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## From the Legal Literature: Criminalizing Propaganda: J. Remy Green's Argument to Digitize Brandenburg

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# From the Legal Literature Criminalizing Propaganda: J. Remy Green's Argument to Digitize *Brandenburg*

Francesca Laguardia, J.D., Ph.D.

## I. INTRODUCTION

Since the threat of terrorism came to the forefront of the public consciousness, there has been a tension between First Amendment protections for political speech and the types of criminal prohibitions lawmakers believed necessary to counter the terror threat. The first counterterror statutes the United States enacted—the prohibitions on providing material support to terrorist organizations—were part of this tension. Indeed, the manner in which these laws imposed on First Amendment activities was the subject of a great deal of debate before their passage.<sup>1</sup> But over the last two decades, terrorist organizations have become so sophisticated in their use of online propaganda and social media to radicalize and recruit new extremists has become so prevalent that many scholars have become concerned about the tension between online speech and the counterterror interests of the state.<sup>2</sup>

Academic treatment of the subject has varied. Authors have

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<sup>1</sup>David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147 (2012); Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L. SEC. L. & POL'Y. 297 (2008) (describing the history and creation of material support statutes and multiple First Amendment challenges before and after their passage).

<sup>2</sup>Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 381 (2017); Erik Eckholm, *ISIS Influence on Web Prompts Second Thoughts on First Amendment*, N.Y. TIMES (Dec. 27, 2015), <http://www.nytimes.com/2015/12/28/us/isis-influence-on-web-prompts-second-thoughts-on-first-amendment.html>; Daniel Hoffman, *Online Terrorism Advocacy: How AEDPA and Inchoate Crime Statutes Can Simultaneously Protect America's Safety and Free Speech*, 2 NAT'L SEC. L.J. 200, 251 (2014) (arguing that new laws to address "online terrorism advocacy" are unnecessary because "existing AEDPA [Antiterrorism and Effective Death Penalty Act] and inchoate crime statutes and their associated case law" give prosecutors "the tools to explore and better evolve the legal boundaries that Congress intended based on the threat"); Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 8 UCLA L.J. & TECH. 4 (2004); Abigail M. Pierce, *#Tweeting for Terrorism: First Amendment Implications in Using Proterrorist Tweets to Convict Under the Material Support to Terrorism Statute*, 24 WM. & MARY BILL RTS. J. 251 (2015); Eric Posner, *ISIS Gives Us No Choice But to Consider Limits on Speech*, SLATE (Dec. 15, 2015), <https://slate.com/news-and-politics/2015/12/isis-online-radicalization-efforts-present-an-unprecedented-danger.html> ("We do not currently face a

concluded that the existing balance between speech rights and government oversight is sufficient;<sup>3</sup> that the existing statutory framework presents an unacceptable violation of First Amendment interests;<sup>4</sup> and that existing First Amendment doctrine (represented by the balance struck in *Brandenburg v. Ohio*<sup>5</sup>) must be modified to allow more prosecution of online speech.<sup>6</sup> An entire literature exists that discusses either the threat or promise of creating exceptions to First Amendment protection based on national security interests.<sup>7</sup> Alan Chen and Mark Tushnet have identified a second area of exceptionalism relevant to this area as well, that of internet exceptionalism.<sup>8</sup> These arguments rely on the notion that the internet fundamentally changes the ramifications and practices of the marketplace of ideas by lessening the cost to the speaker, amplifying the reach of the speech, and allowing greater anonymity.<sup>9</sup> In the case of terrorist propaganda, recruitment, and incitement, these characteristics arguably create a greater threat by allowing for faster and more wide reaching responses.<sup>10</sup> Probably because of these strengths, social media and other forms of online communication

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national emergency comparable to a world war, but anti-propaganda laws may nonetheless be warranted because of the unique challenge posed by ISIS's sophisticated exploitation of modern technology.”); Cass Sunstein, *Islamic State's Challenge to Free Speech*, BLOOMBERG.COM (Nov. 23, 2015), <https://www.bloomberg.com/opinion/articles/2015-11-23/islamic-state-s-challenge-to-free-speech>; Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAN. L. REV. 651, 688 (2017); Benjamin Wittes & Zoe Bedell, *Tweeting Terrorists, Part III: How Would Twitter Defend Itself Against a Material Support Prosecution*, LAWFARE (Feb. 14, 2016, 7:16 PM), <https://www.lawfareblog.com/tweeting-terrorists-part-iii-how-would-twitter-defend-itself-against-material-support-prosecution>.

<sup>3</sup>E.g., Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 HARV. L. & POL'Y. REV. 361, 362–63 (2010); Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 731 (2009); Hoffman, *supra* note 2, at 204, 251.

<sup>4</sup>E.g., Rachel VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1 (2017).

<sup>5</sup>*Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam).

<sup>6</sup>E.g., Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147, 148, 164 (2011); Tsesis, *supra* note 2, at 708.

<sup>7</sup>See, e.g., Chen, *supra* note 2, at 380; David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955–56 (2002); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 3 (2007); GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* (2004).

<sup>8</sup>Chen, *supra* note 2, at 380; Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1639 (2015).

<sup>9</sup>Chen, *supra* note 2 at 391–92; Tushnet, *supra* note 8, at 1651–62.

<sup>10</sup>Chen, *supra* note 2 at 393; CASS R. SUNSTEIN, *REPUBLIC.COM* 2.0 69 (2007).

have become the primary means of terrorist radicalization and recruitment.<sup>11</sup>

At the same time, however, online communication has become a central means of classic U.S. political education and expression.<sup>12</sup> Social media platforms facilitate communication through the creation of online communities.<sup>13</sup> These communities do not merely function to communicate news; they have become the primary source of news for a majority of people in the United States.<sup>14</sup> In many ways, social media communication may be seen as “today’s ‘free press.’”<sup>15</sup> This arguably entitles it to greater, rather than lesser, protection under traditional First Amendment interpretation.<sup>16</sup> Under this interpretation, the press performs a fundamental role in a democratic society as newspapers (and similar media) “giv[e] ‘voice to public criticism.’”<sup>17</sup>

While the threat posed by speech increases due to the special characteristics of the internet, so too do the benefits of speech protections. This presents a paradox in which social media embodies core First Amendment interests which, in turn, increases the interest in protecting its free use, even though the reach of social media increases its harm. Additionally, the inherent uncertainty regarding who precisely is speaking at any given time adds to concerns of unconstitutional vagueness.<sup>18</sup>

From a practical perspective thus far, the constitutionality of online support for terrorists has rested on whether the speaker may be considered to be speaking in coordination with a foreign terrorist organization [FTO].<sup>19</sup> The U.S. Supreme Court has specified that in addition to speech that provides training or exhortations to violence, speech that merely confers legitimacy (without specifically advocat-

<sup>11</sup>VanLandingham, *supra* note 4, at 13–16.

<sup>12</sup>VanLandingham, *supra* note 4, at 112–13.

<sup>13</sup>VanLandingham, *supra* note 4, at 9.

<sup>14</sup>VanLandingham, *supra* note 4, at 12–13.

<sup>15</sup>VanLandingham, *supra* note 4, at 13.

<sup>16</sup>VanLandingham, *supra* note 4, at 22–29.

<sup>17</sup>VanLandingham, *supra* note 4, at 26 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 278, 84 S. Ct. 710, 11 L. Ed. 2d 686, 1 Media L. Rep. (BNA) 1527, 95 A.L.R.2d 1412 (1964)).

<sup>18</sup>VanLandingham, *supra* note 4, at 40–50.

<sup>19</sup>*Holder v. Humanitarian Law Project*, 561 U.S. 1, 8, 130 S. Ct. 2705, 177 L. Ed. 2d 355, 49 A.L.R. Fed. 2d 567 (2010); *U.S. v. Mehanna*, 735 F.3d 32, 49, 92 Fed. R. Evid. Serv. 1167 (1st Cir. 2013); see also Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 4–18 (2005); Thomas Crocker, *Free Speech and Terrorist Speech: An Essay on Dangerous Ideas*, 70 VAND. L. REV. EN BANC 49, 54 (2017); VanLandingham, *supra* note, at 5.

ing for violence or unlawful conduct) may be prosecuted under 18 U.S.C.A. § 2339B (criminalizing the provision of material support to an FTO), but only when it is not independent advocacy.<sup>20</sup> The Court's opinion also relies on the connection with a designated *foreign* organization, expressly stating that it makes no statement as to the constitutionality of treating *domestic* matters similarly.<sup>21</sup>

In the last decade, the threat of terrorism has shifted from organizations to decentralized movements, including domestic ones.<sup>22</sup> This transformation, along with the intensity of the supposed threat from online radicalization and the remaining questions regarding just how far § 2339B prosecutions will be taken, has prevented the First Amendment debate from being entirely settled.<sup>23</sup> In this remaining uncertainty, the test set forth in *Brandenburg v. Ohio* remains of central importance.<sup>24</sup> The fundamental question regarding *Brandenburg's* application to online speech is whether it qualifies as inciting "imminent lawless action."<sup>25</sup> I J. Remy Green takes up this question in the article, "Digitizing *Brandenburg*."<sup>26</sup> Green accurately points out that the imminence requirement in *Brandenburg* seems nearly impossible to fulfill in the context of most contemporary advocacy for terrorism because listeners are remote and uncertain; thus, there is no way to confidently determine whether violent conduct will follow *imminently* upon posting.<sup>27</sup> Nonetheless, Green argues such temporal proximity is not necessary in order to meet some understandings of the word "imminent."<sup>28</sup> Green also explains

<sup>20</sup> *Humanitarian Law Project*, 561 U.S. at 24, 30–34 (reasoning that a person who acts *on behalf of or at the direction of* an FTO may be punished, but a person who independently agrees with the FTO and speaks with no direct connection to the FTO should be protected by the First Amendment).

<sup>21</sup> *Humanitarian Law Project*, 561 U.S. at 39.

<sup>22</sup> Francesca Laguardia, *From the Legal Literature: The Legal Divide Between Domestic and International Terrorism—Do We Need a Domestic Terror Statute?*, 55 CRIM. L. BULL. 1093 (2019); Jesse Norris, *Why Dylann Roof Is a Terrorist Under Federal Law, and Why It Matters*, 54 HARV. J. LEGIS. 259 (2017); Shirin Sinnar, *Separate and Unequal: The Law of "Domestic" and "International" Terrorism*, 117 MICH. L. REV. 1333 (2019).

<sup>23</sup> See *supra* notes 2–8 and accompanying text.

<sup>24</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam).

<sup>25</sup> Chen, *supra* note 2, at 394–95; Crocker, *supra* note 19, at 51–59; Hoffman, *supra* note 2, at 203; Lidsky, *supra* note 6, at 160; Tsesis, *supra* note 2, at 686–91.

<sup>26</sup> J. Remy Green, *Digitizing Brandenburg: Common Law Drift Toward a Causal Theory of Imminence* 69 SYRACUSE L. REV. 351 (2019).

<sup>27</sup> Green, *supra* note 26, at 360–63, 385; see also Lidsky, *supra* note 6, at 160; Tsesis, *supra* note 2, at 667.

<sup>28</sup> Green, *supra* note 26, at 354.

that courts are already moving toward this conception of imminent as well.<sup>29</sup>

**II. J. Remy Green, *Digitizing Brandenburg: Common Law Drift Toward a Causal Theory of Imminence*, 69 SYRACUSE L. REV. 351 (2019).**

Green begins with a discussion of the development of the *Brandenburg* test, tracing the doctrine from its origins in *Masses Publishing Co. v. Patten*<sup>30</sup> to *Abrams v. United States*<sup>31</sup> and *Hess v. Indiana*.<sup>32</sup> But while now well established, the test is hardly consistently applied. Green points out:

Courts have found lawless activity is spatiotemporally imminent where the speaker: sent an email encouraging “electronic civil disobedience” on a specified date; published a book with detailed instructions on how to become a “hit man”; counseled and directly assisted preparing false tax returns; held up a sign on television at a school event proclaiming “BONG HiTS 4 JESUS”; and offered a reward to anyone “who kills, maims, or seriously injures a member of the American Nazi Party” at an event five weeks away. However, courts have found lawless activity not to be spatiotemporally imminent where the speaker(s): posted a list of “Top Twenty Terror Tactics” online; led a Klu Klux Klan (KKK) rally where members were wielding fire arms, burning a cross, and chanting “bury the n\*\*\*\*\*s” and promising “revengeance” (this being *Brandenburg* itself); created violent video games and pornography that purportedly inspired violence in the real world; were fundamentalist preachers who preached that the Bible commands that Christians must violate truancy laws; published an article painting autoerotic asphyxiation in glowing terms; created digitally synthesized child pornography; created posters celebrating the killing of abortion doctors and identifying doctors who had not yet been killed; posted personal information combined with racist and homophobic rhetoric on white supremacist forums; recorded and released the song “Suicide Solution” advocating suicide; called for a strike in a newspaper advertisement in violation of a court order; sold books and magazines whose “primary purpose [encouraged] illegal drug use” at self-identified “head shops”; and urged killing a judge on a public blog.<sup>33</sup>

To highlight the inconsistency of court rulings, Green points to the contradiction between language in two U.S. Circuit Courts of Appeals decision: *Rice v. Paladin Enterprises, Inc.* and *United States v. Fullmer*.

<sup>29</sup>Green, *supra* note 26, at 355.

<sup>30</sup>*Masses Pub. Co. v. Patten*, 244 F. 535, 540, (S.D. N.Y. 1917), rev’d, 246 F. 24 (C.C.A. 2d Cir. 1917).

<sup>31</sup>*Abrams v. U.S.*, 250 U.S. 616, 624, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J., dissenting).

<sup>32</sup>*Hess v. Indiana*, 414 U.S. 105, 108, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (per curiam)); see also Green, *supra* note 26, at 357–59.

<sup>33</sup>Green, *supra* note 26, at 360–62 (internal citations omitted).

*Imminent*: “The freedom to speak is not absolute; the teaching of methods of terror . . . should be beyond the pale.”

*Not Imminent*: “[T]he publication of the ‘Top Twenty Terror Tactics,’ without more, is also protected, because although it lists illegal conduct, there is no suggestion that [Stop Huntingdon Animal Cruelty (SHAC)] planned to imminently implement these tactics.”<sup>34</sup>

Green further points out the willingness of courts to find a risk of imminent lawless action when speech is advocacy for tax evasion.<sup>35</sup>

Based on these inconsistencies and further examination of the cases, Green argues that the time has come for a new understanding of the First Amendment exception for incitement to imminent lawless activity. Green uses the common law reasoning of *MacPherson v. Buick Motor Co.*<sup>36</sup> as a model for constitutional innovation.<sup>37</sup> Relying on David Strauss’s explanation of Judge Cardozo’s reasoning in *MacPherson*, Green suggests that common law innovation is appropriate when “(1) the old regime is no longer workable and (2) though the courts are ostensibly applying the old rule, they are in reality, slowly gravitating towards a new rule.”<sup>38</sup> Green argues that the inconsistency demonstrated in the cases described above shows that the current understanding of imminence is unworkable.<sup>39</sup> A better solution, according to Green, would be to understand that imminence need not refer solely to temporal proximity, but might instead be understood as “causal.”<sup>40</sup>

To flesh out causal imminence, Green first analogizes the test for proximate cause: “[a]n act is a proximate cause of an injury if [(1)] it was a substantial factor in bringing about that injury, and if [(2)] the injury was a reasonably foreseeable consequence of the defendant’s act.”<sup>41</sup> Green notes that “imminence” is frequently used as part of the reasoning to find proximate cause, but in such cases, it refers to inevitability rather than temporal proximity.<sup>42</sup> Using a case where a poison was mislabeled, Green explains that “even if there were an enormous gap in time and space between a doctor’s purchase of

<sup>34</sup>Green, *supra* note 26, at 362 (citing *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 249, 25 Media L. Rep. (BNA) 2441 (4th Cir. 1997)); *U.S. v. Fullmer*, 584 F.3d 132, 141, 50 A.L.R. Fed. 2d 659 (3d Cir. 2009)).

<sup>35</sup>Green, *supra* note 26, at 365.

<sup>36</sup>*MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, 1050 (1916).

<sup>37</sup>Green, *supra* note 26, at 366–68.

<sup>38</sup>Green, *supra* note 26, at 366 (citing David Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 855–56 (2007)).

<sup>39</sup>Green, *supra* note 26, at 368–70.

<sup>40</sup>Green, *supra* note 26, at 370, 375–82.

<sup>41</sup>Green, *supra* note 26, at 376.

<sup>42</sup>Green, *supra* note 26, at 376–77.

what he thought was dandelion extract (a mild medicine) and his administration of belladonna (a deadly poison) in its place, the entire time, the mislabeled canister was simply waiting to cause its harm.”<sup>43</sup> Green argues that similar logic better explains the confusion of cases evaluating imminence in the context of speech—“it should not matter that *Hit Man* [a book offering instructions on performing and covering up a murder] had sat apparently harmless on a shelf for ten years after its publication (likely spatially far away from where it was initially written) before it provided the blueprint to a gruesome triple murder in 1993, because the harm was imminent in the nature of the book.”<sup>44</sup>

As further argument, Green references Judge Posner’s hypothetical “entrapment machine”—a government-created machine that both enables a defendant to commit a crime (who would not have been able to otherwise), and makes the crime so easy and enticing that if the machine just sits and waits, surely *someone* will eventually come along to commit it.<sup>45</sup> The existence of the machine makes the crime inevitable, in the long term, and places responsibility for *causing* the crime on the government that created the machine.<sup>46</sup> Similarly, Green posits, “The internet is, in effect, a lawless action machine.”<sup>47</sup> Harassment and revenge porn cases, for instance, show that one need only provide name, relevant identifying information, and nude photos in order for harassment to become inevitable—even if not immediate.<sup>48</sup> The nature of the internet is such that “if the only causal step left is equivalent to pressing a button, someone is inevitably going to press that button.”<sup>49</sup>

Green concludes by returning to the question of incitement of terrorist action. They use examples of the type of decentralized, undirected violence that is more common in modern times—violence in response to praise of the idea of violence, posted online without any specificity as to listener, and without any particular direction—such as Milo Yiannopoulos’s statement that “I can’t wait for the vigilante squads to start gunning journalists down on sight.”<sup>50</sup> If violence is committed by people who actively follow Yiannopoulos,

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<sup>43</sup>Green, *supra* note 26, at 377.

<sup>44</sup>Green, *supra* note 26, at 377.

<sup>45</sup>Green, *supra* note 26, at 377–79 (citing *U.S. v. Hollingsworth*, 27 F.3d 1196, 1199–2000 (7th Cir. 1994) (rejected by, *U.S. v. Cromitie*, 727 F.3d 194, 89 A.L.R. Fed. 2d 647 (2d Cir. 2013)) (en banc) (emphasis added)).

<sup>46</sup>Green, *supra* note 26, at 378.

<sup>47</sup>Green, *supra* note 26, at 379.

<sup>48</sup>Green, *supra* note 26, at 379.

<sup>49</sup>Green, *supra* note 26, at 380.

<sup>50</sup>Green, *supra* note 26, at 380–85.



or if shooters were found to have retweeted those messages, Green concludes the language would have been proven to be incitement.<sup>51</sup>

#### IV. CONCLUSION

One has to wonder how Green's proposed framework would apply to, for instance, a book *about* a hit man, rather than one which purports to give instructions on how to be one. For instance, we might expect that Yiannopoulos has seen the prevalence of violence and animosity towards journalists. But should we expect the same level of forethought for all public speakers who may bear personal animus against journalists? Green's analogy to the entrapment machine is somewhat problematic in that Posner's entrapment machine provides an incentive to commit the crime. By contrast, Yiannopoulos only states his own opinion, albeit in an incendiary climate in which he knows that his opinion may reach willing listeners via the endless reach of the internet.

In short, Green's suggestion would be a huge departure from prior understandings of incitement to imminent lawlessness. Nonetheless, Green is correct that his analyses seem to reflect judicial movement towards less temporally restricted causal models of dangerous speech.<sup>52</sup> If nothing else, Green provides a valuable exercise in analyzing the risks and responsibilities of our modern methods of communication while highlighting the ongoing debate regarding the dangerousness of online speech.

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<sup>51</sup>Green, *supra* note, 26 at 380–85.

<sup>52</sup>See also Lidsky, *supra* note 6, at 160, 164.