n v. Bunner* disagreed, arguing that the instantaneous nature of Internet transmission meant that the value of the plaintiffs' asserted property right had already been compromised many times over prior to the court's decision.[95] Therefore, according to the court, there was no irreparable harm, making an injunction unnecessary and punitive.

In the on-line pornography area, the Supreme Court has adopted a celebratory view when dealing with content-based regulation. For example, consider the Supreme Court's recent decision in *Ashcroft v. ACLU*.[96] In this case, the Court held that a restriction on Internet pornography harmful to minors would not survive First Amendment scrutiny. The majority observed that the sheer number of hosts worldwide made content-based regulation at the source difficult, if not impossible.[97] The Court also declined to view children's exposure to pornography on-line as unmediated, citing the potential for evolving technology such as parentally-installed filters to provide checks at the recipient end without chilling speech at the source.[98]

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[93] Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).

[94] *Id*. at 451. For a critique of the District Court's opinion in *Corley*, which the appellate court sustained, see Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275 (2002) (arguing that the District Court failed to consider the nature and frequency of change on the Internet).

[95] *See* DVD Copy Control Ass'n v. Bunner, 116 Cal. App. 4th 241, 251 (2004).

[96] Ashcroft v. ACLU, 124 S. Ct. 2783 (2004).

[97] *Id*. at 2792.

[98] *Id*. at 2792-93; *cf*. Reno v. ACLU, 521 U.S. 844, 869 (1997) (striking down earlier effort to limit on-line pornography, and asserting that because Internet content depends in large part on

However, the cautionary view is dominant when the Court can classify the measure at issue as outside the realm of content-regulation. In *United States v. American Library Association*,[99] for example, the Court upheld a measure requiring libraries to install filters to block pornography on the Internet as a condition of receiving federal financial assistance. Here, the Court was so concerned about the prospect of unmediated access to the Internet that it downplayed the overbroad character of the filters required, which adversely affected access to a range of non-pornographic content.[100] The Court also dismissed plausible alternatives to the filter requirement.[101]

In the criminal law area, courts sometimes recognize that the accelerated and unmediated world of the Internet also creates a far greater risk of inadvertent or ephemeral actions leading to criminal liability. A hard copy or even speech in real-time requires far greater deliberation, increasing the likelihood that acts considered orders, solicitations to perform criminal acts, incitements, or true threats will be premeditated. In contrast, the Internet's absence of mediation can become a trap for the

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viewers' informed and conscious choices, it was more susceptible to mediation within the home than broadcast media).

[99] United States v. American Library, 539 U.S. 194 (2003).

[100] *Id*. at 220 (Stevens, J., dissenting).

[101] For example, the Court did not regard the possibility of installing filters only on computers used by minors as a basis for deeming the statute insufficiently tailored. *Id*. at 2320 (Souter, J., dissenting). Simultaneity has also played a role outside the realm of on-line pornography. In a recent decision holding that the National Archives was not required to release graphic photos of Vince Foster's body taken after his suicide, the Court cited the concern of Foster's sister that the photos, once released, "would be placed on the Internet for world consumption." *See* Nat'l Archives & Records Adm. v. Favish, 124 S. Ct. 1570, 1577 (2004).

unwary. For example, in *United States v. Alkhabaz*,[102] a student posted a graphic rape and abduction fantasy about a person bearing the name of a female dorm-mate to a message board, and was subsequently charged with making a threat of violence using instrumentalities of interstate commerce. Holding that the intent to make the female student aware was a crucial element of the charge, the Sixth Circuit dismissed the charges. As the Sixth Circuit noted, there was no evidence that the defendant wished to make the female student aware of his fantasy.[103] Before the Internet, the defendant may have circulated his story in hard-copy form to persons sharing his admittedly troubling interests. He would have understood that sending a copy to the female student could have yielded tort or even criminal liability, and would have conformed his conduct accordingly.[104] In this way, the absence of mediation on the Internet – the breaking down of barriers between intended and unintended audiences – can lead to overreaching in the regulation of Internet speech and unfairness to defendants, unless courts pay careful attention to context.

Here, too, however, courts sometimes embrace a pro-regulation view as a means of controlling the Internet's new fora. For example, a court has held that a government agent need not have probable cause to view conversations in a chat room and subsequently pose as an individual interested in child

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[102] United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997); *see also* Scott Hammack, Note, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J. L. & SOC. PROBS. 65, 92-93 (2002) (discussing *Alkhabaz*).

[103] The female student's awareness of the defendant's fantasy stemmed from third parties who brought the fantasy to her attention after a search of the Web yielded items including message board postings. *Alkhabaz*, 104 F.3d at 1494-95.

[104] In *Alkhabaz*, there was no evidence that the defendant took any action to actualize his

pornography to secure evidence against another chat room visitor.[105] A court could instead view a chat room as a forum whose openness some participants may not fully comprehend, leading to confused expectations. By declining to suppress the agent's chat room surveillance, the Court may have encouraged intrusive law enforcement tactics.

In sum, courts move from a celebratory to a cautionary view with little consistency or overall analytical framework. As the Internet matures, judicial consistency may similarly develop. However, the risk is that the evolution of case law will suffer permanently from this patchwork beginning.[106]

III. THE INTERNET AND THE STRUCTURE OF TERRORIST NETWORKS

Analysis of the interaction of terrorism and the Internet also reflects the perils of dichotomies. The Internet offers significant synergies to entrepreneurs of violence. However, it also holds out the

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fantasy. *Id*.

[105] *Cf*. United States v. Charbonneau, 979 F. Supp. 1177 (S.D. Ohio 1997) (holding that defendant should have known that chat room permitted him to be "overheard" by other visitors). Other negative externalities, such as loss of trust, result if the default position changes and Internet users assume that their audience is comprised of law enforcement personnel. *See* Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1008 (2001) ("[A]n internet user will not be sure that he is talking to a friend and not a government interloper seeking evidence of criminal activity.").

[106] For an approach that seeks a nuanced but principled path through Internet law, albeit one that may be more deferential to law enforcement interests than the participant-centered approach outlined in this article, *see generally* Kerr, *Perspective in Internet Law*, *supra* note 7 (arguing that courts and legislatures should select either "external" perspective on Internet, shaped by the physical architecture of digital communication, or "internal" perspective, focused on the expectations of the parties, in fashion that maintains continuum with pre-digital approaches to regulation of law enforcement authorities and other actors).

hope of enhanced access for subordinated groups. Neglecting either dimension of the Internet's capability is dangerous. To establish the synergies between the Internet and terrorist activity, this Part turns first to the absence of mediation in cyberspace, and secondly to the impact of simultaneity. It then examines the countervailing potential of the Internet for building democracy through dialog. Finally, this Part sketches some challenges at the post-September 11 intersection of the Internet and terrorism.

A. *Unmediated Character*

The absence of mediation on the Internet can promote polarization and permit consumers to avoid the unexpected teachable moment.[107] On a technical level, the absence of entry barriers to Internet communication also facilitates the operations of terrorist groups. I discuss each in turn.

Lack of mediation is a key ingredient in the production of polarization and concerted violence against innocents to achieve political, cultural, or social aims.[108] This concerted violence, typically, if perhaps too glibly called "terrorism,"[109] can result from the actions of states[110] or private groups of

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[107] *See* SUNSTEIN, *supra* note 5, at 51-65 (discussing lack of mediating mechanisms on the Internet).

[108] *Cf*. Cass R. Sunstein, *Why They Hate Us: The Role of Social Dynamics*, 25 HARV. J. L. & PUB. POL'Y 429 (2002) (discussing role of polarization and group homogeneity in fomenting violence).

[109] *See* PHILIPB. HEYMANN, TERRORISM AND AMERICA 6 (1998) (defining terrorism as "violence conducted as part of a political strategy by a subnational group or secret agents of a foreign state").

[110] *See, e.g.*, DANA R. VILLA, POLITICS, PHILOSOPHY, TERROR 14-21 (1999) (discussing "totalitarian terror"); Gerald L. Neuman, *Terrorism, Selective Deportation and the First Amendment After Reno v. AADC*, 14 GEO. IMMIGR. L.J. 313, 323 (2000) (discussing "state terrorism" as one strand in debates about definition of terrorism).

domestic[111] or transnational[112] origin. From the genocide of Rwanda and the Sudan to the efforts of white supremacists and anti-abortion extremists in the United States, governments or other organizations practicing concerted violence against innocents often emerge from shared sentiments of inequity or displacement.[113] Exploiting these sentiments, entrepreneurs promote the appeal of exclusionary images of "authenticity."[114] Substantively, these exclusionary images thrive through comparisons with

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[111] In the course of American history, domestic groups such as the Ku Klux Klan have likely committed more acts of terrorist violence with varying degrees of involvement from state actors than transnational groups such as Al Qaeda. *See* Virginia v. Black, 538 U.S. 343, 389 (2003) (Thomas, J., dissenting) (describing Klan as "terrorist organization").

[112] *See* HOFFMAN, *supra* note 1, at 100-01 (reporting that during a speech in Los Angeles, Rabbi Meir Kahane, the New York native who founded the Israeli extremist group, Kach, "described the Arabs as 'dogs', as people who 'multiply like fleas' who must be expelled from Israel or eliminated").

[113] *See* Margulies, *Regime Change*, *supra* note 17, at 393-95 (discussing how social comparisons generated by inequality augment social capital of terrorist groups); *cf*. AMY CHUA, WORLD ON FIRE 229 (2003) (discussing roots of anti-American global sentiment in economic inequality).

[114] Margulies, *Regime Change*, *supra* note 17, at 395-96 (discussing authenticity entrepreneurship in states and organizations); *cf*. CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE 34 (2003) (discussing role of "political entrepreneurs" who "promote violence... by activating boundaries, stories, and relations that have already accumulated histories of violence; by connecting already violent actors with previously nonviolent allies; by coordinating destructive campaigns; and by representing their constituencies through threats of violence"); CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 117 (2003) ("Al Qaeda has made a pervasive effort to... [emphasize] a shared identity, one that includes an "us" and excludes a "them"); Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999) (analyzing role of "availability entrepreneurs" in shaping public policy by exploiting salient narratives); *see also* MICHAEL IGNATIEFF, THE LESSER EVIL 127 (2004) (arguing that state and organizational entrepreneurs of collective violence, whatever their stated ideology, practice "the redescription of intended victims as inferior creatures to be brushed aside on the path to a higher goal"); Ladan Boroumand & Roya Boroumand, *Terror, Islam, and Democracy*, J. DEMOCRACY, Apr. 2002, at 5, 7-8 (2002) (discussing the influence of Fascism and Communism on theorists of violent Islamism, including Sayyid Qutb).

"inauthentic" others, defined through traits such as race, ethnicity, nationality, or even occupation.[115] Procedurally, this stark view of authenticity entails the rejection of introspection, dialog, and debate as means for peacefully coming to terms with difference.[116] By stigmatizing others and discrediting dialog, authenticity entrepreneurs designate violence as the tactic of choice.

The unmediated nature of the Internet exacerbates polarization. Most media, including broadcast and paper sources, have some form of mediation mechanism between their content and their audience. In a newspaper, for example, the editor reviews the content, often seeking a range of stories and a range of views.[117] This may not be the case for a web-site with minimal physical infrastructure, investment, or stake in the community. Websites face even fewer constraints than most traditional media to the propagation of ideologically homogenous content, and often lack the legal staff or institutional culture to curb rumor, innuendo, and libel. Web sites catering to particular niches tend to attract an audience of persons who already agree with the extreme opinions featured on the site. Homogeneous groups are likely to perceive both identity and grievances in a far more polarized fashion,

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[115] *See* Margulies, *Regime Change*, *supra* note 17, at 397.

[116] President Bush's comments that other nations are either "for us or against us" in antiterrorism efforts echo the stark nature of pronouncements that lead to collective violence. *Cf*. *id.* (criticizing "preemptive" approach of Bush Administration). While force is sometimes necessary to deal with threats, such public pronouncements create a dynamic that makes the use of force more likely, even in the absence of necessity. Terrorist organizations take similar rhetorical turns. *See* Abu Khubayb & Abu Zubayr, *Greater and 'Lesser' Jihad?*, available on http://www.hamasonline.com/indexx.php?page=Qassam/greater_lesser_jihads (denying legitimacy under Islamic doctrine of view that jihad struggle to improve self is more important than violence directed at others); *cf*. Sunstein, *supra* note 108, at 429 (2002) (discussing role of polarization and group homogeneity in fomenting violence).

[117] *See* SUNSTEIN, *supra* note 5, at 71.

thereby promoting recruitment for violent acts, and impeding the interchange and deliberation crucial to democracy.[118]

The Internet's lack of mediation also facilitates rapid revision of web-site content in a fashion that can assist terrorist organizations. A site that contains specific or personal information about potential targets of terrorist attacks, including buildings, installations, or people, can readily update that site as new information becomes available. While people or groups can alter patterns of behavior to deal with other kinds of public threats, the flexibility and modifiability of Internet communications mean that those behavior alterations can be quickly passed on to persons who might be committed to executing attacks. In addition, the flexibility of the Internet makes it easy to shut down web-sites and set up new ones to avoid detection.[119]

B. *Simultaneity*

The speed of Internet communication offers the prospect of connections across the globe,[120] enhancing ability to communicate operational information regarding terrorist activities. Many violent networks are geographically dispersed.[121] Transnational groups such as Kach, Hamas, and Al Qaeda

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[118] *See* Sunstein, *supra* note 108, at 432.

[119] *See* Wright, *supra* note 2, at 50 (noting that sites associated with Al Qaeda "move continuously... sometimes several times a day, to avoid being hacked by intelligence agencies or freelance Internet vigilantes... [webmasters of these sites] now cover themselves by stealing unguarded server space...").

[120] *See* Hammack, *supra* note 102, at 81-86 (discussing synergies between terrorist operations and Internet).

[121] *Cf*. VIRILIO, *supra* note 87, at 12 (observing that drug traffickers in the United States have

raise money and recruit operatives on an international scale.[122] Domestic networks such as extremist anti-abortion or white supremacist organizations also have members in far-flung locations. The qualities of the internet make it perfect for such dispersed communication. Participants in a network can log in from locations all over the map, and gain access to information more efficiently than is possible with traditional media.

Complementing this notion of simultaneity is the Internet's facilitation of asynchronous interactions.[123] Visitors to a web-site need not communicate in real-time; instead they can send messages that will be read and responded to at the convenience of others, but without the transmission delays of older modes like "snail mail." The Internet also facilitates the automatic and user-accessible archiving of material awaiting the visitor's attention. Coupled with the Internet's geographic reach, the temporal versatility of the Internet is a boon to terrorists.

C. *Benefits of the Internet for Democracy*

The simultaneity and absence of mediation on the Internet also have salutary consequences. For example, the Internet's speed and geographic reach can enable the connection of diasporated communities on a regional and global basis. Consider here Edward Said's account of Palestinian refugees in a camp on the West Bank setting up the "Across Borders Project," which used the Internet

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used technological innovations such as cell-phones to evade detection and apprehension).

[122] The September 11 attackers, for example, traveled to Afghanistan, later to Hamburg, and finally to a variety of sites all over the continental United States, from Florida to San Diego. *See* 9/11 COMMISSION REPORT, *supra* note 2, at 145-241.

to connect residents of the camp with residents of other Palestinian refugee camps in Lebanon, Jordan, Syria, and Gaza. The Project allowed residents to exchange views on important issues of relevance to the Palestinian community, such as the future of the peace process.[124] One might not agree with all, or indeed any of the opinions articulated in such an exchange. One can hardly gainsay, however, the value to ideals of political participation represented by this capability.

Similarly, the Internet can provide intellectuals and activists with avenues to bypass the status quo-centered mediation offered by most mainstream media. When major media offer privileged access to Bush Administration officials promoting an intervention in Iraq justified by faulty intelligence, intellectuals and activists can turn to the Internet to communicate an alternative vision.[125] Some countries, including Myanmar, Saudi Arabia, and the People's Republic of China,[126] restrict Internet access for their citizens out of fear of such alternatives. The United States, however, should model a more robust commitment to democratic debate.

D. *Post-9/11 Challenges*

In an uncertain world, the interaction between fear of new technology like the Internet, and apprehension about newcomers to the United States, labeled as suspected terrorists, prompts distortions in First Amendment doctrine. A cautionary approach to the Internet might increase the risk

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[123] *See* LESSIG, *supra* note 7, at 42-43 (2004).

[124] *See* EDWARD W. SAID, HUMANISM AND DEMOCRATIC CRITICISM 133-34 (2004).

[125] *See id.* at 132.

[126] *See* VAIDHYANATHAN, *supra* note 4, at 178.

of a return to the bad tendency test, perhaps camouflaged in the rhetoric of content-neutrality. A prosecution that resulted in the deportation of a Saudi national with a student visa, Sami Al-Hussayen, for coordinating extremist web-sites raises this concern,[127] as do subsequent cases.[128] Similarly, the post-September 11 climate may further incline courts and legislatures to curb the publication of information about terrorist tactics or scientific processes, even when this information contributes to public debate. However, in this climate the use of the Internet by home-grown hate groups to intimidate opponents may not receive comparable attention, both because such groups do not fit the terrorist "profile" and because celebratory scholars may view the ubiquity of hate on the Internet as neutralizing the intimidation conveyed. The potential result is the worst of all worlds, as skewed perceptions generate both over- and under-regulation.

IV. THE INTERNET, SPEECH, AND THE LAW: A PARTICIPANT-CENTERED VIEW

A contextual view that will both respect free speech and limit the use of the Internet to cause collective violence can help resolve this dilemma. Meeting this need, a participant-centered view echoes

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[127] Al-Hussayen was acquitted of terrorism charges in June, 2004. *See No Conviction for Student in Terror Case*, N.Y. TIMES, June 11, 2004, at A14. He was subsequently deported.

[128] *See* Douglas Jehl & David Johnston, *Terror Detainee is Seen as Leader in Plot by Qaeda*, N.Y. TIMES, Aug. 6, 2004, at A1 (reporting on a number of arrests, including the arrest in London pursuant to a sealed federal warrant of Babar Ahmed, on charges stemming from his alleged use of United States websites and e-mail to solicit funds for terrorist causes). *Cf*. Linda Fisher, *Guilt By Expressive Association: Political Profiling, Surveillance, and the Privacy of Groups*., ARIZ. L. REV. (forthcoming 2004) (discussing inappropriate surveillance of religious groups after September 11).

the position of thinkers and activists that participation in public discourse is a central value in a democracy.[129] This view, developed here through the work of Louis Brandeis and Hannah Arendt, preserves participation against the totalizing force of the state, and the state's tendency to stigmatize outsiders. It identifies the practice of concerted violence not as an aspect of participation, but as an activity that undermines deliberation and discourse. It also preserves private space as a refuge and respite from the rigors of participation, in the face of the Internet's invasion of the private realm.

A. *Brandeis, Arendt, and the Theoretical Underpinnings of the Participant-Centered Approach*

Brandeis and Arendt reflect the focus of the participant-centered view on both engagement with and sanctuary from the public sphere. Brandeis argued in his famous dissent in *Whitney v. California* that "the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary... the greatest menace to freedom is an inert people."[130] Similarly, for a civic republican theorist like Arendt, involvement in public discourse is

[129] *See* STRUM, *supra* note 22, at 106 (noting that Brandeis agreed with accounts of Athenian democracy, which echoed his "the concern for justice and public affairs that had to exist for the protection of democracy"); Hannah Arendt, *Civil Disobedience*, *in* CRISES OF THE REPUBLIC 51, 94 (1972) (noting that "consent and the right to dissent became the inspiring and organizing principles of action that taught... the 'art of associating together'" to Americans); *cf*. Margulies, *Tales of the Unexpected*, *supra* note 21; Michelman, *Law's Republic*, *supra* note 21; Sunstein, *Beyond the Republican Revival*, *supra* note 21.

[130] *See* Whitney v. California, 274 U.S. 357, 372, 375 (1927) (Brandeis, J., concurring); *cf*. SUNSTEIN, REPUBLIC.COM, *supra* note 5, at 47 (citing Brandeis's concurrence); Blasi, *supra* note 22; at 668-80 (discussing Brandeis's opinion in *Whitney*); Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J. L. & POL. 451 (1988) (drawing parallels between Brandeis's perspective and civic republican thought).

crucial to the realization of human potential.[131] Through sharing stories in the public realm, human beings open themselves to the realm of the unexpected, acknowledging the contingency of their own prejudices and preconceptions.[132]

While engagement in human *governance* is the highest goal or pursuit for a participation-centered account, *government* exists in an ambivalent relationship with participation. Government, properly understood, needs participation to develop new ideas and challenge old habits. However, government officials often seek ways to domesticate or manage participation, robbing it of the alliance with the unexpected that makes it a central expression of what it means to be human. Seeking to manipulate public opinion, governments frequently alter facts and massage the truth.[133] Governments also seek to stigmatize dissenters, casting them as outsiders of questionable loyalty. Brandeis, for example, feared that in times of crisis the simultaneity and unmediated nature of government repression –

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[131] MARGARET CANOVAN, HANNAH ARENDT: A REINTERPRETATION OF HER POLITICAL THOUGHT 111 (1992) (noting for Arendt, "what characteristically gathers and separates human beings is... the 'public realm'").

[132] *See* ARENDT, *The Crisis in Education*, *supra* note 23, at 17-74 (citing the "opportunity, provided by the very fact of crisis... to explore and inquire... [without] the answers on which we ordinarily rely"); ARENDT, HUMAN CONDITION, *supra* note 21, at 191 (noting "inherent unpredictability" of every body politic); Margulies, *Tales of the Unexpected*, supra note 21; *cf*. New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 310-11 (1932) (Brandeis, J., dissenting) (praising experimentation, and noting importance of moving beyond preconceptions in world in which "the seemingly impossible sometimes happens").

[133] *See* Arendt, *Civil Disobedience*, *supra* note 129, at 14(noting, with regard to government deception regarding Vietnam War brought to light by Pentagon Papers, that "the policy of lying was hardly ever aimed at the enemy... but was destined chiefly, if not exclusively, for domestic consumption, for propaganda at home, and especially for the purpose of deceiving Congress").

fostered by "hysterical, unintelligent fear"[134] – would distort democratic deliberation and chill or punish participation.

To reinvigorate civic engagement, both Brandeis and Arendt looked to outsiders. Both thinkers believed that immigrants strengthened democracy by bringing new ideas and renewed commitments.[135] Each identified the labor movement as a central engine of participation for the hitherto excluded and viewed repression of the movement as a danger to participation-centered ideals.[136] Arendt also praised the role of the anti-war and civil rights movements of the 1960's in making the government accountable.[137]

Although civic republican theorists' insist on the need for dissent, they tend to view organized violence against others as undermining engagement. For Arendt, violence reflects a homogenized viewpoint, certain of its conclusions, and focused too often on the mechanics of death and pain.[138] Such

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[134] *See* RABBAN, *supra* note 40, at 361.

[135] *See* ARENDT, *Crisis in Education*, *supra* note 23, at 175 (arguing that immigration demonstrates that democracy in America "did not shut itself off from the outside world... in order to confront it with a perfect model," but instead symbolizes a commitment to what Tocqueville called an "indefinite perfectibility"); STRUM, *supra* note 22, at 103 (arguing that working-class immigrants such as Jewish garment workers from Eastern Europe "possessed... qualities which we of the twentieth century seek to develop in our struggle for justice and democracy").

[136] *See* RABBAN, *supra* note 40, at 358 (noting that Brandeis protested the harsh treatment by law enforcement authorities of members of the International Workers of the World (IWW) during a strike in Massachusetts, arguing that "citizens and aliens have, under the guise of administering or enforcement of the law, been denied civil rights"); ARENDT, HUMAN CONDITION, *supra* note 21, at 219 (arguing that labor movement sought to "found... a new public space with new political standards").

[137] *See* Arendt, *Civil Disobedience*, *supra* note 129, at 75.

[138] *See id*. at 105, 108-09 (deploring proliferation of strategic thinkers who plan war through "hypothetical constructions of future events... [in which] what first appears as a hypothesis... turns

a view corrodes the commitment to transparency – to letting a concept be seen from all perspectives[139] – that animates participation. Violence inevitably skews discourse among both perpetrators and survivors, creating habits of insularity and fear that inspire further destruction.[140]

The participant-centered account also argues that private forces can undermine democracy and engagement as severely as a repressive government. Indeed, under the participant-centered account, there is often a continuum between repressive private and public forces. For Brandeis, of course, corporate power was a profound threat to civic engagement and accountability.[141] Arendt also lamented the rise of corporate power as displacing the public realm.[142] In addition, Arendt devoted substantial attention to charting the rise of polarized private groups, such as the Nazis and Fascists, who used violence and intimidation to take over governments, converting them into repressive and sometimes

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immediately... into a "fact," which then gives birth to a whole string of similar non-facts"); ARENDT, HUMAND CONDITION, *supra* note 21, at 202-03 (arguing that tyrants who seek to rule by violence inevitably fail because they seek to substitute force for the power that emerges from the "human capacity to act and speak together"); RABBAN, *supra* note 40, at 359 (discussing Brandeis's rejection of the goals of the IWW and other radical groups which incorporated violence into their approach).

[139] *See* ARENDT, *The Concept of History*, *supra* note 22, at 227, 242 (noting that in participation in political discourse, "a particular issue is forced into the open that it may show itself from all sides, in every possible perspective").

[140] *See* Arendt, *Civil Disobedience*, *supra* note 129, at 154 (noting that a totalitarian government comprised of former revolutionaries "turns not only against its enemies but against its friends and supporters as well... the police state begins to devour its own children... [and] yesterday's executioner becomes today's victim").

[141] *See* MCCRAW, *supra* note 31, at 94-97 (discussing Brandeis's campaign against the trusts).

[142] *See* ARENDT, HUMAN CONDITION, *supra* note 21, at 126-35 (discussing adverse effects on participation of the rise of "consumer society"). The critique of consumerism is also crucial for cautionary Internet Exceptionalists. *See* SUNSTEIN, REPUBLIC.COM, *supra* note 5, at 117 (discussing "consumption treadmill").

genocidal regimes.[143]

As a bastion against oppression, civic republicans also value a zone of privacy. For Brandeis, a space "to be let alone"[144] ensured the flourishing of each person's "spiritual nature, of his feelings and intellect."[145] It also ensured the vitality of the public sphere, since the "intensity and complexity"[146] of engagement in public matters required periodic opportunities for "retreat from the world."[147] Arendt for her part wrote powerfully about the need for a "place of one's own."[148] For Arendt, this space "offers the only reliable hiding place from the common public world."[149] Without this sanctuary, public engagement becomes "shallow" and trivial.[150]

The participant-centered view argues that modern media such as the Internet can frustrate

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[143] *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 364-73 (1975) (discussing dynamics of totalitarian movements aspiring to state control, including commitment to paramilitary capability, iteration of core images and narratives, and shunning of engagement with opposing views).

[144] *See* Warren & Brandeis, *supra* note 35, at 193, 195 (*citing* Judge Thomas Cooley); *cf*. EDWARD J. EBERLE, DIGNITY AND LIBERTY: CONSTITUTIONAL VISIONS IN GERMANY AND THE UNITED STATES 80-82 (2002) (discussing Brandeis's conception of privacy).

[145] Warren & Brandeis, *supra* note 35, at 193.

[146] *Id*. at 196.

[147] *Id*. *Cf*. Robert C. Post, *The Social Foundations of Privacy*: *Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957 (1989) (describing privacy as contributing to discourse within community); Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647, 651 (1991) (arguing that for Brandeis, normative conception of privacy reflected the "respect that we owe to each other as members of a common community").

[148] ARENDT, HUMAN CONDITION, *supra* note 21, at 70.

[149] *Id*. at 71.

participation by destroying privacy. Brandeis was concerned that the virtually "instantaneous" speed of modern "inventions... business methods... [and] mechanical devices" would "invade[ ] the sacred precincts of private and domestic life."[151] Arendt described the corrosive effects of the exposure of private persons to the ministrations of mass media, observing that, "[f]ame penetrates the four walls, invading their private space, bringing with it... the merciless glare of the public realm, which floods everything in the lives of those concerned."[152] In addition to these direct effects, the marketing of unmediated trivialities about personal affairs would crowd out matters of genuine public importance,[153] undermining more difficult but necessary discourse and confirming people's pre-packaged opinions.[154]

Even more ominously, for Brandeis and Arendt, emerging technology spawns more intrusive government methods of surveillance, such as the wire-tapping that Brandeis criticized as an unreasonable search and seizure in his dissent in *Olmstead v. United States*.[155] Technological advances might ultimately offer the government clandestine access to "the most intimate occurrences of

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[150] *Id*.

[151] Warren & Brandeis, *supra* note 35, at 195.

[152] *See* ARENDT, *The Crisis in Education*, *supra* note 23, at 186.

[153] Warren & Brandeis, *supra* note 35, at 196.

[154] Arendt agreed that the consumer society's thirst for triviality could crowd out civic discourse, noting that European monarchs at the threshold of the modern era had drained the political vitality of potential rivals by expanding the circle of nobles attending the monarch, and "making them entertain one another through the intrigues, cabals, and endless gossip which this perpetual party inevitably engendered." *See* HANNAH ARENDT, *The Crisis in Culture*, in BETWEEN PAST AND FUTURE 197, 199 (1977).

[155] Olmstead v. United States, 277 U.S. 438, 471 (1928).

the home,"[156] and to "unexpressed beliefs, thoughts, and emotions,"[157] enabling government to more tightly manage the people's unruly urge to participate. Technology could enable the government to more effectively dominate discourse, leveraging new media and techniques of persuasion to obscure or erase inconvenient facts about the world.[158]

However, the participant-centered view would also value the countervailing capability that technology offers for dissenters. In this vein, Arendt noted that governmental attempts to erase the past will fail so long as government cannot "wield power over the libraries and archives of all countries of the earth."[159] The virtually limitless archives of the Internet thus mediate the government's attempts to achieve dominion over data, sustaining alternative resources for participation. In addition, the decentralized spaces created by the Internet have the potential to generate new kinds of civic interaction

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[156] *Id*. at 474. Brandeis's papers indicate that he viewed television, a medium barely past the experimental stage at the time *Olmstead* was decided, as a potential "means of espionage" that might allow future governments to reproduce in court documents covertly viewed in home offices without the resident's knowledge or consent. *See* STRUM, *supra* note 22, at 137.

[157] *Olmstead*, 277 U.S. at 474.

[158] *See* ARENDT, *The Concept of History*, *supra* note 22, at 89 (predicting that "social techniques... have only to overcome a certain time-lag to be able to do for the world of human relations and human affairs as much as has already been done for the world of human artifacts" by earlier technology); ARENDT, *Lying in Politics*, *supra* note 133, at 7-12 (in the context of revelations in the "Pentagon Papers" about United States officials' deception regarding war in Vietnam, discussing manipulation practiced by "public-relations managers in government," along with "problem-solvers" who turned to reductive versions of social science explanation to rid themselves of reality's "disconcerting *contingency*") (emphasis in original).

[159] *See* ARENDT, *Lying in Politics*, *supra* note 133, at 13 (discussing the ultimate futility of Stalin's effort to "eliminate Trotsky's role from the history of the Russian Revolution" by killing Trotsky and "eliminating his name from all Russian records").

and fresh perspectives on perennial problems.[160]

The participant-centered model also captures the two central elements of concern about the Internet: lack of mediation and simultaneity. Those acting as agents of terrorist organizations or operations are not only far less susceptible to mediation, but more committed to preventing others with whom they interact from obtaining access to mediated views.[161] This is the danger of conspiracy and agreement that has typically made such operational terrorist "networks" unprotected under the First

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[160] *See* ARENDT, HUMAN CONDITION, *supra* note 21, at 198 (noting that Greeks' observation that, "Wherever you go, you will be a *polis*... expressed the conviction that action and speech create a space between the participants which can find its proper location almost any time and anywhere"). For Brandeis, decentralization was equally important to innovation and liberty. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 310-11 (1932) (Brandeis, J., dissenting) (discussing states as "laboratories" of federalism); Erie Railroad v. Tompkins, 340 U.S. 64 (1938) (requiring that federal courts defer to state law in diversity cases). For recent elaborations of Brandeis's theme of decentralization promoting experimentation and refinements in the ordering of liberty, *see* Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 60 (1998) (citing Brandeis); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (discussing constitutional basis for enhancing accountability and flexibility of government); *cf*. Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 175-77 (1995) (discussing Brandeis as pragmatist who rejected formalist solutions).

[161] Margulies, *Judging Terror*, *supra* note 17, at 419-20; *cf*. HOFFMAN, *supra* note 1, at 169-80 (discussing structure of terrorist groups); Sunstein, *Social Dynamics*, *supra* note __ (same); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U.L. REV. 1, 44-46 (2003) (arguing that rigid intractable beliefs of terrorist operatives may make them "undeterrable"); *see also* Greenawalt, *supra* note 8, at 57-65 (describing conspiracies as involving "situation-altering utterances" that bind individuals to illegal course of conduct and mute countervailing influences); Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003) (discussing psychological and organizational theory undergirding criminalization of criminal agreements). Because of this structural intractability, the familiar Brandeisian remedy of "more speech" will be far less effective. *Cf*. Whitney v. California, 274 U.S. 357, 372, 377 (1927) (Brandeis, J., dissenting) (arguing that "more speech" is best remedy for extreme views); HOLMES-LASKI LETTERS, *supra* note 65, at 204 (discussing Holmes's move, in part due to discussions with Brandeis, toward "more speech" approach); *see also supra* notes 67-71 and accompanying text (discussing Holmes's shift in *Abrams*).

Amendment. Simultaneity is important in the privacy context, where non-public persons can be intimidated by the Internet transmission of continuously updated information accessible to network members that have a track record of violence directed against such private persons. The power of this threat potentially serves to intimidate people into silence, disabling the "more speech" antidote outlined by Brandeis in *Whitney*.

The participant-centered view protects participants in public discourse, including those participants testing or exceeding the limits of polite discussion. However, the participant-centered view denies protection to willful participation in agreements or conspiracies that set the stage for escalating violence. The absence of a "more speech" antidote shuts down mediating mechanisms for such participants. At the same time, the participant-centered view protects individuals engaged in high-risk activities deemed important to democratic life, including witnesses in high-profile criminal trials and persons engaged in vindicating reproductive rights. By attaching special protection to certain roles important for democratic participation, and simultaneously depriving protection to roles that chill the participation of others, a participant-centered view emphasizes the social nature of both protected and unprotected activities.[162]

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[162] Other commentators have emphasized participation in their accounts of the First Amendment. *See* SUNSTEIN, REPUBLIC.COM, *supra* note 5; VAIDHYANATHAN, *supra* note 4, at 190-92; Balkin, *supra* note 86; Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411-12 (1986). Some commentators cite participation as a function of individual autonomy. *Cf*. Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, *supra* note 3, at 167 (offering "participatory perspective [that] emphasizes the autonomy of individual citizens"); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978). This view runs the risk of slighting the interests of the audience for speech, as well as the role of some Internet communication in facilitating violence. On the other hand, Sunstein, perhaps the contemporary legal scholar most closely identified with civic republican notions of participation, sometimes slights the

B. *A Taxonomy of Speech and Conduct*

An initial step in a participant-centered approach is to identify three different ways in which speech can facilitate violence by terrorist groups or institutions in the Internet context. This analysis sets out three modes of crime-facilitating speech or communication: information and affiliation, mobilization, and operation. It acknowledges, however, that these categories are unstable. Moreover, certain mainstays of typical First Amendment analysis, such as the requirement that harm be imminent to criminalize speech that is otherwise protected and the general view that First Amendment protection attaches to a greater degree to public rather than private speech,[163] do not necessarily hold true in the context of the Internet and terrorism.

A participant-centered view accords affiliational and informational speech the highest level of protection. This speech involves a statement of political support for a particular group or cause, no matter how abhorrent to the majority, or a description of a group, event, or thing in the world. The modern First Amendment generally protects abstract calls for violence captured in either the affiliational or informational mode, as in, "I support the overthrow of the United States government," or, "X

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positive role of extreme speech in focusing attention on inequality. *See* Sunstein, *Why They Hate Us*, *supra* note 108 (discussing organizational dynamics as basis for terrorism, while neglecting role of perceptions of inequality as catalyst for violence); *cf*. Margulies, *Regime Change*, *supra* note 17, at 395 (arguing that both organizational structure and inequality are important to understanding and addressing terrorism). The account offered here, in some ways more indebted to Greenawalt's careful treatment of the interaction of speech and crime, *see* Greenawalt, *supra* note 8, and strives for a more balanced approach regarding the impact on democracy and terrorism of changes in communications technology.

[163] *See* Greenawalt, *supra* note 8, at 117-18.

supports the use of force to effectuate the revolution." Such statements, however extreme, are tied to participation in public discourse, as long as they retain a general focus. Speech of this kind would include on-line discussions of the status of violent jihad in Islamic doctrine.[164]

Extreme speech warrants protection because of its strong ontological and pragmatic links to ideals of participation.[165] Such speech may be an element of a learning process for participants, who may test extreme rhetoric, and then determine that it does not meet their needs. Extreme rhetoric can also serve as an outlet for dissent, and as an indication of vulnerabilities for regimes that may then undertake reform.[166] Similarly, the participant-centered approach would generally protect reports about world events, such as newspaper accounts of speeches by leaders of alleged terrorist groups, as serving similar functions. Moreover, a government with the power to deter or punish such statements of affiliation or information may use its power broadly to stifle all disagreement and target disfavored groups, chilling civic involvement.[167] As indicated previously, this is the theory underlying the "bad tendency" test and the broad interpretation of "clear and present danger," as endorsed by the *Dennis* Court.

In some cases, however, speech couched in the language of information or opinion may be operational in intent or effect. Operational communications involve commands, agreements,

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[164] *See* Abu Khubayb & Abu Zubayr, *Greater and 'Lesser' Jihad?*, *supra* note 116.

[165] *See* Post, *Reconciling Theory and Doctrine*, *supra* note 3.

[166] *See* Richard A. Posner, *The Speech Market and the Legacy of Schenck*, in ETERNALLY VIGILANT, *supra* note 52, at 121, 132.

[167] *See* POSNER, *supra* note 52, at 131.

solicitations, or threats to perform illegal acts. Such acts, particularly those that involve violence, reflect a shift away from participation in civic discourse and a subsequent move toward conduct that is either largely self-interested or focused on undermining the participation of others.

History reveals that leaders of violent organizations often use the language of opinion or information to authorize violence. Sometimes an authorization may come in the form of a question, as when Henry II of England asked, "Will no one rid me from this turbulent priest?"[168] Henry's select audience of nobles responded with the murder of Thomas à Becket. More recent leaders of violent organizations have cast extortion and intimidation as the simple supply of information, tendering data about an offer their interlocutor "cannot refuse." For example, an alleged Mafia boss on trial in New York resorted to the language of opinion, averring that he "would like to leave a receipt" for targets of his displeasure; those targets soon found themselves migrating to settings of higher (or lower) altitudes.[169]

While most of the above examples concern individual targets, leaders of organizations with the capacity and inclination to practice violence may also have designs on collective targets. For example, leaders of such networks may target members of particular ethnic, religious, national, or even

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[168] Theodor Meron, *Crimes and Accountability in Shakespeare*, 92 AM. J. INT'L L. 1, 20 (1998).

[169] *See* William Glaberson, *Prosecutor Ridicules Idea of Mob Boss as Pacifist*, N.Y. TIMES, July 24, 2004, B3 (reporting on testimony at trial of alleged mob boss Joseph Massino). At a higher pay-grade, President George W. Bush and high officials of his administration, despite their subsequent disavowals, sent signals about toleration of mistreatment of detainees in Iraq when they offered their opinions that international law was unduly restrictive or irrelevant. *See* Anthony Lewis, *Making Torture Legal*, N.Y. REV. BKS., July 15, 2004, at 4 (discussing development of the Administration's legal position, which disregarded both treaties and applicable precedent).

occupational groups, such as Palestinians on the West Bank,[170] Jews in Israel,[171] Tutsis in Rwanda,[172] or doctors performing abortions in the United States.[173] Here, too, leaders may couch their directives in terms of opinion or metaphor, noting, for example, that "the gates of resistance are open totally."[174] What separates such expressions from mere statements of opinion or sentiment is their context: the organizational structure of the group and its pattern or practice of violent acts suggests that the audience for the remarks consists of members of the group who view the expressions not as opinions, but as operational instructions.[175]

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[170] *See* HOFFMAN, *supra* note 1, at 102 (describing machine-gun attack by militant Israeli settlers, pursuant to "specific approval and sanction of their own clerical authorities," on Islamic students at college on West Bank, which killed three and wounded thirty-five).

[171] *Id*. at 99 (discussing attacks on Israeli civilians by Palestinian group Hamas).

[172] *See* TILLY, *supra* note 114.

[173] *See* HOFFMAN, *supra* note 1, at 119-20.

[174] A key political leader of Hamas acknowledged that he used this phrase to trigger suicide bombings. *See* Joel Brinkley, *Arabs' Grief in Bethlehem, Bombers' Gloating in Gaza*, N.Y. TIMES, April 4, 2002, A1; *cf*. Elaine Sciolino, *Moroccan Connection Is Emerging as Sleeper in Terror War*, N.Y. TIMES, May 16, 2004, sec. 1, p. 1 (noting that comment such as "soccer team is ready" can be a trigger for illegal operations). Government evidence about use of code, public or private, by terrorist organizations, should be particularized and concrete to justify restrictions on communication. *See* Margulies, *Virtues of Solidarity*, *supra* note 16, at 207-10 (discussing problems with attorney-client monitoring policy implemented by Attorney General Ashcroft); Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, 17 GEO. J. LEGAL ETHICS 145 (2004) (same).

[175] *See* United States v. Abdel Rahman, 189 F.3d 88, 116 (2d Cir. 1999) (upholding conviction for conspiring to blow up New York City landmarks and commit other acts of violence despite defendant's contention that he was merely stating his opinion within bounds of First Amendment; evidence allowed the jury to infer that defendant's communications constituted direction to act). This operational link separates the examples discussed in the text from the abstract discussions of violence protected under *Brandenburg*. However, fully addressing such operational speech in the terrorism

In the context of Internet-driven collective violence, the public expression of the authorization and the occasional time lag between the authorization and subsequent violence do not vitiate the operational character of the remarks.[176] The asynchronous nature of Internet time allows operatives to readily gain access to material on web-sites at their convenience. An operative who is inaccessible during the "real-time" delivery of the authorization of violence can readily pick up the thread at a subsequent point. Imminence also seems to be irrelevant where, as in the case of September 11, terrorist operations can take months or years of planning.[177] From an anti-terrorist policy point of view, the relevant issue is the ongoing capability of the terrorist organization to plan and execute violence once authorized, not the time period between the authorization and the completed act.

The structure of violent networks also undermines the rationale for the protection of public speech. In the collective violence context, victims are fungible, targeted because of group characteristics such as race or ethnicity rather than individual identity.[178] Authenticity entrepreneurs can

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context requires some modification of *Brandenburg*'s imminence requirement, as well as the presumption that public speech is protected. *Cf. infra* notes 176-80 and accompanying text.

[176] *See* ROHAN GUNARATNA, INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR 76 (2002) (noting Al Qaeda operatives' use of encrypted e-mail communications).

[177] *See* 9/11 COMMISSION REPORT, *supra* note 2; Brian M. Jenkins, *The Organization Men: Anatomy of a Terrorist Attack*, *in* HOW DID THIS HAPPEN? 1, 9 (James F. Hoge, Jr. & Gideon Rose eds., 2001) (discussing planning of September 11 attacks).

[178] *See* HOFFMAN, *supra* note 1, at 1010 (noting that Rabbi Meir Kahane "openly called upon the Israeli government to establish an official 'Jewish terrorist group' whose sole purpose would be to 'kill Arabs and drive them out of Israel and the Occupied Territories'"). *See generally* PHILIP B. HEYMANN, TERRORISM AND AMERICA: A COMMONSENSE STRATEGY FOR A DEMOCRATIC SOCIETY 99 (1998) ("speeches or writings by charismatic leaders urging political violence can provide the battering ram of encouragement a potential terrorist needs to take himself past the wall of social condemnation to a willingness to commit violent acts"); HOFFMAN, *supra* note 1, at 94 ("Religion...

deliver instructions to commence targeting such fungible victims *more* efficiently in public than in private.[179] Committed or prospective perpetrators may also view directives on a web-site as more authoritative than dissemination in a more private medium, whether someone's living room or a chat room on the Internet. Moreover, in an area such as Rwanda, which in the 1990's approached a "tipping point" of violence as a result of authorizations and collective appeals by "authenticity entrepreneurs," perpetrators may also be fungible, deciding to commit violence because of opportunity rather than a long pedigree of commitment to the cause.[180] Finally, when operatives are committed but dispersed and compartmentalized to promote secrecy, a broad public authorization is a useful starting point for planning. Once an authenticity entrepreneur issues a directive, planning can proceed in a more covert fashion, with the secret and homogenous structure of the organization shutting out mediating views.

Threats offer yet another context in which abstract justifications of violence can combine with specific, personal information about possible targets of violence to generate a message that, viewed as a whole, is operational. In such a case, a participant-centered approach would consider the impact of such hybrid speech on the participation of targets, as well as speakers. The participant-centered approach, therefore, is inherently reciprocal, protecting the communication of those who do not

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imparted via clerical authorities claiming to speak for the divine – therefore serves as a legitimizing force. This explains why clerical sanction is so important to religious terrorists and why religious figures are often required to 'bless' (i.e., approve or sanction) terrorist operations before they are executed").

[179] *Cf*. Greenawalt, *supra* note 8, at 118 n. 52 (noting that precautions often possible in response to public speech are not practicable in case where "racist speaker urged members of his audience to kill a member of another race, at random").

materially interfere with the ability of others to speak.

Moving beyond these categories, communication can also entail the mobilization of infrastructure for future illegal activity. Mobilizing activity stops short of operational action's direct link to violence, instead building an organization's resources and capabilities. For example, a person may seek to collect money in order to hand it over to a transnational network such as Al Qaeda, whose track record of violence has resulted in its designation as a terrorist organization. Such an individual might also knowingly manage a web-site on Al-Qaeda's behalf,[181] or contribute to a violent network's inventory of information about security measures and vulnerabilities of possible terrorist targets, knowing that such information will aid the network in making final target selections.[182]

Courts generally regard such mobilization as appropriately prohibited by government, as long as the limits are carefully tailored to avoid direct regulation of protected speech.[183] Under this analysis, Congress can prohibit raising cash for a transnational organization with a recent track record of violence, because the transnational and horizontally integrated nature of the group makes it difficult to

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[180] *See* TILLY, *supra* note 114, at 34; Margulies, *Regime Change*, *supra* note 17, at 395-96.

[181] *See* Amy Waldman & Salman Masood, *Elaborate Qaeda Network Hid 2 Captives in Pakistan*, N.Y. TIMES, Aug. 3, 2004, at A10 (noting capture of Muhammed Naeem Noor Khan, a computer engineer who worked with Al Qaeda in "an elaborate network for transmitting messages across Pakistan and then posting them in coded e-mail messages or on the Web").

[182] *See* Douglas Jehl & David Johnston, *Reports That Led to Terror Alert Were Years Old, Officials Say*, N.Y. TIMES, Aug. 3, 2004, A1 (discussing discovery of detailed information apparently compiled by Al Qaeda operatives about security arrangements at United States and global financial institutions).

[183] *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133-36 (9th Cir. 2000), *cert. den. sub nom* Humanitarian Law Project v. Ashcroft, 532 U.S. 904 (2001).

ensure that money goes only to nonviolent activities.[184] Congress cannot, however, prohibit pure affiliational or informational speech in support of the group's ends or means. Nevertheless, as we shall see in the next section, distinguishing between protected affiliational or informational statements and mobilizing conduct is not always easy, creating the risk that regulating mobilization will become a back-channel method for restricting content and singling out marginalized groups such as immigrants.

In sum, each of these categories, including affiliational, informational, operational, and mobilizational speech, bleed into each other. While each category has paradigm cases where consensus is plausible, at the margins overlaps and ambiguities persist. To consider how the participant-centered approach assists in sorting out those ambiguities, consider the examples in Part V.

V. THE PARTICIPANT-CENTERED APPROACH IN PRACTICE: THREE EXAMPLES

Ambiguities between state power and civil liberties may be a permanent legacy of September 11. Cyberspace has more than its share of such uncertain boundaries. Legal issues surround the

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[184] *Id*. at 1136 (noting difficulties in accounting for money distributed transnationally, and asserting that some ostensibly nonviolent activities, such as special support for the families of suicide bombers, also aid and abet violence); *cf*. Margulies, *Virtues and Vices of Solidarity*, *supra* note 16, at 200-07 (same); Neuman, *Terrorism, Selective Deportation and the First Amendment*, *supra* note 110, at 329-30 (same). Even scholars who argue, with some justification, that the mobilization rationale is overbroad concede that Congress could prohibit fund-raising for groups, such as Al Qaeda, "so committed to violence that all other activities are merely a front for terrorism." *See* COLE, *supra* note 17, at 62. This concession begs the question of who decides which groups meet the standard. As an institutional matter, courts may not be the optimal forum to assess the degree of transnational organizations' commitment to violence. *See* U.S. v. Rahmani, 209 F. Supp.2d 1045, 1051-52 (C.D. Ca. 2002) (holding that appropriateness of designation of group as terrorist organization is political question, while holding that the procedures surrounding the designation must meet due process requirements for notice and an opportunity to be heard); *see infra* notes 201-06 and accompanying text (proposing limits on mobilization rationale as basis for culpability).

prohibition of Internet-based "material support" to terrorist organizations and conspiracies, the publication on the Web of terrorist manuals or scientific processes, and the use of the Internet to circulate "true threats" against groups such as abortion providers.

A. *Material Support*

The participant-centered approach helps to clarify some problems associated with conduct on the Internet that might violate the prohibition on "material support" of a designated terrorist organization (DFTO)[185] or terrorist conspiracy.[186] The material support prohibitions are an example of government

[185] *See* 18 U.S.C. 2339B. Material support includes funding, training, "expert advice or assistance", "communications equipment", "personnel", "transportation", and "other physical assets." *See* 18 U.S.C. 2339A(b) (2002). Funding includes "currency or monetary interests in financial securities... [and] financial services". *Id*. Material support also includes "lodging, ... false documentation or identification, facilities, weapons, lethal substances, [and] explosives". The USA Patriot Act added the "expert advice or assistance" category in 2001. A number of courts have held that some of these terms are unconstitutionally vague as applied, *see, e.g.*, United States v. Sattar, 272 F. Supp.2d 348, 357-61 (S.D.N.Y. 2003) (holding that "personnel" and "communications equipment" were unconstitutionally vague as applied); *cf*. COLE, *supra* note17, at 75-79 (arguing that statute on its face violates First Amendment); Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilty By Association Critique* (Review Essay), 101 MICH. L. REV. 1408, 1433-51 (2003) (discussing material support statute, and arguing that certain terms, such as "personnel," are unconstitutionally vague in the sec. 2339B context); *but see* Margulies, *The Virtues and Vices of Solidarity*, *supra* note 16, at 203-07 (arguing that provisions are not vague as applied to facts of *Sattar*, where government charged defendants with knowingly acting on behalf of a designated terrorist organization in order to facilitate violent acts).

[186] *See* 18 U.S.C. 2339A (prohibiting material support to conspiracies to commit specific violent crimes, such as a conspiracy to kill or kidnap persons in a foreign country, prohibited by 18 U.S.C. sec. 956); *cf*. United States v. Sattar, 314 F. Supp.2d 279, 296-303 (S.D.N.Y. 2004) (holding, when government filed superseding indictment under sec. 2339A after dismissal of charges brought under 2339B on vagueness grounds, that 2339A prohibitions, because they referred to specific crimes, were not unconstitutionally vague); *cf*. Chesney, *supra* note 185 (discussing differences between sections 2339A and B).

regulation that imposes incidental burdens on speech in the interest of regulating conduct. Too broad an interpretation of "material support" on the Internet could recapitulate the sorry history of the bad tendency test in a more neutral guise.[187] Applying the participant-centered view, however, offers an exit from this difficulty.

1. Incidental Burdens Generally

Permitting government to impose incidental burdens on speech in the course of vindicating substantial government interests is both necessary and dangerous. As a general matter, incidental burdens analysis holds that the government can regulate conduct related to free speech when: (1) such regulation is content-neutral; (2) the regulation serves an important governmental interest; and (3) the regulation is narrowly tailored to serve the interest.[188] Without some ability to impose incidental burdens, government itself would become impossible.[189] However, the incidental burdens test, which is less demanding on government than the test for content-based speech, leaves open a back-door for government efforts to control speech.[190]

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[187] *Cf*. Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2236-60 (2003) (discussing political and institutional factors that tend to broaden the scope of criminal liability under federal statutes); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 799-801 (2003) (discussing institutional incentives of prosecutors and other law enforcement officials); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001) (discussing convergence of interests between legislators and prosecutors that broadens scope of criminal law).

[188] *See* United States v. O'Brien, 391 U.S. 367 (1968).

[189] *See* Dorf, *supra* note 15.

[190] *See id.* (criticizing implementation of test as unduly deferential); Jed Rubenfeld, *The First*

This problem with the incidental burdens test is emphasized in the leading Supreme Court decision, *United States v. O'Brien*.[191] In *O'Brien*, the Court upheld a statute passed at the height of protests against the Vietnam War which criminalized burning one's draft card. The Court asserted that the government was merely trying to vindicate its interest in an orderly draft system. For the Court, the system would become disorderly if registrants for the draft or draft-eligible individuals could destroy their draft cards. For the Court, therefore, the statute was a narrowly tailored vehicle for serving a significant government interest. According to the Court, since the statute was indifferent to any political view that an individual might seek to express in burning his draft card, simply penalizing the conduct itself, the statute was content-neutral.

The same analysis figures in the more recent case of *Universal City Studios v. Corley*.[192] In *Corley*, the Second Circuit upheld the provisions of the Digital Millennium Copyright Act (DMCA) that prohibited the distribution of software that had the ability to defeat use and reproduction restrictions on digital products licensed for sale. The court reasoned that the DMCA does not directly impinge on speech, since it does not restrict persons from criticizing the restrictions contained in licensing agreements, but simply promotes enforcement of those agreements. Thus, according to the *Corley* court, the DMCA is a reasonable and narrowly tailored vehicle for promoting intellectual property rights.

Amendment's Purpose, 53 STAN. L. REV. 767, 775-78 (2001) (questioning coherence of incidental burdens analysis).

[191] United States v. O'Brien, 391 U.S. 367 (1968).

[192] Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).

Commentators have vigorously criticized both *O'Brien* and *Corley* as requiring far less tailoring than the incidental burdens test seems to contemplate. In *O'Brien*, for example, commentators have noted that Congress had already enacted measures requiring that registrants for the draft have their draft card in their possession.[193] The government did not demonstrate that these pre-existing provisions were inadequate to safeguard the government's interests. Moreover, commentators assert that the timing of the statute's enactment, after the start of protests against the Vietnam War, strongly suggests that the statute was designed to suppress speech, and was therefore not content-neutral.

Similarly, commentators have argued that *Corley* did not take into account that the use restrictions at issue had little relevance to the goal of preventing unauthorized duplication.[194] Moreover, these commentators have in effect argued that the DMCA was *not* content-neutral, since it took sides between those arguing for corporate intellectual property rights, and consumers arguing for preserving fair use rights.[195] In addition, the Court's invocations of simultaneity proved too much – if the software was *already* widely available, enforcing the statute against the hackers would not effectively serve a government interest[196] and would merely suppress hackers' efforts to encourage corporations to build a better, more responsive business model.

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[193] *See* GREENAWALT, *supra* note 15, at 328-31; Dorf, *supra* note 15, at 1202-05.

[194] *See* VAIDHYANATHAN, *supra* note 4.

[195] *Cf*. Liam Seamus O'Melinn, *The New Software Jurisprudence and the Faltering First Amendment*, 6 VAND. J. ENT. L. & PRAC. 310, 316-18 (2004) (criticizing incidental burdens analysis in *Corley*).

[196] *See* DVD Copy Control Ass'n v. Bunner, 116 Cal. App.4th 241, 251 (Ct. App. 6th App. Dist. 2004) (endorsing celebratory view of simultaneity, which regards regulation as futile).

2. Material Support, the Internet, and the First Amendment

Transported to the law and terrorism arena, material support concerns frame the analysis of the recent prosecution of Sami Omar Al-Hussayen, a Saudi national studying computer science at the University of Idaho. Al-Hussayen was arrested with great fanfare in early 2003 and charged with providing and conspiring to provide material support to terrorist groups. According to the government, the defendant provided "expert advice or assistance" by using his computer and Internet skills to set up a web-site for a group later designated as a terrorist organization, which also included a link to a web-site tied to the Palestinian DFTO organization Hamas.[197] Al-Hussayen also posted accounts and audio files of speeches by radical Saudi clerics to his site, to chat rooms, and to e-mail lists.[198] The government did not allege and presented no evidence that Al-Hussayen actually collected money for the purpose of conveying funds to Hamas, or held himself out as an agent of Hamas for this purpose. Indeed, the government never alleged that Al-Hussayen worked for Hamas at all. However, the government alleged that Al-Hussayen specifically intended to provide material support to Hamas and other terrorist organizations.

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[197] According to the government in its indictment, Al-Hussayen helped "create, operate, and maintain" a website, www.islamway.com, that "included links to a variety of articles, speeches, and lectures promoting violent jihad in Israel." On this site, according to the indictment, a page asked visitors the question, "What is your role?," answered by urging visitors to contribute to Hamas, and provided a hyperlink to another site, www.palestine-info.org, to permit donations to Hamas. *See* United States v. Al-Hussayen, Cr. No. 03-0048-C-EJL (D. Idaho March, 2004) (hereinafter Al-Hussayen Indictment), at 8.

[198] *See id*. at 9 (alleging that a February, 2000 posting by the defendant urged members of the group to "donate money to support those who were participating in violent jihad").

While a jury ultimately acquitted Al-Hussayen of the material support charges,[199] Al-Hussayen's victory was of limited value to the defendant. Al-Hussayen's family left the country, and Al-Hussayen was himself imprisoned for over a year pending trial (during which time he continued to work on his degree from his jail cell), before he was subsequently deported.[200] The government was able to proceed to trial in the case, confining Al-Hussayen for a year, because specific intent is virtually always a triable issue. Because the government continues to bring other material support cases involving the Internet,[201] now is an appropriate time for considering whether the specific intent standard in Internet material support cases is sufficiently speech-protective.

The Al-Hussayen prosecution illustrates the risk that the material support prohibition will become the contemporary equivalent of the content-based regulation the courts permitted in the World War I cases like *Schenck*. One of the government's recent theories was in effect the mirror image of *Schenck*: while Schenck sent direct mail to inductees, allegedly with the intent of persuading them not to serve, Al-Hussayen sent material on-line to persons interested in Islamic issues, allegedly with the specific intent of encouraging them to participate in terrorist training camps or contribute funds to terrorist organizations.

Despite the premise of judicial decisions upholding the material support statute as being content-neutral, the government's theories nevertheless focused on the content of the material conveyed on-line

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[199] *No Conviction for Student in Terror Case*, N.Y. TIMES, June 11, 2004, A14.

[200] *See Saudi Acquitted in Terror Case is Deported*, L.A. TIMES, July 22, 2004, A14.

[201] *See* Jehl & Johnston, *Terror Detainee is Seen as Leader in Plot by Al Qaueda*, *supra* note 128, at A9.

by the defendant. A statement such as, "I support Hamas and I urge everyone on this list to support it monetarily and otherwise," reflects an opinion (praise of Hamas) and advocacy of an abstract course of action (financial or other support) that should receive First Amendment protection. Prosecution for Internet speech under the material support statute in this context, far from merely imposing incidental burdens on speech, constitutes a de facto content-based classification. Permitting such law enforcement action also encourages the profiling of particular groups the government associates with terrorism, including immigrants of the Muslim faith. Moreover, prosecutions of this kind unduly discount the efficacy of mediation, such as the deterrent value of prohibiting the actual provision of material support in the form of financial assistance or other resources. Unfortunately, the court in the Al-Hussayen case failed to rule on the issue, thereby posing no obstacles to future government use of the material support statute for this purpose.

To avoid the risk of a rebirth of the bad tendency test, courts presiding over material support prosecutions involving Internet communications should require a showing that the defendant acted as an agent for a specific terrorist organization, or as a participant in a conspiracy to commit a specific terrorist act. To be an agent in this context, a defendant charged with material support of a designated terrorist organization would have to reach an express or implied agreement with decisionmakers within the organization to seek resources on the organization's behalf. Agency could involve a defendant holding himself out as collecting money or other resources for the organization, offering advice to prospective contributors on laundering contributions to avoid detection, or providing resources such as

website management directly to the organization – actions that can subsidize or facilitate violence.[202] Proof of such activity moves the speaker's conduct squarely into the operational or mobilizational realm, minimizing the chances that the material support prohibition will be used to chill affiliation or information-seeking.[203]

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[202] *See* Margulies, *Virtues and Vices of Solidarity*, supra note 16, at 203-07 (noting that providing human capital, such as expertise with information technology, directly to DFTO is analogous to providing financial capital, given integrated nature of organization and organization's ability to use human capital to defray other costs); *see generally* Chesney, *supra* note 185 (acknowledging that Congress could criminalize financial contributions and certain forms of human capital such as specific instruction in use of explosives, while arguing that criminalizing other forms of human capital triggers vagueness concerns); *supra* note 184 and accompanying text (discussing case law and commentary on integrated structure of terrorist organizations).

[203] Posting or linking should require similar evidence. Suppose a defendant designs a website and includes a link to the official website of Hamas or Kach. Once linked to the DFTO website, a visitor can click on another link to receive information about contributing financial assistance or other resources to the organization, or possibly even contribute on-line. Despite this, criminalizing provision of the link without more would raise substantial constitutional problems, because of its impact on the provision of information or the expression of affiliation. For example, an anti-terrorist organization could include the link to offer visitors to its site an opportunity to see for themselves the nature of the material on the DFTO site. Others who merely seek to express their affiliation with the DFTO could link for that purpose. For this reason, even proof of specific intent to encourage contributions should be insufficient, without evidence that the defendant acted in concert with the organization. *Cf*. Comcast of Illinois X, L.L.C. v. Hightech Electronics, Inc., No. 03-C-3231, 2004 U.S. Dist. LEXIS 14619, *18 (N.D. Ill. stet 2004) (holding that plaintiff, cable operator, stated a claim for relief by alleging that defendant received compensation for links to websites that sold illegal pirating devices); Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc., 75 F. Supp. 2d 1290, 1293 (D. Utah 1999) (holding that liability for links to websites containing copyright-infringing material would not attach absent proof of "direct relationship" between defendant and individuals operating websites); *with* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 456 (2d Cir. 2001) (upholding injunction on posting code that circumvented user-restrictions or linking to sites containing code if defendant knew offending material was on site, knew material was illegal, and acted with purpose of disseminating code); *cf*. Shady Records, Inc. v. Source Enterprises, No. 03 Civ. 9944, 2004 U.S. Dist. LEXIS 10511, slip op. at 10-12 (S.D.N.Y. stet 2004) (holding defendant magazine in contempt for violating court order that required removal of links on magazine's website to complete lyrics of song by rapper Eminem).

Courts have often used a comparable approach to determine liability in cases involving speech facilitating violation of the tax laws. These cases mirror material support cases like Sami Al-Hussayen's – in the tax context, defendants allegedly seek to deprive the government of lawful revenue, while in the material support context, defendants allegedly seek to provide revenue to unlawful organizations. In tax cases, courts have held that the First Amendment protects defendants who support the position that tax laws are unfair and that persons therefore are morally justified in violating them.[204] Courts have often looked for some indicia of collusive activity between the speaker and the audience, including concrete assistance in the filing of fraudulent tax returns.[205]

In the tax context, such collusive behavior lends an operational tone to the speaker's conduct, removing it from the realm of affiliation or information. Specific collaboration between the speaker and the audience raises particular concerns about simultaneity and the absence of mediation. A visitor to a DFTO or tax-evasion website that receives concrete advice is far more likely to quickly make the

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[204] *See* United States v. Dahlstrom, 713 F.2d 1423, 1428 (9th Cir. 1983) (holding that generalized instructions to an audience on how to violate the tax code, along with advocating for tax shelter scheme that was not clearly illegal at the time of the conduct, are protected).

[205] *See* United States v. Buttorff, 572 F.2d 619, 623 (8th Cir. 1978) (to establish culpability for aiding and abetting filing of fraudulent tax return, defendant would have to "in some sort associate himself with the venture" in a specific manner); United States v. Raymond, 228 F.3d 804, 807 (7th Cir. 2000) (defendant negotiated with individuals interested in purchase of defendant's set of tax violation materials, selling materials for as much as $2,600; many purchasers subsequently engaged in violation of the tax laws); *cf*. United States v. Estate Preservation Servs., 202 F.3d 1093, 1198-99 (9th Cir. 2000) (arguing that extent of defendant's participation in tax violations committed by others was factor in issuance of injunction against "plan or arrangement" to furnish statements in tax return pursuant to 26 U.S.C.§ 6700); United States v. Schiff, 379 F.3d 621, 626-30 (9th Cir. Aug. 9, 2004) (employing commercial speech analysis to justify enjoining defendants who expressed protected anti-tax views in book but also used book to market deceptive products on website).

decision to go forward with a specific violation, having been enabled with operational guidance facilitating such conduct. Similarly, the agreement between the speaker and the audience member makes it far less likely that other countervailing influences, including the general deterrence provided by law, will interfere with the audience member's plans, or that the government will learn of the illegal activity. Furthermore, such concerted activity gives the speaker a stake in the transaction, making it more likely that he or she will take further actions to ensure the success of the particular mode of illegal conduct.[206]

The above analysis would have resulted in the dismissal of the charges against Al-Hussayen, but would have permitted prosecution to go forward in *United States v. Sattar*.[207] In *Sattar*, the government charged three individuals with violating the material support prohibition by seeking to secure the approval of an incarcerated terrorist leader, Sheikh Abdel-Rahman, for the Internet posting of a decree urging members of the Sheikh's organization to kill Americans and Jews.[208] The organization had been designated by the government as a terrorist organization after the leader was convicted of participating in a conspiracy to commit numerous acts of violence within the United States.[209] The

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[206] Conduct of this kind strongly resembles what Kent Greenawalt calls "situation-altering utterances." See GREENAWALT, supra note 15, at 244-45 (noting that individualized training for illegal activities should not constitute protected speech).

[207] United States v. Sattar, 314 F. Supp.2d 279 (S.D.N.Y. 2004).

[208] *Id.* at 291.

[209] *See* United States v. Abdel Rahman, 189 F.3d 88, 109-17 (2d Cir. 1999) (upholding conviction of defendants under federal seditious conspiracy statute, 18 U.S.C. 2384, for inter alia, conspiring to blow up New York City landmarks such as the Holland Tunnel). Members of the group, in an avowed attempt to gain the leader's release, engaged in a massacre of more than sixty people at a tourist site in Luxor, Egypt. *See* HOFFMAN, supra note 1, at 93 (discussing Luxor attack); Douglas

group later declared a "cease-fire." The co-defendants allegedly sought to procure the jailed leader's approval of the fatwah and its subsequent posting on the Internet to disrupt the cease-fire and turn the group back toward violence.

If it is true, as the government alleges, that the *Sattar* defendants attempted to place the incarcerated leader of the organization back in the "loop" in order to direct future violent acts, the defendants went beyond the realm of information and statements of affiliation into the operational realm of conspiracy.[210] Although the fatwah was couched in the semantic frame of opinion, the recent history

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Jehl, *70 Die in Attack at Egypt Temple*, N.Y. TIMES, Nov. 18, 1997, at A1 (same). The defendants in *Sattar* include defense attorney Lynne Stewart and others working for Stewart, who allegedly used their access to the Sheikh as his legal representatives to facilitate communications about future violent activities. *Cf*. Margulies, *Virtues and Vices of Solidarity, supra* note 16, at 194 (arguing that if allegations are true, Stewart "crossed the line" separating advocate from accomplice and merited prosecution). Stewart is mounting a vigorous defense. *See Justice for Lynne Stewart, at* http://lynnestewart.org (last visited Oct. 12, 2004).

[210] A fatwah like the one allegedly endorsed by Sheikh Abdel Rahman authorizing the killing of Jews "wherever they are," or a "death sentence" distributed on the Internet regarding a group or an individual, should be reachable by the law despite its arguably public nature and lack of demonstrable imminence. *See supra* notes 176-80 and accompanying text. Often, such authorizations have direct links with subsequent violent operations. *See* HOFFMAN, *supra* note 1, at 97 (noting that persons responsible for first World Trade Center bombing in 1993 "specifically obtained a *fatwa* from Sheikh Omar Abdel Rahman... before planning their attack"). Where the government has designated a group as a terrorist organization through a statutory process, restrictions on the communication of potential incitements can also fit a counter-mobilization rationale, constituting legal attempts to disrupt terrorists' communications networks. In this sense, a bar on intra-organization communications about proposed violent activity is akin to a bar on the receipt or collection of funds, or on the provision of communications equipment to organization members. *See* 18 U.S.C. § 2339(a) (setting activities that constitute material support). Since the law could appropriately prohibit an individual from lending the incarcerated leader of the organization a disposable cell-phone on which to make calls to organizational operatives, *see* Chesney, *supra* note 185; it could also prohibit a visitor to the leader from acting as a communications link that gives the leader input from subordinates and allows him to offer instructions.

and the statement's particular wording suggested otherwise.[211] The evidence that the *Sattar* defendants acted in concert with the organization's leader on the organization's behalf and with knowledge of the organization's structure and practice distinguishes the *Sattar* case from the independent informational activities engaged in by Al-Hussayen. The participant-centered approach's focus on context thus holds decisionmakers in organizations accountable for statements that are the operational predicates for violent acts, while simultaneously protecting independent participants in civic discourse who merely offer information or express their affiliation, no matter how extreme.

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[211] Organizations with recent histories of violence may in some cases exhibit a more heterogeneous, mediated discourse. Indeed, there is some evidence that this is true of the organization involved in the *Sattar* case, the Gama Islamiya or Islamic Group (IG). *See Lawyer denies Islamic Group has withdrawn backing for peace*, BBC SUMMARY OF WORLD BROADCASTS, June 24, 2000 (quoting Egyptian lawyer for faction of Islamic Group as disputing report that Sheikh Abdel Rahman had withdrawn his support for the cease-fire). However, in such cases members of the group committed to violence may splinter off, forming a new group that complies with the leader's decrees. Groups committed to violence need not be numerous to be deadly, as the nineteen September 11 hijackers demonstrated.

The issue of change in terrorist organizations such as IG is nonetheless a difficult one not adequately addressed in current United States anti-terrorism law. I have suggested elsewhere that designated terrorist organizations have the opportunity to apply for "transition relief," a remedy akin to bankruptcy that would allow the organization to wipe the slate clean and chart a non-violent course in the future. A mechanism for affording such relief to organizations that demonstrate a transition to non-violence would strengthen incentives for positive change. *See* Margulies, *Regime Change*, *supra* note 17, at 410. Effective anti-terrorism policy also requires assistance to grass-roots groups abroad that support non-violent reform. *Id.* at 411-12; *cf.* Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1433-57 (2003) (noting role of women's groups in working within framework of Islamic culture and society); Janine A. Clark & Jillian Schwedler, *Who Opened the Window? Women's Activism in Islamist Parties*, 35 COMP. POL. 293 (2003) (same); *see also* Heiner Bielefeldt, *"Western" Versus "Islamic" Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion of Human Rights*, 28 POL. THEORY 90, 109-12 (2000) (noting diversity and nuance as well as common ground within cross-cultural conceptions of human rights); Volpp, *supra* note 17, at 1592-98 (same).

B. *Disclosing Tactics, Techniques, and Scientific Methods*

The participation-centered approach also argues for greater protection for the on-line publication of terrorist techniques and scientific methods. Disclosure of such material may lead to greater citizen involvement and more vigorous debate. Moreover, the arguments against such participation are likely to be highly skewed variants of the simultaneity and unmediated risk claims that our jurisprudence has rightly rejected in the core area of political speech.

To explore this argument in the Internet and terrorism setting, it is useful to return to *Universal City Studios v. Corley*,[212] in which the court enjoined a website's posting of computer code that enabled website visitors to play DVDs on Linux computers. Although the code had been written by hackers without knowledge of or participation in the work that produced the use restriction, the court validated the recording industry's vague argument that the use restriction also discouraged piracy.[213] The *Corley* court's deference to the recording industry was particularly troubling in light of the First Amendment value of the code in question.

In the DVD cases, the on-line availability of techniques that may aid illegal conduct is important to alert society that such knowledge *is* available, and therefore to encourage business organizations seeking to benefit from copyright-protective technologies to better equip themselves to compete in the

[212] Universal City Studios, Inc. v. Corley, 273 F.3d 429, 455 (2d Cir. 2001).

[213] *Id.* at 454-55; *see* VAIDHYANATHAN, *supra* note 4, at 70 ("it would be hard to show that hacking through [the user restriction] CSS... contributes to piracy or peer-to-peer distribution for one simple yet often ignored reason: CSS regulates access and compatibility, not copying. Anyone can copy the data on a DVD with little effort. Playing a DVD on an unauthorized machine is another matter").

marketplace of ideas. One way to deal with music or movie piracy, for example, would be to create a user-friendly alternative to peer-to-peer networks. Corporations that avoid devising such alternatives, because of reliance on a technological lock-down, are relying on short-term fixes, instead of considering long-term values.[214]

A consideration of the First Amendment value of the DVD-hacking code in the Internet context also makes short work of the mediation and simultaneity claims. While a code that penetrated copyright restrictions on software would allow individuals to make unauthorized copies, software manufacturers have a range of mediative strategies at their disposal. As suggested in the preceding paragraph, mediation may be indirect, taking the form of attractive alternative technologies devised and marketed by the manufacturers themselves. In addition, if manufacturers wish to retain the option of coercive measures, they can institute legal actions against end-users to deter piracy. Indeed, manufacturers have pursued a combination of these two mediative strategies because the simultaneity argument, irrespective of legal results, cuts so clearly against them as a matter of business planning. Once software of such general interest is on the Internet, putting the genie back in the bottle is all but impossible.[215] If the goal

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[214] *See* LESSIG, *supra* note 7; *see also* Tom Zeller, Jr., *Permissions on Digital Media Drives Scholars to Lawbooks*, N.Y. TIMES, June 14, 2004, at C4 (describing travails of Prof. Edward Felten of Princeton, who was subjected to threats of a lawsuit over publication of a paper analyzing technologies to secure music files online).

[215] *See* DVD Copy Control Ass'n v. Bunner, 116 Cal. App. 4th 241, 253 (Cal. Ct. App. 2004) (arguing that injunction would be unavailing in Internet intellectual property case because of widespread circulation of decryption code); *see also* VAIDHYANATHAN, *supra* note 4, at 71-72 (author notes that, "Within days of the injunction [in *Corley*], T-shirts appeared with the [decryption] code emblazoned on them (with the headline, 'I am a circumvention device.'). People wrote poems and songs that expressed the code lyrically. Internet users appended the code to the signature sections of e-mails").

of suppressing speech is to bar access to information, legal efforts to cope with the simultaneity of the Internet will literally fail before they begin.[216] The global reach of the Internet compounds the futility of legal intervention in such cases.

Armed with analysis from the software piracy context, we can investigate how these issues play out regarding two areas important for law and terrorism: disclosure of terrorist tactics and scientific processes for the formation of weapons of mass destruction.

Internet publication of detailed instructions for terrorists on assassinations, extortion, and the like, inevitably give rise to justified public apprehensions about the impact of these violent acts. Yet here, as in the context of extremist speech, current legal tests based on specific intent may not provide adequate protection for speech. Consider the example of "Hit Man,"[217] a detailed guide for hired killers published in hard-copy form as well as on the Internet.[218] Because the publisher stipulated for purposes of summary judgment that it intended that the materials be used by actual or aspiring hit-men, a court awarded damages to victims of killings where the killer apparently used the book.[219] It was clear, however, that there was no actual or knowing participation in the killings by the book's author or

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[216] *See* Ashcroft v. ACLU, 124 S. Ct. 2783, 2794 (2004) (noting that courts below failed to consider rate of change of technology on Internet); Lee, *supra* note 94, at 1307-08 (same).

[217] Rice v. Paladin Enters., 128 F.3d 233, 235-40, 243 (4th Cir. 1997) (denying summary judgment to publisher).

[218] *See* Rex Ferel, Hit Man Online: A Technical Manual for Independent Contractors, *at* http://ftp.die.net/mirror/hitman (last visited Aug. 20, 2004).

[219] *Cf*. PHILIP B. HEYMAN, TERRORISM, FREEDOME, AND SECURITY: WINNING WITHOUT WAR 108 (Mit. Pr 2003) (citing *Paladin* for principle that "constitutional protections... may not prevent criminalizing the dissemination of information intended to help others in committing a crime by, for example, publishing instructions on how to commit a terrorist attack").

publishers.[220]

While the "Hit-Man" decision has its proponents,[221] it is troubling because of the guide's First Amendment value as well as the court's failure to think through the issues of simultaneity and mediation. The book's value, like that of a Jihad manual for terrorists-in-training, is in illustrating the vulnerabilities of our current system, and the ease with which a lawbreaker can operate with impunity.[222] The Hit-Man and Jihad materials also offer useful insights into the psychological dynamics of the individuals who embark on such a violent course of action, thus allowing participants in civic debates to learn about the

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[220] In this sense, the "Hit-Man" case and the Jihad manual are different from the cases on the publishing of tax avoidance schemes. In most of the tax schemes, *see* United States v. Schiff, 2004 U.S. App. LEXIS 16351 (9th Cir. Aug. 9, 2004), the defendants have engaged in some degree of interaction with the persons who may use defendants' products or materials to file fraudulent returns. *See* United States v. Raymond, 228 F.3d 804, 815 (7th Cir. 2000); cases cited *supra* notes 204-06 and accompanying text. In *Schiff*, for example, the defendant wrote a book arguing that the administration of the tax laws was unfair and unconstitutional, suggesting that taxpayers enter "zero" as the amount of income to be taxed, regardless of the money the taxpayer had actually earned. In upholding an injunction against the defendant's continued sale of his book on his website, http://www.paynoincometax.com , and a requirement that the defendant post the injunction on his site, the court noted that the defendant also marketed packets and kits on the site that purport to assist taxpayers in legally paying no taxes. (The website items include a "Lien and Levy Packet" priced at $95.00 that offers similar tax advice.) The site allows visitors to e-mail the defendant. *Cf*. David Cay Johnston, *Federal Grand Jury Indicts Protester for Tax Evasion*, N.Y. TIMES, Mar. 25, 2004, at C8 (reporting that Schiff and co-defendants were charged with tax evasion and conspiracy to commit tax fraud based on Schiff's alleged failure to declare $3.7 million in sales from his bookstore, defendants' use of offshore accounts to conceal income and assets, and defendants' preparation of at least 4,950 returns falsely declaring zero income). Applying a commercial speech rationale, the court held that while Schiff's book contained protected speech about the tax system, viewed in its totality it served as a marketing tool for the deceptive products Schiff sold on his website. The interactivity and integrated nature of Schiff's enterprise distinguish the case from *Paladin*.

[221] *See* Rodney Smolla, *From Hit Man to Encyclopedia of Jihad: How to Distinguish Freedom of Speech from Terrorist Training*, 22 LOY. L.A. ENT. L. REV. 479 (2002).

[222] The Justice Department has placed an alleged Al Qaeda training manual on the Internet. *See*

homogeneity of thought and selective moral concern of terrorist groups[223] as well as democratic counter-examples that value diversity.

In the Hit-Man and Jihad manual context, our assessment of simultaneity and mediation is likely to be skewed by our apprehension of the events described in the materials.[224] First, consider mediation. If short-term punitive fixes are available against those who distribute such information, we may unduly discount the impact of longer-term mediative strategies, such as policy alternatives that promote global equality and thereby blunt the recruiting of new terrorist operatives.[225] Such alternatives will not always work, particularly given the polarized discourse within violent networks and the small number of people

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http://www.usdoj.gov/ag/trainingmanual.htm (last visited Aug. 20, 2004).

[223] *See* Kanan Makiya & Hassan Mneimneh, *Manual for a 'Raid'*, THE N.Y. REV. OF BOOKS, Jan. 17, 2002, at 18, 20 (discussing Al Qaeda training manuals' targeting of population centers).

[224] *See* Steven J. Sherman, et al., *Imagining Can Heighten or Lower the Perceived Likelihood of Contracting a Disease: The Mediating Effect of Ease of Imagery*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 98, 101 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002) (noting that images that are readily available to human cognition, such as a disease with readily identifiable symptoms, raise assessments of probability of contracting disease even in the absence of objective evidence); *see also* Amos Tversky & Daniel Kahneman, *Extensional versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, in HEURISTICS AND BIASES, *supra*, at 19, 22-25 (noting that judgments about representativeness, defined as superficial similarity between events, raise probability assessment); *see also* Kuran & Sunstein, *supra* note 114 (discussing "availability cascades" as influence on public policy); *see also* Matthew Rabin, *Psychology and Economics*, 36 J. ECON. LIT. 11, 30-31 (1998) (discussing importance of salience in human inference); *see also* ROSEN, *supra* note 57at 75 (discussing cognitive biases in war on terror); *see also* Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional?*, 112 YALE L.J. 1011, 1019 (2003) (same); *cf*. Peter Margulies, *"Who Are You to Tell Me that ?": Attorney-Client Deliberation Regarding Nonlegal Issues and the Interests of Nonclients*, 68 N.C.L. REV. 213, 232-34 (1990) (discussing cognitive biases in lawyering).

[225] *See* Margulies, *Regime Change*, *supra* note 17, at 404-19 (discussing approaches, such as more equitable immigration policy, that stress equality and liberty as well as security in anti-terrorism efforts).

required to create catastrophic damage. However, legal rules should nonetheless encourage such options.[226]

Analysis of simultaneity leads to the same conclusion. As the World War I cases demonstrate, combustibility is a powerful metaphor for the language of incitement, shaping not only views of an event itself, but also assessments of communications perceived as related to the event.[227] People often attribute the same speed and sudden impact characteristic of a catastrophic event, such as an explosion, to abstract speech advocating or describing illegal conduct perceived as related to the catastrophe. These connections, however, are far less clear in practice. Putting together a terrorist operation or a hit requires elaborate planning, as the September 11 hijackers demonstrated. Groups with the structure and control over their members required for such planning also generally have the resources for

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[226] The legal system also has coercive strategies currently available when necessary, including military action when required by self-defense, *cf*. William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679-80 (2003) (discussing "customary constitutional authority" for exigent measures based on self-defense); *see* Richard Falk, *Ends and Means: Defining a Just War*, THE NATION, Oct. 29, 2001, at 11, 12 (justifying American resort to force against the Taliban regime in Afghanistan by arguing that Al Qaeda is a "transnational actor... [whose] relationship to the Taliban regime in Afghanistan [was]... contingent, with Al Qaeda being more the sponsor of the state rather than the other way around"), prosecution of individuals actually committing or conspiring to commit terrorist criminal acts, *see* United States v. Sattar, 314 F. Supp.2d 279, 296-303 (S.D.N.Y. 2004) (upholding charges under 18 U.S.C. sec. 2339A against vagueness challenge), and detention of alleged unlawful combatants with appropriate procedural safeguards; *see* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (holding that presumptive United States citizen detained as alleged enemy combatant was entitled to procedural protections such as right to be heard and right to counsel); *see also* Rasul v. Bush, 124 S. Ct. 2686 (2004) (finding federal jurisdiction under habeas statute to hear petitions of alleged Al Qaeda detainees at Guantanamo Bay Naval Base); *cf*. Margulies, *Judging Terror*, *supra* note 17, at 417-31 (discussing due process in detention of alleged unlawful combatants).

[227] *See* Tversky & Kahneman, *supra* note 224.

developing and distributing their own proprietary tactical materials. Even when, as apparently occurred in the "Hit Man" case, a perpetrator draws inspiration and data from published materials, these materials often duplicate other materials already available.[228] Given the simultaneity of the Internet, attempts to stop the flow of information qua information will merely inspire an endless virtual fun-house of mirror sites.[229]

While on the surface, information about scientific processes may be more technical than information regarding terrorist tactics, the same analysis ultimately applies.[230] Benefiting from a formula for poison gas or a nuclear device, for example, requires the cultivation of a body of knowledge and professional judgment, as well as the resources to build and maintain a physical plant for the manufacture and distribution of the weapon. Developing the expertise and the infrastructure to exploit that formula thus "demands a significant investment of time and money."[231] Persons with sufficient skills and resources to exploit the formula are unlikely to need the published formula to do their work.

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[228] For example, the material on secrecy in the "Hit Man" manual, which boils down to a generic "Trust no one, especially women," *see* "Hit Man" *supra* note 218, largely duplicates the advice in the Al Qaeda Training Manual, *supra* note 222.

[229] *See* "Hit Man" manual, *supra* note 218.

[230] United States v. Progressive, Inc., 467 F. Supp. 990, 992 (W.D. Wis. 1979) (enjoining publication of formula for hydrogen bomb); *cf*. Near v. Minnesota, 283 U.S. 697, 715-16 (1931) (dicta asserting that courts could enjoin disclosure of movements of military transports or "number and location of troops"); N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (holding that First Amendment barred injunction against publication of Pentagon Papers which detailed course of United States involvement in Vietnam).

[231] See VAIDHYANATHAN, *supra* note 4, at 132; *but see* Eugene Volokh, *Crime-Facilitating Speech*, *at* http://www1.law.ucla.edu/~volokh/facilitating.pdf (conceding difficulties of developing infrastructure to exploit information about weapons of mass destruction, but arguing that government can nonetheless prohibit publication of such information).

Similarly, persons lacking such expertise cannot benefit from the formula even it is published on the Internet or elsewhere.[232]

Moreover, similar to the Hit-Man and Jihad manual circumstances, democratic governments have mediative measures available in the scientific process context as well. Persons with scientific expertise who act as agents of terrorist groups to enhance those groups' destructive capacities can be prosecuted under a mobilization rationale.[233] So can persons who donate substantial sums of money to terrorist organizations – money that can be used to purchase the services of persons with such expertise. Similarly, a participant-centered rationale would allow legal recourse against an individual who discloses information gained through participation in proprietary research, or those who induce such a disclosure, since these actions undermine participation in the research process. Absent evidence of such participation, the legal system should not criminalize or enjoin on-line publication of tactics, techniques, or scientific methods.[234]

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[232] *But see* S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1225 (2000) (arguing that law and policy would justify criminalizing publication of bomb-making recipe by Unabomber); *cf*. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273 (2003) (analyzing issues concerning the extent to which criminal liability can be imposed for the dissemination of certain types of speech).

[233] *See supra* notes 201-06 and accompanying text.

[234] *See* POSNER, *supra* note 52, at 361 (arguing that pragmatic application of First Amendment principles would permit prohibition on "disseminating a truthful formula for making poison gas"); *cf*. IGNATIEFF, *supra* note 114, at 161-62 (arguing for carefully tailored regulation of distribution of scientific data). On the other hand, courts should strongly consider constitutional protection for independent individuals who obtain information through methods that the law formerly considered fair use, such as "reverse engineering" of software. *See* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673 (2000); David A. Rice, *Sega and Beyond: A*

C. *Threats*

While the participation-centered approach offers heightened protection in dealing with incidental burdens and disclosure of terrorist tactics and scientific methods, it argues for minimal protection of the provision of personal information in a threatening context over the Internet. Here too, however, categories are murky. Material that intimidates can also inform. The participant-centered approach resolves issues by focusing on participation not only by speakers, but also by the targets of speech.

In a democratic society, threats are punishable not because they necessarily lead to physical violence, but because they deter participation in a broad range of activities. Despite the focus on immigrants that has historically tainted antiterror efforts,[235] many of the most serious threats to participation in American political discourse are home-grown. The extortion practiced by organized crime is punishable because it affects people engaged in a broad range of commercial activities beneficial to society, either forcing people out of these activities or "offering" them the possibility of staying in business if they pay a tax to the offeror. Practitioners of collective violence such as the Ku

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Beacon for Fair Use Analysis... At Least As Far As It Goes, 19 DAYTON L. REV. 1131, 1160-63 (1994) (discussing reverse engineering as fair use). While licensing agreements for software often prohibit reverse engineering, this process often resembles a venerable independent pursuit such as taking apart a car engine much more than it resembles free-riding or exploiting access to information gleaned through work sponsored by the putative owner of the intellectual property at issue. *Cf*. Weiser, *supra* note 4, at 547-49 (discussing reverse engineering). Treating both courses of conduct as actionable extends the ambit of intellectual property into areas of independent inquiry appropriately reserved for First Amendment protection. *See* LESSIG, *supra* note 7.

[235] *See* COLE, *supra* note 17; Bosniak, *supra* note 25; Margulies, *Uncertain Arrivals*, *supra* note 17.

Klux Klan also use fear to stifle participation.[236] If victims of such intimidation seek to inform the authorities, the organization in question retaliates. In this fashion, threats deter the important civic duty of holding wrongdoers accountable. Participation withers, and alienation takes its place.[237] The result is the corruption of ordinary democratic processes by practitioners of violence.[238]

Threats occur not merely expressly, but also implicitly, sometimes in conjunction with proffers of information. Context, including justifications for violence, a recent pattern of violence directed at the target group, and specific information about the group, are important.[239] For example, symbolic speech such as cross-burning on the property of a member of the target group, combined with the Klan's historic justifications for and pattern of violence, sends a powerful message about that target's vulnerability.[240] In perhaps a more controversial case, the Ninth Circuit held that the "Nuremberg Files"

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[236] *Cf*. Virginia v. Black, 538 U.S. 343, 389 (2003) (Thomas, J., dissenting) (describing Klan as "terrorist organization, which, in its endeavors to intimidate, or even eliminate those it dislikes, uses the most brutal of methods").

[237] *See* ARENDT, THE ORIGINS OF TOTALITARIANISM, *supra* note 143, at 344-45 (noting that Nazi campaign of assassination of political opponents, along with their public claiming of responsibility, "attempted to prove to the population the dangers involved in mere membership" of groups opposing Nazis, and "made clear to the population.... that the power of the Nazis was greater than that of the authorities;" also noting "[t]he similarities between this kind of terror and plain gangsterism").

[238] Threats against a public figure, such as the President, have a similar result, by raising the specter that private agendas or obsessions can frustrate the will of the people expressed through the electoral process.

[239] In the appropriate context, a statement such as, "We know where you live," may be a powerful threat, because it suggests that the speaker has access to information about the subject that renders the subject vulnerable and has a motivation for exploiting that vulnerability.

[240] *See* Virginia v. Black, 538 U.S. 343 (2003) (history of cross-burning provides satisfies objective test required for verbal or symbolic action to constitute true threat).

website that identified individual doctors performing abortions as mass-murderers, labeleded them as "wanted," and placed a line through the names of doctors that had been murdered, constituted a "true threat" which was subject to injunction.[241] Thus, a website that fails to express an overt threat may nonetheless tender a true threat if the context demonstrates that the designers of the website intend to intimidate a person or persons.[242]

The Internet is a singularly useful medium for such intimidation. Traditional media will typically decline to carry such information because of safety or taste concerns.[243] In addition, the simultaneity of the Internet, which dispenses with the "lead time" of any other medium, presents a greater intrusion on people targeted and gives them less opportunity to make adjustments to promote safety. Updates and

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[241] The Ninth Circuit Court of Appeals held that the maker of the communications could reasonably foresee that the subject of the descriptions would interpret them as a "serious expression of intent to harm." *See* Planned Parenthood v. American Coalition of Life Activists (ACLA), 290 F.3d 1058 (9th Cir. 2002) (ruling that circulating "Wanted Posters" of doctors who performed abortions and posting their names on web site entitled the "Nuremberg Files" constituted "true threat" outside ambit of First Amendment).

[242] On the other hand, courts will not use true threat doctrine to stifle the dissemination of information, including some personal information, when that information facilitates political participation, such as peaceful protest of perceived law enforcement overreaching. *See* Sheehan v. Gregoire, 272 F. Supp.2d 1135, 1142 (W.D. Wash. 2003) (holding unconstitutional statute that barred distribution of home address or phone number of law enforcement or judicial employees "with intent to harm or intimidate," regardless of whether a reasonable person would view herself as threatened by such disclosure, in case where operator of website calling for law enforcement accountability called solely for lawful protest and had no record of violent action); *cf*. *Gov't Attempts Subpoena for Indymedia Logs – Service Provider Refuses*, *at* http://www.indymedia.org (last viewed Aug. 30, 2004) (discussing government efforts to acquire information regarding activist group's posting of personal information about delegates to Republican National Convention).

[243] *See* SUNSTEIN, REPUBLIC.COM, *supra* note 5; *supra* note 117 and accompanying text; *cf*. Brenner, *supra* note 232, at 383 (noting that operator of website dedicating to stalking targets can readily include photographs or video of victim).

revisions of rapidly-changing information are routine on the Internet. If targets change their schedules, addresses, or other personal information, the site's webmaster can post the new information on the site virtually immediately. Because threats constitute attempts to intimidate others, courts should view them as inherently operational, and not subject to the constraints on regulation of information and affiliation under the First Amendment. A hate group's "death sentence" can reach intending and aspiring "executioners" most efficiently through the Internet.[244] The capabilities of the Internet support the argument that a punishable threat should not require distinct proof of collaboration with persons who will attempt to carry out the threat because violence need not be a certainty in order to deter listeners' participation. Given a context of violence, potential victims should not be required to guess whether a person making a threat of violence that seems clear in its intent to intimidate has the connections or resources to carry out that threat. Indeed, even in cases where there is no express interaction between the speaker and those individuals with the means and propensity to carry out the speaker's threat, the fear sparked by uttering the threat may be amplified when related violent actions have already occurred. Leveraging violence in this fashion is not a form of political participation, but rather a rejection of the premises of the participatory model.[245] If the threat, in itself, would intimidate a reasonable person,

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[244] *See* Steven Lee Myers, *A Russian Fighting Hate is Killed in Hate*, N.Y. TIMES, June 26, 2004, at A7 (discussing murder of Russian researcher on hate groups, who had aided the police in law enforcement efforts focusing on "how the language [these groups] used... on the Internet constituted incitement to ethnically motivated violence;" website had published a letter (apparently appearing only after victim's death, although dated prior to his murder) imposing a "death sentence" on the victim); *cf*. Brenner, *supra* note 232 (noting Internet's ability to direct "diffuse" groups held together by common interests rather than geographic location); Hammack, *supra* note 102 (same).

[245] Speakers who leverage violence in this fashion and subsequently cite the First Amendment to frustrate accountability are free riders who contribute little to political debate but seek to derive

such a threat is a sufficient basis for culpability.[246]

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advantage from constitutional commitments. In contrast to the contribution made by persons who utter extreme or outrageous opinions and thereby question mainstream assumptions, *cf*. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in ETERNALLY VIGILANT, *supra* note 3, at 153, 168-70 (viewing speaker's experience of participation as crucial, while also acknowledging more instrumental notion of contribution to self-government), speakers who leverage a history of violence for purposes of intimidation practice a particularly cynical brand of what Frederick Schauer has called "First Amendment opportunism." *See* Frederick Schauer, *First Amendment Opportunism*, in ETERNALLY VIGILANT, *supra* note 3, at 175, 196-97. Of course, all constitutional commitments engender some free riding. *Id*. at 191-92. However, this is not a valid objection to attempts to limit free riding, but merely an indication that courts must ensure that such limits are narrowly tailored.

[246] *See* GREENAWALT, *supra* note 15, at 252 (whether a threat is criminal "does not depend on whether the speaker actually intends to carry out the threat; it is sufficient that he intentionally lead the listener to think that he will carry out the threat"). *See also* Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1075-76 (9th Cir. 2002) (holding that culpability for true threat does not depend on ability to execute threat). Some courts have required more specific evidence of the speaker's capacity and inclination to make good on the threat as proof of the reasonableness of the target's apprehension. *See* United States v. Kelner, 545 F.2d 1020 (2d Cir. 1976); *cf*. Steven G. Gey, *The Nuremberg Files and the First Amendment Value of Threats*, 78 TEX. L. REV. 541, 590 (2000) (arguing that speaker's communication of "intent to carry out the threat personally" is crucial to definition of true threat); Jennifer E. Rothman, *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 289 (2001) (same).

Just as material not cast as a threat in semantic terms can be threatening in context, context may indicate that material that constitutes a threat in semantic terms should not trigger liability. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982); Watts v. United States, 394 U.S. 705, 706, 708 (1969) (court held that Vietnam war protester who in course of speech at rally said, "I have got to report for my physical [pursuant to the draft] this Monday... I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." was not making threat but engaging in "very crude offensive method of stating a political opposition to the President"). Context can also help determine the nature of the speaker's intent. *See* Virginia v. Black, 538 U.S. 343, 365-66 (2003) (noting that state can criminalize cross-burning directed at individuals, but not cross-burning not so directed, for example, cross-burning at rally or on motion-picture lot).

Judges and commentators have argued vigorously that the "Nuremberg Files" case burdens free speech, because the defendants were expressing views on abortion, an issue in the public arena. *See* Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058, 1089 (9th Cir. 2002) (Kozinski, J., dissenting); G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisdiction of the Federal Criminal Law*, 2002 BYU L. REV. 829; *cf*. C. Edwin Baker, *Harm,*

In addition, persons making on-line threats should not be able to cite the presence of other protected material on a site as a means for evading accountability. Some of the material on the "Nuremberg Files" site, such as the general characterization of doctors performing abortions as murderers and war criminals, clearly reflects protected social and political views. However, anti-abortion extremists have ample means available for expressing such sentiments that do not contain personal information about specific doctors.[247] Because of the wide availability of alternatives, a rule imposing criminal or civil liability for implicit threats does not unreasonably burden the participation of the speaker.

Liberty, and Free Speech, 70 S. CAL. L. REV. 979, 990-92 (1997) (arguing that attempts to hold speakers accountable for harm done by others unduly discount autonomy interest of speaker in articulating her values, as well as "mental mediation" provided by actual perpetrator who responds to speaker). The counter-argument here, as in the case of tax resistance advocacy coupled with commercial speech, *see* United States v. Schiff, 2004 U.S. App. LEXIS 16351 (9th Cir. Aug. 9, 2004), is that the speaker can readily separate protected expressions of affiliation from offending conduct. This is true even when the conduct at issue involves a category of speech, such as threats or criminal agreements. *See* Virginia v. Black, 538 U.S. 343, 361-62 (2003) ("When the basis of content discrimination consists entirely of the very reason that entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists"); *cf*. R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992) ("content [of fighting words] embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey"). To pass First Amendment muster, the court must narrowly tailor its definition of the prohibited category and analyze context with care. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982) (finding that remarks of community leader, viewed in context, were threats of community ostracism protected by First Amendment, not proscribable threats of violence); Volokh, *Freedom of Speech and Information Privacy*, *supra* note 231, at 1108-09 (noting that public remarks threatening social ostracism or disapproval are integral to robust social and political debate and therefore constitute protected speech).

[247] *See* Planned Parenthood of the Columbia/Willlamette, Inc. v. American Coalition of Life Activists, 290 F.3d 1058, 1078 (9th Cir. 2002) (discussing importance of context for in evaluating a threat to the speaker).

To illustrate how true threat doctrine might apply to the Internet, consider a recent series of events involving a government witness in the trial of prominent white supremacist Matthew Hale for soliciting the murder of a federal judge. Witness Tony Evola's testimony led to Hale's conviction.[248] A website sympathetic to Hale excoriated the witness, publishing the home phone and address of an individual who happened to share the witness's name, but was in fact an entirely different person.[249] Previously, one of Hale's followers had gone on a homicidal rampage in connection with an earlier legal defeat for Hale, killing two people.[250] Meanwhile, a radio host of an avowedly "eugenics-based" broadcast dedicated to propagating conceptions of racial superiority gave out information about the website, "In case anyone wants to say hi."[251]

In the climate of violence engendered by the Hale case, intimidation of the kind noted above goes beyond threats of social ostracism, and leverages fear of physical harm in order to chill participation in the legal system. Responding to the threat, the participant-centered account would have supported an injunction and a claim for damages against the offending website and against the radio host, had the host continued to encourage his listeners to commit violence. Criminal liability under a carefully drafted statute that bars intimidation of witnesses may also have been appropriate, along with

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[248] *See* John Kass, *Hale Supporters Confused About Whom to Hate,* CHI. TRIB., April 28, 2004, at C2.

[249] *Id.*

[250] *See* Matt O'Connor, *Officials Monitor Hate Talk on Web, Backlash Feared on Hale Verdict*, CHI. TRIB., April 28, 2004, at C1.

[251] *See id*.

tailored intervention with Internet Service Providers (ISP's) to limit the publication of the material.[252]

Legal authority to regulate threats should not simultaneously regulate the independent disclosure of lawfully obtained personal information.[253] The presence of the intent to intimidate distinguishes the personal information revealed in the above discussion from the personal information revealed in cases such as the Kobe Bryant prosecution. In that case, the Colorado Supreme Court enjoined news media outlets from publishing information that they had received in an erroneous electronic transmission containing information about the complainant and recent motions concerning the scope of Colorado's

[252] My attempts to secure Internet access to the sites with the erroneous information about the witness turned up Internet addresses that were apparently unavailable at the time of the search. An ISP that on its own or because of government intervention stops publication of an on-line threat provides a narrowly crafted source of mediation that is consistent with the participation-centered approach. Connoisseurs of the political and social opinions advanced on sites that publish threats should not despair of the availability of alternative fora. *See*, e.g., www.gentileworld.com (last visited Aug. 10, 2004) (noting and critiquing world dominance by Jews); www.whitestruggle.net/Kosher_Konspiracy.html (last visited Nov. 14, 2004) (same).

[253] *Cf.* Schwartz, *supra* note 5 (arguing that some measures ensuring privacy in cyberspace serve interests of democratic participation); Solove, *supra* note 5 (same); *with* Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1108-09 (2000) (arguing that asserting link between privacy and democratic participation could justify overbroad regulation of otherwise protected speech). The nature and alienability of an individual's interest in privacy of personal data has inspired an extensive literature. *See* Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055 (2004) (arguing for regulated market in personal data); Pamela Samuelson, *Privacy as Intellectual Property*, 52 STAN. L. REV. 1125 (2000) (arguing for market system for personal data, but asserting that property rights are too rigid for this purpose); *but see* Anita L. Allen, *Coercing Privacy*, 40 WM & MARY L. REV. 723 (1999) (arguing for some level of inalienability with respect to personal data, on grounds that law should not allow people to sacrifice fundamental aspects of personhood); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373 (2000) (same).

"rape shield" law.[254] In the order issuing the injunction, the Colorado Supreme Court sought to distinguish two significant United States Supreme Court cases that had struck down measures prohibiting or creating liability for disclosure of personal information about parties in criminal cases.[255]

Despite the Colorado Supreme Court's efforts in the Kobe Bryant case, the information about the complainant, obtained without wrongdoing on the media outlet's part, seems to fall squarely within the First Amendment ambit established by Supreme Court precedent. The scope of the rape shield law is a significant matter of public concern.[256] Material in the motion papers could enhance and refine debate about future interpretation of the statute. That interest in participation should be outweighed only by evidence that the media obtained the evidence through participation in illegal conduct such as bribery or theft.[257]

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[254] *See* Colorado v. Bryant, 2004 Colo. LEXIS 557 (July 19, 2004).

[255] *See* Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979) (striking down statute barring truthful publication of the name of alleged juvenile offender); Florida Star v. B.J.F., 491 U.S. 525 (1989) (vacating as unconstitutional damage award against newspaper that had revealed name of rape complainant).

[256] For a useful discussion of the rationale for rape shield laws, *see* Tracey A. Berry, Comment, *Prior Untruthful Allegations Under Wisconsin's Rape Shield Law: Will Those Words Come Back to Haunt You?*, 2002 WIS. L. REV. 1237, 1243-44.

[257] Of course, the court also has inherent power to punish attorneys appearing in the case for disclosing such information contrary to court order. *See* Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 796 (1987) ("The ability to punish disobedience to judicial orders is regarded as essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches."); Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1311-13 (2003) (discussing judicial inherent authority).

D. *Summary*

The participant-centered view offers a nuanced approach to simultaneity and absence of mediation in the First Amendment analysis of Internet material related to terrorism. It prevents ostensible incidental burdens on speech from impinging on content by focusing on the degree of independence of the defendant in material support cases. Similarly, it protects independent publication on the Internet of information on terrorist tactics and scientific processes. At the same time, however, the participant-centered approach recognizes that statements on the Internet expressly or implicitly endorsing violence, accompanied by specific and personal information about targeted individuals pose a special danger of intimidation. With this nuanced approach, the participant-centered view avoids the risk of over- or under-regulation presented by Internet Exceptionalism.

VI. ALTERNATIVE APPROACHES

While the participant-centered approach has a number of advantages, it is always prudent to consider alternatives. Two candidates are the categorical approach, which classifies various kinds of communication as less valuable or more dangerous, and the algorithmic approach, which imposes broad filtering requirements on ISP's.

A. *A Categorical Approach to Information*

One alternative to the participant-centered view is a categorical approach.[258] Instead of

[258] *See, e.g.*, Volokh, *Crime-Facilitating Speech*, *supra* note 231.

focusing on any single overarching concept, such as promoting participation, the categorical approach supports regulation in particular areas, such as speech having virtually no First Amendment value[259] and speech involving weapons of mass destruction.[260] While the categorical approach sheds light on important First Amendment problems, it is ultimately unconvincing as a framework for analysis.

The greatest overlap of the categorical approach with the participant-centered view is in the area of personal information, such as home phone numbers, home addresses, and Social Security numbers. It is tempting to agree that such information lacks First Amendment value, and is useful primarily to facilitate illegal conduct such as identity theft.[261] However, doubts remain. First, as a general matter, it is dangerous for a democracy to place too much weight on the notion that some speech has no First Amendment value. Categorizing speech as having or not having First Amendment value enhances the risk that conclusions will drive analysis and encourages habits in government that harm democratic deliberation. As one commentator favoring this approach acknowledges, we cannot always know in advance what information will contribute to public debate.[262] Given this lack of certainty, a democracy should probably eschew declaring whole areas of information valueless for First Amendment purposes.

Second, it is far from clear that personal information is necessarily lacking in First Amendment value. The Social Security number of a person in government or business, for example, may be useful in

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[259] *Id.*; Solove, *supra* note 5.

[260] *See* Volokh, *Crime-Facilitating Speech*, *supra* note 231.

[261] *See* Solove, *supra* note 5 (making argument that personal information is not speech).

[262] *Id.*

determining whether that individual has provided false information in any transaction. While conventional media outlets might decline as a matter of journalistic ethics or decorum to use such investigative tools, it is not clear that the legal system should enforce those informal journalistic standards. Lawmakers should be especially wary of restrictions on the flow of information when less restrictive forms of mediation are available, such as laws that forbid disclosure of personal information by institutions such as state governments that require such information for particular legal purposes.[263]

A similar analysis applies to information about weapons of mass destruction. Here, too, the public has an interest in assessing society's vulnerability and understanding the pervasiveness of knowledge about such devices and risks. At the same time, the government is likely to overstate both the simultaneity and the unmediated nature of the risks involved. For this reason, tailored tests dealing with persons who acquired knowledge through participation in scientific projects sponsored by the state, or conveyed the information as agents of a terrorist organization would be more appropriate here as well.[264]

B. *The Algorithmic Approach*

An extreme view of the cautionary approach might suggest that the most effective measures against terrorist exploitation of the Internet require the use of algorithms that would filter out information

[263] *See* Reno v. Condon, 528 U.S. 141 (2000) (upholding federal Driver Privacy Protection Act, which imposed penalties on state selling driver information obtained by state as regulator of driving safety, and on persons obtaining information from state); *cf*. Froomkin, *The Death of Privacy?*, *supra* note 7 (offering narrow reading of *Condon*).

[264] *See supra* notes 233-34 and accompanying text.

at the ISP level. Such algorithms are already used in filters available to end-stage users who wish to screen out certain kinds of material, such as pornography.[265] Requiring that ISP's apply such technology to filter out sites containing terrorist material would constitute a far more proactive way to screen out such material – certainly more effective than deterrence at the source. Unfortunately, however, the breadth of the material covered by algorithms would pose profound tensions with the First Amendment.[266]

Algorithms, key words or phrases formulated for search purposes, are inevitably imprecise.[267] Although the government currently employs algorithms as part of its comprehensive and targeted surveillance of Internet traffic,[268] algorithms used in a "filter" mode would be both over- and under-

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[265] The term "algorithm" as used here takes in a range of software used by government and ISP's. *See* Ashcroft v. ACLU, 124 S. Ct. 2783, 2792-93 (2004) (discussing development of Internet filters); United States v. American Library Ass'n, 539 U.S. 194 (2003) (upholding constitutionality of statute requiring filters in library computers as condition of federal funding); *see* also STEPHEN J. SCHULHOFER, THE ENEMY WITHING: INTELLIGENCE GATHERING, LAW ENFORCEMENT, AND CIVIL LIBERTIES IN THE WAKE OF SEPTEMBER 11 40-42 (2002) (arguing that Carnivore can be misused); *cf*. ROSEN, *supra* note 57, at 196-97 (discussing government Internet "packet-sniffer" Carnivore, which allows the government acting pursuant to court order permitting collection of evidence of crime to sort out Internet traffic within scope of order); Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U.L. REV. 607, 649-54 (2003) (explaining Carnivore technology, and arguing that USA Patriot Act imposed new privacy restraints on Carnivore deployment); *see generally* Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. REV. 653 (2003) (discussing controls at ISP level).

[266] *See* Volokh, *Crime-Facilitating Speech*, *supra* note 231 (discussing First Amendment issues with this approach).

[267] *See* United States v. American Library Ass'n, 539 U.S. 194, 220-22 (2003) (Stevens, J., dissenting); *cf*. ROSEN, *supra* note 57, at 196-97 (urging government to make available source code for Carnivore, so that independent analysts can assess its efficacy).

[268] *See* ROSEN, *supra* note 57; SCHULHOFER, *supra* note 265; Kerr, *supra* note 265.

inclusive. Algorithms that filter information tend to block websites and content offering general information about terrorist organizations – information useful to the public, researchers, journalists, and indeed government itself. Conversely, filters designed to detect a particular word or phrase likely would fail to block coded information of a mobilizational or operational character.[269]

Although the Supreme Court has upheld legislation requiring libraries that receive federal funds to use such filters as a condition of federal support,[270] applying similar filters to ISP's or end-stage users would likely constitute an unconstitutional content-based restriction, insufficiently tailored to government objectives. The imprecision of algorithms, at least in their current state of development, would be of central concern. Compounding that problem are related aspects of such filtering that make remedies for this imprecision ineffectual. First, the algorithms themselves are usually secret and proprietary, impeding independent analysis that might enhance their precision.[271] Second, although any such algorithmic approach would have to permit wrongly classified websites or other sources of information to seek relief on an individualized basis, any such process will necessarily be cumbersome, depriving the site of visitor access for substantial periods of time while relief is pending. Even though the lack of mediation on the Internet can be problematic, algorithm-based filtering would represent an unmediated effort by government to enforce conformity, inimical to First Amendment values.

Interventions at the ISP level, however, may be appropriate in more narrowly tailored

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[269] *See* Deibert & Stein, *supra* note 2, at 171 (discussing Al Qaeda's use of verbal codes to convey instructions).

[270] United States v. American Library Ass'n, 539 U.S. 194 (2003).

[271] *Id.* at 233-35 (Souter, J., dissenting).

contexts.[272] When a site presents material that constitutes a true threat, or presents false information in a fashion that may present a danger to persons, the First Amendment should not bar the government from bringing such matters to the ISP's attention, as apparently occurred regarding the false information about the address and phone number of the government's chief witness in the prosecution of white supremacist Matthew Hale.[273] The availability of narrowly tailored approaches demonstrates the folly of sweeping reliance on over- and under-inclusive algorithms.

CONCLUSION

New media have always challenged our understanding of freedom of speech. The government has often viewed new media with fear, driven by concerns that emerging technology will foment violence and decrease deliberation. Typically, this fear of new technology has merged with fear of new arrivals to America. The result has been a recurring tendency to restrict new media and target immigrants during times of crisis. The legal system needs an approach that guards against the effects of fear while also addressing the contexts in which new technology such as the Internet can imperil a model of democracy based on civic engagement. The participant-centered model seeks to fill that gap.

Apprehensions about new technology and new arrivals were central to the struggles that attended the birth of the modern First Amendment. Two overlapping concepts dominated these apprehensions: simultaneity and unmediated risk. The speed of modern communications media and the

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[272] *Cf*. Zittrain, *supra* note 265.

[273] *See supra* notes 248-52 and accompanying text.

perceived identification of immigrant communities with America's adversaries abroad raised concerns that, particularly in the difficult period surrounding America's entry into World War I, immigrants would share strategic information with those adversaries. The government was also concerned that then-new technologies such as cable, film, and targeted direct mail would become unmediated risks, inflaming communities and bypassing exposure to mediating mainstream discourse and institutions. At the same time, prescient Progressives such as Brandeis saw in new media the potential for unprecedented intrusions on privacy that could impoverish civic life.

Courts' evolving understanding of the First Amendment reflects concerns about simultaneity and absence of mediation in times of national crisis. In order to deal with those who opposed America's imperialist alignments during World War I, courts first turned to the bad tendency test, which identified advocacy of particular ideas and creeds as posing a special risk of accelerated moral decline and decay, particularly in immigrant communities. While the modern jurisprudence of the First Amendment reflected in *Brandenburg* purports to address the problems of simultaneity and unmediated risk with respect to potentially inflammatory speech, the challenges posed by Internet communications after September 11 have destabilized the modern First Amendment equilibrium.

Scholars analyzing cyberissues have typically adopted what this article calls an Internet Exceptionalism view, which stresses virtual communication's differences from earlier media in both technical architecture and user expectations. In its celebratory iteration, Internet Exceptionalism lauds the simultaneity and absence of mediation of the Internet as facilitating communication beyond the oft-constraining channels of traditional media. In its cautionary iteration, Internet Exceptionalism rehearses the concerns about simultaneity and absence of mediation of earlier eras, evidencing a preoccupation

with the Internet's contributions to polarization and fragmentation. Courts have often shifted between these two modes, without developing a convincing synthesis.

The relationship between the functionality of the Internet and the goals of terrorist organizations is far more nuanced. Terrorist organizations, both domestic and foreign, may value the Internet's geographic scope, the ability to reach a particularized audience at any time with continuously revised material, and the freedom from editing by outside "umpires" of taste. These synergies may facilitate certain kinds of terrorist conspiracies, as well as intrusions on the lives of individuals or the activities of groups targeted by terrorist organizations. However, the Internet also precipitates the risk that government will invoke simultaneity and absence of mediation to suppress extreme speech or information that should be in the public domain. The Al-Hussayen case – in which a foreign student was deported for posting extreme speech on websites, allegedly with intent to encourage financial support of terrorist organizations – exemplifies these dangers. In other words, the Internet Exceptionalism school leads to either under- or over-regulation of the Internet.

The participant-centered approach outlined here stresses the interaction of the Internet, terrorism, and civic participation. Inspired by the civic humanist thought of thinkers such as Hannah Arendt, as well as the pragmatic perspective on technology and media of Louis Brandeis, this approach focuses on the participatory lives of both speakers and audience members. The approach recognizes that the Internet's speed, sweep, and low entry barriers create extraordinary opportunities for global conversations. It cautions against invoking simultaneity and absence of mediation to stifle extreme speech, suppress useful information, or stigmatize outsider groups such as immigrants. At the same time, the participant-centered approach recognizes that the Internet can distort or deter civic

participation. The Internet, for example, can enable entrepreneurs of collective violence to target individuals based on aspects of identity such as race, religion, or nationality, and to mobilize homogeneous, polarized, and geographically dispersed groups in both international and domestic arenas. Entrepreneurs of collective violence and their followers can also harness the Internet to intimidate potential victims by coupling express or implied threats with the distribution of personal and "real-time" information.

A participant-centered approach can sharpen our ability to analyze current controversies regarding the Internet and terrorism. For example, with respect to the use of legislation barring "material support" of terrorist conspiracies or organizations, a participant-centered approach would require authorities to distinguish between Internet communications made by persons acting independently and such communications made by the organization's agents or supporters for purposes of aiding a terrorist conspiracy. Prosecution of independent persons for Internet communications urging others to support the group, or even providing postings or links that facilitate the supply of illegal or dangerous resources, is simply too close to the mere expression of opinion or provision of information penalized by the now-discredited bad tendency test. The speed and connectivity of the Internet, however, should not provide a justification for courts to dust off previously discredited doctrines. By focusing on speakers' degree of involvement with terrorist organizations, the participant-centered approach can distinguish between persons engaging in protected modes of extreme speech, and those persons engaging in criminal agreements that are not receptive to mediation.

Similarly, a participant-centered approach would allow for the distribution on the Internet of information about tactics and scientific processes dealing with violence, as long as the sources of such

information did not actively collaborate with violent organizations or distribute such information as part of a conspiracy to commit violent acts. Internet distribution of materials regarding weapons of mass destruction such as poisonous gases, or information about terrorist tactics, can refine the public debate about our nation's vulnerabilities to violence, thereby promoting civic participation. Thus, legal action against the distribution of scientific or tactical information would be permissible only when the parties' brand of participation manifestly veered toward impermissible criminal agreements, or when pubic disclosure was facilitated by parties' previous participation as "insiders," rather than as licensees, in projects requiring secrecy for the facilitation of the creative enterprise.

Finally, a participant-centered approach would apply true threat doctrine to impose civil and criminal remedies on individuals disclosing private citizens' personal information over the Internet with the intent to intimidate individuals targeted for violent attacks. People cannot participate in a democratic society unless they have some assurance that they will not be intimidated as a result of their participation. Accordingly, the online publication of personal information as part of an express or implied threat of future violence stifles such engagement in public discourse. The speed and lack of mediation of the Internet heighten this chilling effect. Particularly in sensitive areas, such as testimony in a criminal trial or provision of reproductive health services, individuals engaging in arguably controversial modes of participation should not forfeit protection from threats of violence. Internet sites similar to the "Nuremberg Files," which combine individuals' personal information with justifications for committing violence against those individuals, threaten participation and therefore constitute appropriate subjects for legal action.

Admittedly, a participant-centered approach cannot deal with all of the issues posed by a still-

developing medium such as the Internet. The government will continue to invoke simultaneity and lack of mediation as justifications for speech-restrictive measures. At the same time, committed terrorist operatives will continue to look for opportunities and vulnerabilities in information technology. By arguing that civic engagement is a core value for both speaker and listener, however, the participant-centered approach offers a framework that addresses both repression by the government and intimidation by private groups. In the process, the participant-centered view seeks to maximize the Internet's potential for enhancing democracy.