ENTERTAINING SATAN: WHY WE TOLERATE TERRORIST INCITEMENT

*Andrew Koppelman**

Words are dangerous. That is why governments sometimes want to suppress speech. The law of free speech reflects a settled decision that, at the time that law was adopted, the dangers were worth tolerating. But people keep dreaming up nasty new things to do with speech.

Recently, the Islamic State of Iraq and Syria (ISIS) and other terrorist organizations have employed a small army of Iagos on the internet to recruit new instruments of destruction.[1] Some of what they have posted is protected speech under present First Amendment law. In response, scholars have suggested that there should be some new exception to the law of free speech.[2] Thus far, no workable exception has been suggested.

American free speech law could ban certain noxious forms of incitement, as has been done in other countries.[3] But in doing that, we would, to a certain extent, give up being a nation of adults.

Anwar al-Awlaki, a planner of terrorist operations forAl Qaeda who was eventually killed by an American drone strike, maintained a website that defended terrorist violence.[4] One of its readers was Nidal Hassan, who also exchanged emails with al-Awlaki.[5] None of the email exchanges were explicitly conspiratorial, and no immediate plans were discussed.[6] Hassan

* John Paul Stevens Professor of Law and Professor of Political Science, Northwestern University. Thanks to Martin Redish for comments on an earlier draft. Portions of this Article are revised from an earlier piece in the *Northwestern Law Review*. *See* Andrew Koppelman, *A Free Speech Response to the Gay Rights/Religious Liberty Conflict*, 110 NW. U. L. REV. 1125 (2016). This Article was prepared for the *Fordham Law Review* symposium entitled *Terrorist Incitement on the Internet* held at Fordham University School of Law. For an overview of the symposium, see Alexander Tsesis, *Foreword: Terrorist Incitement on the Internet*, 86 FORDHAM L. REV. 367 (2017).

1. *See generally* GABRIEL WEIMANN, TERROR ON THE INTERNET: THE NEW ARENA, THE NEW CHALLENGES (2006).

2. *See, e.g.*, *infra* notes 27–28 and accompanying text.

3. Frederick Schauer, *The Exceptional First Amendment*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 35 (Michael Ignatieff ed., 2005).

4. Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1167–68 (2013).

5. *Id.*

6. *Id.* (reporting that the email exchanges "gave no indication that [Nidal Hassan] had any immediate plans to carry out . . . an attack").

eventually shot to death thirteen soldiers at Fort Hood in Texas.[7] Later, al-Awlaki defended the killing spree as "a heroic act" and "a wonderful operation."[8]

Ali Amin, a lonely Virginia teenager, was drawn into the virtual world of ISIS, where he found a welcoming community.[9] Eventually he was induced to provide logistical support, showing the organization how to secretly transfer funds and driving one recruit to the airport.[10] He was convicted of material support of terrorism and sentenced to eleven years in prison.[11]

American free speech doctrine will not permit this speech to be criminalized, so long as it falls short of direct solicitation or conspiracy. Incitement to law violation is constitutionally protected, unless it falls within the narrow *Brandenburg v. Ohio*[12] exception: "the constitutional guarantees of free speech and press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[13] Imminent means *really* imminent; even an indefinite time later in the day does not satisfy the standard.[14]

Generalized praise of ISIS, or even of terrorist violence, is protected speech. *Brandenburg* allows people to preach

> that the Islamic State is a social movement devoted to protecting Muslims and fighting an unfair global economic system; that it does not discriminate on the basis of race or nationality; that it uses violence in self-defense and in ways that mimic Western films and video games; and that Westerners who join the fight in Syria and Iraq are normal people fighting a just war.[15]

Why should free speech doctrine ever tolerate speech that advocates violation of the law? And if it ever tolerates it, why draw the line here?

Government tries to censor speech because it thinks, often reasonably, that the speech will cause something bad to happen. Before the development of modern free speech law, speech could be punished "[i]f the natural and

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7. *Id.* at 1168.

8. *Id.* at 1167–68.

9. Scott Shane et al., *Americans Attracted to ISIS Find an 'Echo Chamber' on Social Media*, N.Y. TIMES (Dec. 8, 2015), https://www.nytimes.com/2015/12/09/us/americans-attracted-to-isis-find-an-echo-chamber-on-social-media.html?_r=1 [https://perma.cc/D9EL-LVFA].

10. *Id.*

11. *Id.*

12. 395 U.S. 444 (1969) (per curiam).

13. *Id.* at 448.

14. Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam) (holding that advocating for illegal activity at an indefinite time in the future is not imminent); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927 (1982) ("This Court has made clear, however, that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment."). A few recent lower court cases have dramatically relaxed the imminence requirement, but these are inconsistent with U.S. Supreme Court doctrine and are unlikely to endure. *See* Thomas Healy, Brandenburg *in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 669–70 (2009).

15. Shane et al., *supra* note 9.

reasonable effect of what is said is to encourage resistance to a law."[16] But as Justice Louis Brandeis observed, this test bars any criticism of the status quo: "Every denunciation of existing law tends in some measure to increase the probability that there will be a violation of it."[17]

Justice Oliver Wendell Holmes made a more general point: "Every idea is an incitement. It offers itself for belief, and if believed, it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth."[18] If government can suppress speech that is likely to produce law violation, then it can suppress any speech that criticizes the law on the books—and that is the end of democracy. The *Brandenburg* standard was adopted in response to that problem.[19] Does it allow too much?

The trouble with an insistence on imminence was explained long ago by Justice Edward T. Sanford:

> [T]he immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when, in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.[20]

Sanford could have been talking about ISIS. So could Robert Bork: "Cumulatively [dangerous utterances] may have enormous influence, and yet it may well be impossible to show any effect from any single example."[21]

Laurence Tribe is too sanguine when he writes that the imminence requirement is "an additional safeguard for the harmless inciter."[22] Some inciters whom *Brandenburg* protects are not harmless. Rodney Smolla, defending *Brandenburg*, observes that "[g]overnments at all places and at all times tend to exaggerate dangers when they move against speech," and that "[i]n virtually *every* freedom of speech case involving political dissent that

16. Masses Pub. Co. v. Patten, 246 F. 24, 38 (2d Cir. 1917). The court also required "the words [to be] used in an endeavor to persuade to resistance," but since it left that question to the jury, it was not much of a barrier to prosecuting unpopular speakers. *Id.*

17. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

18. Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

19. James Weinstein, *The Story of* Masses Publishing Co. v. Patten*: Judge Learned Hand, First Amendment Prophet, in* FIRST AMENDMENT STORIES 61, 78–83 (Richard Garnett & Andrew Koppelman eds., 2012).

20. *Gitlow*, 268 U.S. at 669 (majority opinion).

21. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 33 (1971). For a similar objection, see LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 76–77 (2005).

22. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 12-09, at 849 (2d ed. 2000).

has ever reached the United States Supreme Court for resolution, *no palpable harm ever in fact occurred*."[23] That is not true of terrorist incitement. There have been serious harms, and more are probably coming.

The law is not utterly helpless to deal with terrorist propaganda on the web. Some of it may rise to the level of conspiracy and solicitation. Some may incite imminent lawless conduct and so may be unprotected under *Brandenburg*. Some may constitute true threats—another unprotected category of speech. Some may constitute material support for terrorism, which is unprotected even when it consists of speech.[24] But quite a lot of terrorist incitement does not fall into any of these categories. So where to draw the line?

The problem is a tough one, and I cannot solve it. I can say that the modifications of free speech law that have been proposed do not solve it. Cass Sunstein would get rid of *Brandenburg*'s imminence requirement: "If (and only if) people are explicitly inciting violence, perhaps their speech does not deserve protection when (and only when) it produces a genuine risk to public safety, whether imminent or not."[25] As we have already seen, however, long-term risk is hard to assess. Sunstein's proposal is not as bad as the old "natural and reasonable effect" test,[26] but it does authorize the same kind of judicial guesswork. One would want a reason to believe that this modification of *Brandenburg* would do good in some actual case. In the stories of terrorist incitement that have motivated our inquiry, the speakers have always been overseas, beyond the jurisdiction of American courts. Creating a new category of unprotected speech will not help if the law cannot reach the speakers.

Eric Posner responds to this difficulty by targeting readers, not speakers.[27] He proposes

> a law that makes it a crime to access websites that glorify, express support for, or provide encouragement for ISIS or support recruitment by ISIS; to distribute links to those websites or videos, images, or text taken from those websites; or to encourage people to access such websites by supplying them with links or instructions.[28]

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23. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 116 (1992); *see* DANIEL FARBER, THE FIRST AMENDMENT 70–71 (3d ed. 2010).

24. *See* Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651 (2017) (analyzing these categories and discussing their applicability).

25. Cass R. Sunstein, *Islamic State's Challenge to Free Speech*, BLOOMBERG (Nov. 23, 2015), https://origin-www.bloombergview.com/articles/2015-11-23/islamic-state-s-challenge-to-free-speech [http://perma.cc/E28U-2VDY].

26. Debs v. United States, 249 U.S. 211, 216 (1919) (holding that a person can be convicted of incitement if illegal conduct was the "natural tendency and reasonably probable effect" of the speech).

27. Posner's skepticism about the *Brandenburg* standard is also developed in ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 230–34 (2007).

28. Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE (Dec. 15, 2015), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html [http://perma.cc/RM8X-FTS2].

There is, of course, a problem of notice: how can one tell whether the website one is looking at crosses the line? Posner suggests the following solution:

> The law would provide graduated penalties. After the first violation, a person would receive a warning letter from the government; subsequent violations would result in fines or prison sentences. The idea would be to get out the word that looking at ISIS-related websites, like looking at websites that display child pornography, is strictly forbidden.[29]

But if the authorities know that someone is spending time with this material, then less draconian responses immediately suggest themselves. Ali Amin was seventeen years old.[30] Had his parents been told what he was doing, they could have intervened very effectively. More generally, when consumers of this material are detected, there are plenty of ways to respond to them without criminalizing the underlying speech.

Posner acknowledges that scholars and journalists may have legitimate reasons for wanting to look at terrorist incitement on the internet. He responds by trying to define a class of privileged readers: "[T]he law could contain broad exemptions for people who can show that they have a legitimate interest in viewing ISIS websites. Press credentials, a track record of legitimate public commentary on blogs and elsewhere, academic affiliations, employment in a security agency, and the like would serve as adequate proof."[31] Evidently we would get a modern analogue of the old Catholic Index of Forbidden Books, which could be read only with permission from the sacred congregation of the Roman Inquisition.[32]

The law cannot reach the speakers. If it detects the listeners, and the speech has not yet risen to the level of conspiracy, then there is a lot that you can do short of punishment for that subset of listeners—no one knows how large a subset—who present a danger. But why protect this worthless, dangerous speech in the first place?

In modern free speech theory, there has been a persistent puzzle about whether those who reject democracy are entitled to free speech.[33] Alexander Meiklejohn offered the classic response: "A government is maintained by the free consent of its citizens only so long as the choice whether or not it shall be maintained is recognized as an open choice, which the people may debate and decide, with conflicting advocacies, whenever they may choose."[34] Meiklejohn's argument is essentially the same as John Milton's original defense of free speech offered in 1644: in order for the choice of

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29. *Id.*

30. *See* Shane et al., *supra* note 9.

31. *Id.*

32. *Index Librorum Prohibitorum*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/Index-Librorum-Prohibitorum [http://perma.cc/NC6E-PVMA] (last visited Oct. 16, 2017).

33. Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 186–89 (1956); Bork, *supra* note 21, at 31.

34. Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 468 (1953).

good to be authentic, there must be a real option to choose evil.[35] People must learn to cope with evil thoughts. "He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true warfaring Christian."[36] The way to be virtuous is "to ordain wisely as in this world of evil, in the midst whereof God hath placed us unavoidably."[37]

God thus allowed the serpent to tempt Adam and Eve. That did not go well. Some proponents of free speech have been forthright about the dangers. Justice Holmes wrote that free speech "is an experiment, as all of life is an experiment."[38] Justice Brandeis thought that maintaining a free society required courage.[39]

Whenever people are treated as adults, with the power to make their own choices, they may make them badly. The value of free speech is that it enables us to be awake, to be conscious of what we are doing, and to be aware of the options available to us. Treating people as adults is dangerous because we do not know what they will do if they entertain Satanic ideas or allow themselves to be entertained by those ideas. Some people visit Islamic radical websites out of pure curiosity. It is impossible for a censor to know what effect any text will have on its audience, because readers are so diverse.[40]

Recent work on the cultural specificity of ideals of free speech and their roots in dissenting Protestantism raises the question whether the idea of free speech has anything to offer to non-Western civilizations.[41] Democracy provides a familiar answer: authoritarian government has the same pathologies everywhere, and official accountability is impossible without

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35. The Miltonic roots of Meiklejohn are elaborated in Andrew Koppelman, *You're All Individuals: Brettschneider on Free Speech*, 79 BROOK. L. REV. 1023, 1027 (2014). Another similarly Miltonic formulation is as follows:

> If men are not free to ask and to answer the question, "Shall the present form of our government be maintained or changed?"; if, when that question is asked, the two sides of the issue are not equally open for consideration, for advocacy, and for adoption, then it is impossible to speak of our government as established by the free choice of a self-governing people.

ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 123 (1960).

36. JOHN MILTON, AREOPAGITICA (1644), *reprinted in* JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 716, 728 (Merritt Y. Hughes ed., 1957).

37. *Id.* at 733.

38. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

39. *See* Whitney v. California, 274 U.S. 357, 375, 377 (1927) (Brandeis, J., concurring). *See generally* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653 (1988).

40. *See* Andrew Koppelman, *Does Obscenity Cause Moral Harm?*, 105 COLUM. L. REV. 1635, 1662 (2005); Andrew Koppelman, *Eros, Civilization, and Harry Clor*, 31 N.Y.U. REV. L. & SOC. CHANGE 855, 863–64 (2007).

41. *See, e.g.*, JOHN DURHAM PETERS, COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION 93 (2005) ("Comparative modernization studies suggest that cultures with strong support for free expression are clustered in the Protestant cultural zone of northern Europe and America, plus Australia and New Zealand, and even there it does not have uniform support. For Africa, Latin America, southern and eastern Europe, and Asia, absolutist tolerance of offense is rarely the majority public opinion.").

free speech. But another answer is that free speech provides an opportunity to close the "gulf that separates class from class and soul from soul,"[42] as George Bernard Shaw's Henry Higgins put it. Seana Shiffrin argues that, "given that our minds are not directly accessible to one another, speech and expression are the only precise avenues by which one can be known *as the individual one is* by others."[43] Censorship enacts "a sort of solitary confinement outside of prison but within one's mind."[44] Because free communication is essential to avoid this pathology, it is a fundamental human right.[45]

Free speech welcomes the open collision of moral views, which many people will find troubling. When John Stuart Mill's classic defense of free speech balances liberty against harm, Jeremy Waldron has observed, that balancing cannot count the moral distress of having your most cherished views denounced as harm or of contemplating ways of life antithetical to your own.[46] A core value of free speech is that it will and must induce such distress. Mill, and liberalism more generally, places great value on "ethical confrontation—the open clash between earnestly held ideals and opinions about the nature and basis of the good life."[47] Moral distress, "far from being a legitimate ground for interference, . . . is a positive and healthy sign that the processes of ethical confrontation that Mill called for are actually taking place."[48] Part of the reason for protecting illiberal ideas is that they promise to induce that distress.[49]

Free speech aims to create a distinctive kind of human character—open to all ideas, inquisitive, ready to be challenged—and a social environment in which that kind of character can thrive.[50] One cultivates that character by encountering ideas radically at odds with one's own. Mill observes that in order to do that, one

> must be able to hear them from persons who actually believe them; who defend them in earnest and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter

42. GEORGE BERNARD SHAW, PYGMALION (1913), *reprinted in* 1 BERNARD SHAW: COMPLETE PLAYS WITH PREFACES 189, 248 (1962).

43. SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 88–89 (2014).

44. *Id.* at 91.

45. *Id.* at 117.

46. *See* Jeremy Waldron, *Mill and the Value of Moral Distress*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 115, 119–20 (1993).

47. *Id.* at 120.

48. *Id.* at 125. Waldron's more recent call for restriction of hate speech is in tension with this argument. *See* Andrew Koppelman, *Waldron, Responsibility-Rights, and Hate Speech*, 43 ARIZ. ST. L.J. 1201, 1215–21 (2012).

49. This is one reason why the protection of dissent is so central to the free speech tradition. *See* STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 87 (1990).

50. Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 60, 61 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 707–15 (2013).

> and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.[51]

Any citizen of a liberal society might have a legitimate reason to read the recruitment literature of ISIS. No one can think intelligently about the challenge of Islamic radicalism, or of any other illiberal ideology, without spending at least a little time thinking about it from the inside. More generally, one cannot think intelligently about evil without entertaining evil points of view. The fearless, open character that liberal society seeks to cultivate cannot worry about whether one is permitted to look at this or that.[52]

Harry Kalven was right that the incitement question is "the area in which the claims of censorship are at once most compelling and most dangerous to key values in an open society."[53] The American approach is risky. Most countries do not do it that way; they unapologetically censor hate speech and incitement.[54] Maybe they have no choice, but they are treating their citizens as children who are not competent to consider these issues for themselves. So would we. And for what?

51. JOHN STUART MILL, ON LIBERTY 99 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

52. *See* George Kateb, *The Freedom of Worthless and Harmful Speech*, *in* LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR 220, 235 (Bernard Yack ed., 1996).

53. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 119 (1988).

54. *See* Schauer, *supra* note 3, at 32–35; Tsesis, *supra* note 24, at 676.