Terrorism Online: Is Speech the Same As It Ever Was?

Steven R Morrison
Abstract to “Terrorism Online: Is Speech the Same as It Ever Was?”

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Like all of us, terrorists now use the Internet for many purposes. It is commonly believed that planning operations, fundraising, and recruitment are the three main ways that terrorists take advantage of online communication. While it is clear that speech related to the first two can be prohibited, online recruitment speech may be protected under the First Amendment.

As a result, a number of commentators have been concerned at online recruitment and the fact that our current speech rules may not be adequate to deal with this new threat. They have proposed a number of remedies, but have largely accepted that online recruitment is a unique and potent danger.

This article questions that assumption. It discusses the structure of online communication and observations about it from the field of psychology. It concludes that online communication is currently no more dangerous than its real-world counterpart, and may actually be safer when it comes to terror recruitment.

This is not to say that there is no threat. Terrorist groups do recruit via the Internet. By showing, however, that the nature of online communication does not facilitate this recruitment, we can move toward truly effective solutions to the problem of online recruitment.
“Terrorism Online: Is Speech the Same As It Ever Was?”

By Steven R. Morrison*

I. Introduction

Electronic communication via the Internet and related technologies—or Computer Mediated Communication (CMC)—has revolutionized the way people around the globe communicate. Just as rapidly, modern terrorism has assumed new forms. Governments and individuals have had to react quickly and in novel ways to both CMC and terrorism. As a result, systems of law are being reshaped in ways that will affect societies for decades to come. As cyberspace and terrorism continue to evolve, systems of law will have to keep up.

CMC promises something to everyone, and everyone who uses CMC has benefitted in some way. Terrorist organizations are no different. In an era when most everything is migrating online to some extent, commentators have been concerned with online terrorist activity. Cyberspace is primarily a site of speech, and so in the context of such activity, the First Amendment’s application has been an important legal issue.

This article considers the confluence of CMC, terrorism, and speech rights. It asks whether speech rules need to be changed in relation to online terrorist speech when that speech is designed to influence the beliefs and actions of others. Within this context is the age-old question: what forms of speech can Congress constitutionally prohibit, and

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what forms are protected by the First Amendment? To answer this, it is important to ask the right preliminary questions.

First, what is the nature of online terrorist speech? Does this speech (or any part of it) constitute conduct that is subject to legal analysis other than the First Amendment? What is the political and historical context in which terrorist groups operate? What is their message, expressed in online speech? Answers to these questions are often complex, and may vary from speech act to speech act. One speech act could, for example, take place in a private, password protected chat room and convey information about how to build a bomb. Another speech act could consist of an individual’s post on a public forum expressing his hatred of western countries for a NATO strike in the Middle East that killed civilians, and a call for Muslims everywhere to join the insurgents in Iraq and Afghanistan. A third speech act could be an Al Qaeda press release, sent to NYTimes.com, explaining that it continues to operate because United States forces remain in Saudi Arabia, the holiest of Muslim holy lands. The Brandenburg test would apparently treat each of these speech acts differently.

Second, what First Amendment law exists to address this speech? The Brandenburg test is the touchstone, but there is more to the law than that, and there’s no guarantee that Brandenburg will remain good law in the cyberspace/terror age. I argue, however, that Brandenburg is probably adequate to address online terrorist speech, at least as terrorism and cyberspace exist today.

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Third, what is the nature of cyberspace and, more specifically, CMC? Most extant scholarship concerning online terrorist speech makes assumptions about the effects of CMC on recipients of speech that lack basis. This is understandable to a degree: until recently research into online speech has been relatively sparse, and the research that does exist is preliminary and equivocal. Nevertheless, this research has made some surprising findings. Contrary to many assumptions, cyberspace may not be a boon to terrorist organizations that seek to recruit others. Rather, CMC may have characteristics that actually hinder the recruitment process. Although this research says nothing about terrorists’ use of cyberspace to raise or transfer funds and transmit information concerning an operation, it is doubtful that such speech is protected by the First Amendment. What remains is terrorists’ use of cyberspace to recruit and spread their propaganda. Although there is cause for concern in this regard, CMC may not facilitate recruitment in the way many think it does.

This article suggests that the danger of online terrorist recruitment is overstated, and that current First Amendment law is adequate to deal with the problem as it exists today. Beyond that, I want to make a more nuanced point, which is that we should simultaneously welcome a free and open cyberspace, but recognize that the contours and nature of CMC may be different than real world communication. Our task, therefore, should not be either to promote or restrict CMC en masse. Rather, we ought to map the places and ways people speak online, and determine the psychological effects of these

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8 Landman, supra note 6, at 5166.
varied forms of CMC. By doing so, we can formulate intelligent CMC policy and refrain from polarized zero-sum debates.

Let’s first place the discussion in context: what is a “terrorist,” what are commentators saying about terrorists, and why should we care if they have speech rights?

II. Terrorists, Comments, and Caring

“One Man’s Terrorist is Another Man’s Freedom Fighter”

This quote is not intended to assert a belief in moral relativism, nor is it intended to discount the horrific nature of violent acts perpetrated throughout recent history in the name of religion, country, and freedom. Rather, it highlights the fact that who is labeled a “terrorist”—and who, therefore, suffers the concomitant ostracism and deprivations—most often depends on the socio-political position of the labeler. A person or group labeled terrorist may indeed be guilty of horrendous acts. They may also, however, be responding to others’ acts of violence or oppression (real or perceived). Alongside their violence, they may be offering humanitarian aid and seeking redress for their grievances through legal means. What, then, is a terrorist?

United States law defines terrorist in a number of statutes. The Homeland Security Act defines “terrorism” as “any activity that

(A) involves an act that--

(i) is dangerous to human life or potentially destructive of critical infrastructure or key resources; and

(ii) is a violation of the criminal laws of the United States or of any State

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11 Won Kidane, The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices, 33 FORDHAM INT’L L.J. 300, 204 (2010) (Nelson Mandela was considered a terrorist at one point, and as a result was even barred from entering the United States).
or other subdivision of the United States; and

(B) appears to be intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction,

assassination, or kidnapping.”

Elsewhere, the term “international terrorism” is defined as “activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.”

The same statute provides the same definition for “domestic terrorism,” except that it includes acts that are a violation of the criminal laws of the United States or any state, and that take place primarily within the territorial jurisdiction of the United States.

Finally, the Secretary of State has the ability to designate organizations as foreign terrorist organizations (FTOs) if she “finds that—

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(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism); and

(C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.”

Section 1182(a)(3)(B) defines “terrorist activity” as

“any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any--

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain),

with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

22 U.S.C. § 2656f(d)(2), referenced in the statute describing when the Secretary of State may designate an organization an FTO, states that “the term ‘terrorism’ means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”

In short, these statutes define terrorism as violent acts committed to influence a civilian population or a government. Foreign organizations may be deemed to be terrorist organizations if they engage in such violent acts and they threaten the security of the United States. It would appear that these statutes carefully define a type of behavior that is especially unacceptable in American society. We may not like it when a mugger holds someone up or a bank robber shoots a guard in the process of his crime. We think it particularly atrocious, however, when someone or some group targets innocent bystanders based on some social or political grudge. The mugging victim shouldn’t have been in the bad part of town, and the bank guard knew the risks when he accepted the job. Targets of terror, on the other hand, like abused children, never consciously accepted a risk and never played a part in the terrorist’s vendetta.

We ought to bring everything we can to bear against those who would target innocent people. The victims of 9/11 were not American imperialists who worked to oppress the Middle East. It is right that the hijackers were labeled terrorists, because that is precisely what they were, both under statute and in people’s common sense notion of what a terrorist is.

The reality, however, and especially in the realm of speech, is that things are not so simple. Swirling around the statutory definition of terrorism and those few people who easily fit the terrorist mold are thousands, if not millions, of others who view FTOs

like Al Qaeda and Hamas as more complex than merely murderous organizations. One of Osama bin Laden’s closest associates, for example, was able to separate many of Al Qaeda’s goals from 9/11, which he considered unjustifiable and murderous evidence that bin Laden had gone crazy. As we will see in the next section, these organizations grew out of specific socio-political conditions, and often have very focused goals. These goals are often legitimate, even if the FTOs’ tactics are illegitimate, violent, and justifiably criminal. For many Muslims, Al Qaeda and Hamas represent Islam finally fighting back against western powers that have been committing terrorist acts for decades. The victims of 9/11 were not American imperialists, but the Iraqi victims of U.S. sanctions in the 1990s were also innocent, as were many Palestinian victims of Israeli operations.

Because the national security of the United States is a necessary element for declaring an organization an FTO, and because the Secretary of State has great discretion to declare an organization to be an FTO, the designation is, in part, a political move. An organization can be an FTO only if it threatens America. If an organization serves America—however much it terrorizes any other group—it is not terror. Here is where the statutory definition of terror and the common sense definition diverge. Because declaring an organization an FTO is at least partially a political move, what is “terror” and what is something else often depends on what grievances the foreign organization has. This also means that speech will be simultaneously “pro-terror” and valuable because it also expresses legitimate underlying complaints. We may not like the actions

20 See Human Rights Watch, http://www.hrw.org/en/by-issue/publications/228 (last visited Aug. 18, 2010). This is not to say that violent actions against Israelis is any more justified, nor is it to simplify the conflict by assuming that moral condemnation can be leveled against only Israel.
that some groups take, but we should not always ignore the problems that drive the actions. We should, therefore, be very hesitant to restrict speech simply because it does not roundly condemn terrorism and everything associated with it. There is evidence that such restriction is happening.

It is currently illegal to provide material support to terrorists. 21 This includes providing “expert assistance” or “personnel.” There is a question as to what these terms mean. 22 The Government, for its part, has stated that filing an amicus brief on behalf of an FTO would constitute material support. 23 Although the Court has written that one can “say anything [one] wish[es] on any topic,” 24 including saying things in support of FTOs, the Government will, presumably, continue to push the envelope in applying the material support statute.

Speech has become a target of investigations into terrorism. The Antiterrorism and Effective Death Penalty Act of 1996 repealed a law that forbade the FBI from investigating First Amendment activities. 25 As a result, the FBI can now investigate people based on the content of their speech. Since 9/11, FBI agents have been authorized to go undercover to attend public events such as meetings at mosques or churches for the purpose of preventing or detecting terrorist activities. No predicate investigation or inquiry is necessary to do this. 26

The Patriot Act provides to law enforcement the ability to issue National Security Letters (NSLs). NSLs allow the FBI to obtain communications records (phone records,
Internet service provider records, etc.) from service providers. The service provider may be required not to disclose to anyone the FBI’s request. The Act also allows the government to perform warranted searches of people’s homes, and not to disclose the searches to them (so called “sneak and peak” searches).

All of these measures have led Muslim-Americans not only to believe that the government monitors their routine activities, but also to change their daily behavior in response. Such measures are, unfortunately, the government’s typical response to national crises, and the First Amendment is often the first to be assailed. There are a number of reasons we ought to care that the government is targeting speech in order to detect and prevent terrorism.

First, by targeting speech in order to uncover terrorism, the government is chilling speech that contains great value. The central theory in favor of robust speech rights is that free speech leads society to truth about issues of public importance. However critical of the U.S. government and sympathetic to terrorist organizations, some speech involving terrorism does contain a truth value that may not be heard if it is chilled or prohibited. We will see why this is the case in the next section.

Second, the government’s response to extreme speech and technology has tended throughout history to shape speech rights for everyone at all times. Furthermore, any

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28 COLE & DEMPSEY, supra note 23, at 161.
restriction to speech has tended to expand and be excessive to the need.\textsuperscript{33} It is the cases of the accused and the criminals that provide the robust constitutional protections that we all enjoy. If we want to maintain our own speech rights, especially in the Internet era, we ought to be concerned with how the government investigates and prosecutes people suspected of involvement with terrorism.

This is particularly important in light of terrorism and cyberspace. Both phenomena are fundamentally different than what has come before, and therefore present great challenges to the First Amendment. Terrorism has, in fact, spurred calls to regulate cyberspace.\textsuperscript{34} It may be that cyberspace should be regulated and that speech related to terrorism should be restricted. This article argues that such conclusions are premature. If we make then hastily, we all risk losing speech rights that need not be lost.

Any restriction we impose now threatens to undermine the main arguments in favor of free speech. Throughout the twentieth century, scholars have argued that free speech is important to ensure public discussion of public issues,\textsuperscript{35} discover the truth, allow individuals to attain self-fulfillment through self-expression,\textsuperscript{36} secure “core” speech by protecting the boundaries where questionable speech is located,\textsuperscript{37} and achieve other related goals. These arguments can be reduced to Americans’ almost poetic faith in debate,\textsuperscript{38} or the marketplace of ideas,\textsuperscript{39} to arrive at truth. This particularly American method of truth seeking depends on an anti-paternalistic reliance on individual liberty to

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\textsuperscript{34} LAWRENCE LESSIG, \textit{CODE: VERSION 2.0} 61 (2006).

\textsuperscript{35} CHAFEE, \textit{supra} note 31, at 934.

\textsuperscript{36} BOLLINGER, \textit{supra} note 32, at 45.

\textsuperscript{37} Id. at 77.

\textsuperscript{38} Gilbert v. Minnesota, 254 U.S. 325, 337 (1920) (Brandeis, J., dissenting).

\textsuperscript{39} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
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speak as one will.\textsuperscript{40} Free speech is therefore oriented toward the progress of society as well as the liberty of the individual. Free speech serves as a bridge between the group and the person. It ensures that individuals will be able to “believe what they will and say what they believe.”\textsuperscript{41} By enabling people to do so, society has the benefit of various points of view as it determines truth and how best to go forward.

There is, of course, some speech that needs to be restricted. Such restriction may change with the context. The Brandenburg test allows government to restrict speech that is directed at inciting or producing imminent lawless action and is likely to incite or produce such action.\textsuperscript{42} It is possible that in wartime, the ability of Congress to restrict speech is broadened,\textsuperscript{43} but it is equally or more possible that context cannot alter speech rights.\textsuperscript{44} It is even possible that in wartime, speech protections ought to be even more robust than in peacetime.\textsuperscript{45}

Whether the First Amendment applies equally at all times or changes with the context, it is obvious that circumstances play a role. One could reasonably argue that a posting on a website, “Take up arms, and kill all American soldiers you see in Iraq,” could or should be restricted. A similar posting, “Take up arms, and kill all American soldiers you see in Germany,” would be less likely to be restricted because it’s less likely to lead to such killing. Another posting, “Take up arms, and kill all American soldiers

\textsuperscript{40} Schaefer v. United States, 251 U.S. 466, 474-75 (1920) (freedom of speech is “so intimate to liberty in every one’s convictions—we may say feelings—that there is an instinctive and instant revolt from any limitation of them”).
\textsuperscript{41} LEWIS, supra note 30, at 106.
\textsuperscript{43} Near v. Minnesota, 283 U.S. 697, 716 (1931); Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting); Schenck v. United States, 249 U.S. 47, 52 (1919).
\textsuperscript{44} Frohwerk v. United States, 249 U.S. 204, 208 (1919); See Holder v. Humanitarian Law Project, --- U.S. --, 130 S.Ct. 2705, 2730 (2010) (even in the war on terror, the Court wrote that “we in no way suggest that a regulation of independent speech would pass constitutional muster, even if the Government were to show that such speech benefits foreign terrorist organizations.”).
\textsuperscript{45} DeJonge v. Oregon, 299 U.S. 353, 365 (1937).
you see in North Korea,” would be absurd, as there are no American soldiers in North Korea. The application of the law to the context may change, but the law itself ought to remain stable.

We ought to be concerned with any speech restriction involving terrorism first because such restrictions may tend to restrict other speech and chill the speech of law-abiding citizens. We should be prepared to carefully limit such speech when it poses a certain threat. It is clear that speech that furthers a conspiracy is not protected. Such speech includes the communication of operational plans, technological information such as bomb-making instructions, and the transfer of funds for an operation. What remains is speech designed to influence people’s beliefs and actions, so-called recruitment speech or propaganda.\(^{46}\)

Recruitment or propaganda speech is that which expresses sympathy for individuals or groups that the U.S. government has labeled terrorist. Such speech normally is also accompanied by a healthy dose of anti-Americanism or anti-Western speech. At its most benign, such speech may be, “even though I don’t support their violent acts at all, I can certainly see where Al-Qaeda is coming from. I mean, the United States is the ‘evil empire,’ right?” At its more aggressive, the speech might be, “The call to global jihad is obligatory on all Muslims. We Muslims must take up arms and fight the unbelievers wherever they are. Bin Laden has instructed us to kill Americans wherever we find them, and this is required of all Muslims. I think everyone on this forum ought to do jihad right now.”

\(^{46}\) I use the terms “recruitment speech” and “propaganda” interchangeably in this article, as they are identical for all practical purposes.
Such speech may also include a video of an insurgent strike on an American military convoy, shot from the insurgents’ point of view. It may include a video taken from a major news outlet, and redistributed to one’s friends. The person who appropriated this video may have added subtitles, translations, or a soundtrack. When, if ever, should these speech acts be restricted?

The Brandenburg test is a good starting point. In the cyberspace/terror age, it serves traditional theories of free speech well, and it doesn’t substantially increase any immediate risk. As cyberspace and terrorism evolve, and as we learn more about both, it may be that Brandenburg is inadequate to address new dangers.

To determine whether the dangers are new, we must ask whether online recruitment speech involving terrorism is fundamentally different than any other disturbing body of speech. There are two implicit questions here. First, is recruitment speech outside the pale of speech we ought to protect? In other words, does it lack all value that theories of free speech promote? Second, is CMC fundamentally different than real world speech? Specifically, does the nature of CMC make it particularly influential to recipients of the speech? The answer to all three of these questions is a qualified No.

III. The Terror Phenomenon and Speech Involving Terrorism

Reading most commentaries on the law’s response to terrorism, one gets the sense that the definition of terrorism is common knowledge, and that terrorists and their actions are unconnected to wider social, historical, military, and political realities. The contrary

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47 This is not, however, to criticize these commentators, as the scope of their articles is confined to other matters. See Thomas E. Crocco, Inciting Terrorism on the Internet: An Application of Brandenburg to Terrorist Websites, 23 ST. LOUIS U. PUB. L. REV. 451 (2004); Benjamin Davis, Ending the Cyber Jihad: Combating Terrorist Exploitation of the Internet with the Rule of Law and Improved Tools for Cyber Governance, 15 COMMLAW CONSPECTUS 119 (2006); Todd M. Gardella, Beyond Terrorism: The Potential Chilling Effect on the Internet of Broad Law Enforcement Legislation, 80 ST. JOHN’S L. REV. 655 (2006); Thomas Healy, Brandenburg in a Time of Terror, 84 NOTRE DAME L. REV. 655 (2009); Elisa Kantor, New
is actually true. What “terrorism” is depends upon whom you ask and in what context. The United States, for example, supported and provided support to the anti-Soviet mujahedeen in the 1980s in Afghanistan. Osama bin Laden even headed offices in the United States that openly recruited jihadis. Today, the mujahedeen in Afghanistan are fighting against the latest invader—the United States. In a little over twenty years, the freedom fighters have become terrorists or, at best, insurgents. In similar fashion, the Bush Administration abruptly changed its official opinion of anti-Russian Chechen fighters from freedom fighters to terrorists, apparently in favor of better relations with Russia.

One can, and should, condemn the attacks perpetrated by terrorist organizations on civilians, especially in the civilians’ own countries. The West has suffered such attacks, which include September 11 and attacks in Madrid and London in 2004 and 2005. The East has been targeted as well, in Bali in 2002 and Mumbai in 2008, to name the latest and most infamous. Muslims in the Middle East have taken the lion’s share of

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suffering: attacks on mosques, markets, and other places in Iraq and Afghanistan often seem calculated to kill Muslims, and not U.S. and coalition forces.  

These horrific attacks should not, however, keep us from seeking to understand the social, historical, military, and political realities in which these attacks are embedded. These realities include Middle Eastern borders created by the West during and after the first World War that don’t reflect the needs of locals and an East-West culture clash characterized by misunderstanding and legitimate concerns on both sides.  

When it comes to the United States’ involvement in the Middle East, the realities include supporting Iraq’s pursuit of nuclear and chemical weapons in the 1980s; Iraq’s use of those weapons against its own people; enforcing sanctions against Iraq in the 1990s, which killed two million people; supporting the Saudi government and stationing U.S. troops on Saudi soil; and providing apparently one-sided support to Israel against people in the Palestinian territories.  

Terrorism is the most salient—but not necessarily the most representative or accurate—voice of protest against these realities. Terrorism is not unique, however, to the Islamic context, nor is the fact that it may be a response to

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53 See generally, DAVID FROMKIN, A PEACE TO END ALL PEACE (2001).  
57 Fishman, supra note 19, at 687, 691.  
political, social, economic, and other realities that the terrorists perceive as sufficiently unjust as to warrant their violent acts. Terrorism is a crude rallying point for many people. If they don’t condemn terrorist attacks outright, they may support terrorist groups “in principle” while acknowledging that the concomitant loss of life was an unfortunate necessity. They may, of course, wholeheartedly support such attacks, and celebrate the deaths that ensue. Propaganda in support of terrorism reflects this complex response to terrorism and the realities that gave birth to and drive terrorism.

Since 9/11, Osama bin Laden has been at the center of American consciousness about terrorism. Whatever beliefs we have about terrorism, we imprint those beliefs onto him. Just as he is a symbol of evil for most Americans, he is a symbol of a lot more for others. His complete biography is too long to relate here, and has been discussed elsewhere. A few things, however, should be said.

Osama bin Laden can be viewed as a Muslim’s version of Forrest Gump: throughout the decades, he has always found himself at the center of major events. His father was instrumental in building the Saudi Arabian infrastructure and unifying the kingdom. At the same time, the kingdom was quickly becoming rich beyond imagination off of newly found oil deposits. As a result, the rulers’ use of their wealth offered the world a view of obscene extravagance, while the country as a whole also saw vast changes to daily life. A country that was once centuries behind developed countries in

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61 Terrorist groups and their sympathizers do not define these groups around violent acts so much as they do around abstract ideas and beliefs. This allows people to support the groups while thinking whatever is comfortable for them about individual acts of terrorist violence.
63 Wright, supra note 62, at 99-100.
every respect saw the wholesale introduction of roads, schools, televisions, and other facts of modern life. A country that was viewed as holy and mystical because of its vastness and isolation was all of a sudden plugged into the rest of the world.\(^{64}\) Secular and confusing notions of life came rushing in.\(^{65}\) With its oil wealth and the ability to export it and control markets, Saudi Arabia seemingly became the center of the world. Its rulers became glorious spendthrifts.\(^{66}\) To many devout Muslims, their actions were unislamic and showed that they had given up their religion for the material wealth of the West.\(^{67}\)

Because he built the kingdom’s infrastructure, Osama’s father was very close to the king. Himself a largely devout Muslim, Osama’s father also earned his wealth from the ruler who ushered in secularism and modernism to Islam’s most holy land. Osama, for his part, could easily have followed his father’s path, enjoying wealth and recognition around the kingdom. Had he done so, he no doubt would have ridden on Saudi Arabia’s rise into state dinners and presidential residences around the world. He could have had many wives and mistresses as his father had. Osama, however, rejected this life in favor of another.

When he was fourteen or so, Osama began to exhibit a growing religiosity.\(^{68}\) Accounts vary as to how much he imposed his will on others around him at that age,\(^{69}\) but it is clear that he took his faith very seriously, and acted on it. He never lived extravagantly off of his father’s wealth, but worked side-by-side with his father’s laborers

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\(^{64}\) Id. at 99.  
\(^{65}\) Id. at 99-101.  
\(^{66}\) WRIGHT, supra note 62, at 100.  
\(^{67}\) See id. at 166.  
\(^{68}\) Id. at 87.  
\(^{69}\) BERGEN, supra note 62, at 8-9; Id. at 88-89.
on a number of jobs.  He married only four women, where his father had many more and would at times marry in the afternoon and divorce in the evening. Osama was always warm with his children, contrary to the distance at which his own father kept Osama and Osama’s siblings. Osama attended his local mosque, and usually had time to talk and eat with others there. For choosing this life over the life of riches, modernity, and secularism, millions of Muslims view bin Laden as an Islamic hero who devoted his life to Allah when the world around him seemed to be enjoying its descent into sin.

When the Soviet Union invaded Afghanistan in 1979, Osama migrated there to fight. He claims that he travelled there immediately, but it might have taken him five years. Either way, this wealthy scion yet again abandoned his life of relative comfort and safety to fight jihad on behalf of other Muslims. It is irrelevant that he and the army he assembled were largely ineffectual. The fact is that he took action and was willing to enter battle and die for the Ummah, the worldwide Muslim community.

Osama’s willingness to fight and die reflects what some Muslims call a religious fard ayn, or obligation. Many believe that it is fard ayn to travel to a Muslim land that has been invaded by non-believers and defend it, to the death if need be. This comprises the concepts of defensive jihad and martyrdom. Both concepts are complex. Jihad, for example, is divided into “greater jihad,” which is a person’s internal struggle against sin, and lesser jihad, which is fighting for the sake other other Muslims, as Osama did in 1980s Afghanistan. Furthermore, lesser jihad can be divided into defensive jihad, which took place in Afghanistan, and offensive jihad, which could characterize a number

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70 WRIGHT, supra note 62, at 95.
71 Id. at 118.
of operations, including, some argue, 9/11. Offensive jihad, and certainly 9/11, is where legitimate jihad and terrorism begin to meet.

In Afghanistan in the 1980s, however, there was no doubt that the lesser jihad was defensive, and that the war was truly holy. The United States supported the mujahedeen and did not try to stop American Muslims from travelling to Afghanistan to participate in jihad against the Soviets.\(^\text{72}\) Osama was involved in recruiting people from around the world to do so. He was the perfect person for the job: Osama himself had given up more than any recruit would to go and fight. For this, Muslims again celebrated him around the world.

With the Afghan war over and the Soviet Union gone, the United States was the only remaining superpower. Its dominance was unquestioned. It used this dominance in the first Gulf War to push Iraqi forces out of Kuwait when they invaded. All of this might not have been so bad. What chafed Muslims was that U.S. forces were stationed in Saudi Arabia—non-believers were living there and drinking alcohol, and men and women cavorting, in the holiest of Muslim holy lands. Although Dick Cheney, at the time Secretary of State, promised that U.S. forces would remain in Saudi Arabia no longer than necessary, they remain there today.\(^\text{73}\) To many, this is evidence of America’s war against Islam. After Iraqi forces were adequately hobbled, the U.S. initiated sanctions and a no-fly zone that caused the deaths of millions of innocent Iraqis.\(^\text{74}\) Add to these realities the United States’ support for Israel and its relations with Iran, and one can understand Muslim antipathy toward the United States. Not only had the United

\(^{72}\) Id. at 122.  
\(^{73}\) Jim Mullins, Our Man in Afghanistan Came Back to Bite, SOUTH FLORIDA SUN-SENTINEL, Aug. 9, 2003, at 17A.  
\(^{74}\) Fishman, supra note 19, at 687, 691.
States done concrete things that lead to innocent Muslims’ deaths, but given the history of the Middle East and the United States’ position as sole superpower, one should not be surprised that the United States was viewed with great suspicion in the Middle East.

Bin Laden continued his jihad into the 1990s. Where once it was the Soviet Union, now it was the United States. He formed Al Qaeda around 1988, and was ultimately responsible for 9/11, the worst terrorist attack in history and the defining moment of a generation around the world. Once again, Forrest Gump was at the center. He was still poor, still dedicated to his religion, and still unwavering in the face of what many believe is an evil empire.

Many, if not most, Muslims find bin Laden’s actions to be wrong in every sense of the word. His London representative, for example, heard of bin Laden’s fatwa to fight and kill Americans and their allies, whether military or civilian. He was surprised, and said, “It’s not Islamic to kill civilians.” A mullah who runs a school out of the old bin Laden family compound in Yemen said of the Al Qaeda attack on the U.S.S. Cole: “We are against this holy war. The Cole attack does more harm to Yemen’s reputation than America’s reputation. We feel sorry for the American boys and girls. They are our guests.” A Yemeni shop owner on bin Laden Street and a cousin of Osama pointed to his three-year-old son and said, “This is my jihad,” meaning that raising his son was his religious work.

Bin Laden is not, however, always condemned. A headmaster at a madrassa in Pakistan put his opinion in a larger context, saying of Osama,

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75 BERGEN, supra note 62, at 75.
76 BERGEN, supra note 50, at 99.
77 Id. at 197.
78 Id. at 198.
I do not think he has any aggressive thoughts. He is not a saboteur; nor is he a terrorist . . . . God has gifted us with blessings like oil and gas, but it seems as though Americans want to take everything. I think his answer is that American is being unfair to us.79

Another headmaster put it more starkly: Osama is a “hero because he raised his voice against the outside powers that are trying to crush Muslims . . . this is a man who sacrificed his life for Islam.”80

Bin Laden is a complex person81 because of his response to the rise of Saudi Arabia, the Afghan war in the 1980s, and the United States’ conduct in the Middle East in the 1990s and beyond. He is terrorism’s central figure, but is not the whole story. The Taliban are also vilified, but they may be just as complex as bin Laden. After 9/11, President Bush gave the Taliban an ultimatum to hand him over.82 Their refusal to do so was cause to conclude that the minds of the Taliban and bin Laden were one, that the Taliban supported terrorism and 9/11, and hated the United States.83

There were certainly elements in the Taliban that held these opinions. The reason that the Taliban did not turn Osama over, however, isn’t so simple. One Taliban minister explained: “The subject is brighter than the sun. We have to respect tradition. [Bin Laden] is not a terrorist, he is a holy warrior. The West only accused him. We have a hospitable tradition. He is our guest. It is the tradition of our people.”84 Indeed, protecting a guest residing in one’s home (or one’s country) is such a central part of

79 Id. at 153.
80 Id. at 33.
81 Id.
84 Id. at 164.
Islamic tradition among the Taliban\textsuperscript{85} that it likely forced the Taliban’s hand. While bowing to tradition, many among the Taliban may have preferred to hand bin Laden over.\textsuperscript{86} The Taliban recognized that bin Laden’s terrorist activities threatened to place the Taliban in foreign countries’ crosshairs. Before 9/11 occurred, for example, the Taliban had no knowledge of the attack and had ordered bin Laden not to involve himself in such terror operations.\textsuperscript{87} After 9/11, the Taliban recognized that it faced an existential crisis that the Al-Qaeda leader had generated.

This short tale of Osama’s Forrest Gump adventure is not close to being the full history. It is not intended to convince the reader that bin Laden leads a legitimate organization or that his most violent actions are justifiable. It is, rather, meant to relate the key moments in his life that give many Muslims cause to celebrate him. It is also meant to highlight the fact that terrorism, legitimate jihad, questionable jihad, and non-violent aspects of Muslim and Middle Eastern realities are so closely intertwined that it is difficult to extract and prohibit speech that is characterized solely by its support of terrorism.

Consider the case of Sami Al-Hussayen, a citizen of Saudi Arabia and PhD student at the University of Idaho from 1999 to around 2004.\textsuperscript{88} He was charged with providing material support to a terrorist organization for “creating and maintaining internet websites and other internet media designed to recruit mujahedeen and raise funds [for] violent jihad in Israel, Chechnya and other places.”\textsuperscript{89} The government asserted that

\begin{footnotes}
\item[85] BERGEN, supra note 62, at 231-32.
\item[86] Id. at 233-35.
\item[87] Id. at 234.
\end{footnotes}
Al-Hussayen was an employee of the Islamic Assembly of North America ("IANA"), and provided expert internet-related services to the Al-Haramain Islamic Foundation.\(^\text{90}\) Specifically, his material support was alleged to be creating, maintaining, and administering websites that "contained materials designed and intended to recruit mujahedeen and raise funds for violent jihad."\(^\text{91}\) One website published articles named, "The World’s Bravest People" (extolling the virtues of the Chechen mujahedeen and asking Allah to destroy the Russian army and make their wives into widows), "Jihad in the Qur’an and the Sunnah," "The True Meaning of Shaheed" (stating that to die as a shaheed (martyr) is the ultimate honor), "The Objectives and Aims of Jihad," and "The Religious and Moral Doctrine on Jihad."\(^\text{92}\)

The indictment also stated that Al-Hussayen provided Internet-related services to two prominent Saudi clerics, including the publication of fatwas justifying violent jihad.\(^\text{93}\) The government also alleged that Al-Hussayen himself posted on websites a "Cry and Call" to Muslims to "fight the idolator with your money, your selves, your tongues and your prayers," and another post urging readers to donate money to support those who were participating in violent jihad to provide "them with weapons and physical strength to carry on with the war against those who kill them."\(^\text{94}\)

What the indictment boiled down to was an accusation that Al-Hussayen was the "webmaster and discussion group moderator for several Islamic groups that have

\(^{90}\) Id. at 3-4.
\(^{91}\) Id. at 5.
\(^{92}\) Id. at 6.
\(^{93}\) Id. at 7.
\(^{94}\) Id. at 9.
published content on their web sites advocating jihad and praising suicide bombings."  
These postings were not made by Al-Hussayen himself, but by other people. These websites also apparently contained articles that criticized jihad.

In his opposition to the government’s motion for detention without bail, Al-Hussayen’s attorneys focused on Al-Hussayen’s kind and gentle nature, and claimed that he had always been a champion of peaceful solutions to problems. On September 11, 2001, for example, Al-Hussayen was president of the Muslim Students Association and Islamic Center of Moscow, Idaho. In that role, he wrote to a number of professors at the university, thanking them for their support and declaring the group’s sadness over and condemnation of the 9/11 attacks. He wrote that such acts “do not conform to our belief in particular, and to universal norms, in general. We stand strongly behind all the law enforcement efforts in trying to bring those who are responsible to justice.” He went on to write that “the best way to combat terrorism and racism is to enlighten all of us about our shared belief[s] and show our common desire in standing up against the perpetrators altogether.”

The jury deliberated for two or three hours before finding Al-Hussayen not guilty. One juror said, “There was not a word spoken that indicated [Al-Hussayen]

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96 Id.
97 Id.
99 Id. at 8.
100 Id.
101 Id.
supported terrorism.”\textsuperscript{103} One reporter observed, “There was no evidence the Web sites recruited terrorists, or, for that matter, that [Al-Hussayen] even believed their hateful message.”\textsuperscript{104}

The websites that Al-Hussayen was associated with appear to be like many Islamic-oriented websites. They provide information on Islam, Islamic scholarship, and news of current events that Muslims might be interested in. They often offer Islamic-oriented books for purchase, or links to locations where books can be purchased. They usually have many other links to external websites, and they may operate forums. These forums may be moderated or not, people may have to be registered to post, and the forums may or may not be password protected. Many of these websites may openly advertise their disturbing, militant views. Other websites may provide links to other websites that express such views. Still other sites may provide scholarly texts on jihad and martyrdom (which are, as mentioned above, complex topics that do not necessarily signal terrorism, suicide bombings, and what the government invariably refers to as “violent jihad”\textsuperscript{105}). Finally, many sites provide entirely benign commentary and information.

Expressions of these different viewpoints often overlap each other, and what viewpoint any particular communication takes will often depend on the reader’s interpretation. For example, an article supporting jihad in Chechnya may be seen by a government agent as supportive of and incitement to terrorism, but may be seen by someone else as an op-ed piece discussing a current event. The Al-Hussayen case

\textsuperscript{103} Id.
\textsuperscript{104} Id.
illustrates the difficulty in separating speech that can or should be restricted, and speech that ought to remain protected under the First Amendment.

_Holder v. Humanitarian Law Project_ further illustrates the point. The Humanitarian Law Project ("HLP") is an American organization dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international human rights laws and humanitarian law. HLP wanted to provide support for the humanitarian and political activities of two organizations, one Turkish and one Sri Lankan, that the Secretary of State had declared Foreign Terrorist Organizations. In part, HLP wanted to train organization members to use international law to resolve disputes peacefully, teach members to petition the United Nations and other representative bodies for relief, and engage in political advocacy on behalf of these groups.

HLP is not a front for an extremist group; it is a human rights organization with consultative status to the United Nations, and its president is a retired U.S. administrative law judge. After the Supreme Court held that HLP’s proposed support would amount to material support prohibited by criminal statute, a number of media outlets criticized the decision. The case suggests that even if FTOs use abhorrent methods, they may nevertheless have legitimate grievances. Whether justified or not, these grievances have led to FTOs’ violent tactics, and are intertwined with those tactics. Speech surrounding

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109 Id. at 2716.
110 Id. at 2713.
these groups involves both the tactics and the grievances. Thus, a comment supporting Abu Musab Al-Zarkawi, the late leader of Al-Qaeda in Iraq, may be less a comment in support of terrorism and more support for soldiers fighting foreign invaders. If fog settles over a war, so too does it settle over a war on terrorism.

There is little doubt that terrorists use CMC to their benefit. Zachary M. Mattison claims that the Internet has become a “broad and powerful” “terrorist sanctuary.”¹¹² He argues that “the versatility of the Internet has created a place where terrorists can hide, disseminate plans and collect information effortlessly.”¹¹³ Terrorists, he argues, can use the Internet as a medium for psychological warfare, disseminating tactical advice, and fundraising.¹¹⁴ Stephen I. Landman writes that “the accessibility of the Internet has expanded every facet of [terrorists’] operations, from the spread of propaganda to the planning, financing, and preparation of terrorist attacks.”¹¹⁵ The Internet, he claims, has “revolutionized the process of enlistment,” in part by expanding terrorists’ ability to “recruit new fighters.”¹¹⁶ In short, terrorists use the Internet for “propaganda, recruitment, and e-learning.”¹¹⁷ Dawinder S. Sidhu seconds this, writing that Al-Qaeda uses the Internet to “train and recruit adherents, reestablish damaged cells, obtain financing, and communicate operational information.”¹¹⁸ “Al-Qaeda’s use of the Internet,” he says, “has…enabled it to radicalize and empower armies of new recruits by shaping their general worldview.”¹¹⁹

¹¹² Mattison, supra note 4.
¹¹³ Id.
¹¹⁴ Id.
¹¹⁵ Landman, supra note 6, at 5160.
¹¹⁶ Id. at 5164.
¹¹⁷ Id. at 5166.
¹¹⁸ Sidhu, supra note 29, at 381.
¹¹⁹ Id. at 382.
The question is not whether terrorists use the Internet, but rather how they do so and to what effect. Speech related to terror can be divided into at least two types. The first type is what I will call operational speech, which is speech that furthers actual conspiracies, is part of a criminal enterprise, or raises or transfers funds. Such speech could be the transmission of plans or information for a terrorist operation in the works, communication of orders to organization members in foreign cells, and other speech that has real-world consequences. The purpose of this type of speech is to further the operation of the terrorist organization. It is speech that often can be restricted, and is not considered in this article.

This article involves the second type of speech, which I call aspirational speech. This is speech intended to recruit fighters, convince others of the righteousness of a group’s activities and belief system, and sympathize with terrorist organizations. Because much of both operational and aspirational speech is found in “password-protected discussion forums” and “encrypted websites,” it is difficult to fully understand the nuances of aspirational speech. It is fair to say, however, that what the government may call speech designed to recruit fighters—i.e. propaganda—may be seen as news or religious texts by a Muslim. There are, for example, thousands of “jihadi videos” circulating the Internet. Some depict quite disturbing events, such as beheadings. Others depict operations in Iraq or Afghanistan from the insurgents’ point of view, in which an American convoy hits an improvised explosive device, or an insurgent group cases an American outpost to assault at a later time. Such videos are similar to those shown on major American media outlets. The only difference is that they are told from the insurgents’ viewpoint. Some of these videos were, in fact, pulled from major media

120 Landman, supra note 6, at 5161.
outlets and redistributed through informal networks of real-world and online friends. Some have been altered with the addition of subtitles, translations, music, and so forth.

Kids in the Middle East consume these videos like American kids consume video games like Grand Theft Auto. Most of these kids won’t become jihadis as a result, but the U.S. government views these videos as recruitment tools. They are more likely to be either entertainment or sources of news, or both. This is also the case with videos depicting Muslim scholars and leaders speaking—often favorably—about the insurgents, the liberation of Iraq and Afghanistan, and about jihad.

This is not to say that online recruitment does not occur or that it is invariably unsuccessful. Cass Sunstein has observed that online incendiary speech may be different than its real-world counterpart simply because it is widely disseminated. The speech may not be likely to produce lawless conduct in any particular listener or viewer. But, he writes, “suppose…that it is believed that of the millions of listeners, one or two, or ten, may well be provoked to act, and perhaps to imminent, illegal violence.” The Internet enables this possibility, and terrorist groups may be taking advantage of it. The Saudi government has launched an initiative to counter online extremist speech with speech intended to moderate potential converts to terrorism. The U.S. Senate held hearings on violent Islamist extremism, and concluded that Al-Qaeda and like-minded groups use “tightly controlled messaging campaigning…designed to spread their violent message.”

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121 Sunstein, supra note 4, at 370.
This article is concerned with the ability of CMC promulgated by terrorist organizations or sympathizers to convince others to adopt their views and, perhaps, engage in conduct in accord with their views. If cyberspace provides a space in which listeners or readers are more susceptible to influence by such speech, then perhaps current First Amendment law is inadequate to address this threat. Let’s turn now to the First Amendment law that should apply.

IV. Applicable First Amendment Law

Prior to the First World War, there was little judicial precedent to establish any substantive speech rights under the First Amendment. Only prior restraints were prohibited. Under the Espionage Act of 1917, defendants could be convicted if juries found their speech to be “disloyal.” Although there was some pushback against speech restrictions, notably by Judge Learned Hand and Justices Holmes and Brandeis, the World War I cases affirmed the power of the government to restrict most of the speech it wanted, especially in wartime. The judges were, however, coming to believe that the First Amendment meant more than a mere prohibition on prior restraints. They proceeded slowly, affirming convictions but also staking out positions on which future courts would build modern First Amendment law. It was in this time, for example, that Justices Holmes and Brandeis laid the groundwork for the imminent danger test. Just as

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125 Patterson v. Colorado, 205 U.S. 454, 462 (1907).
126 Lewis, supra note 30, at 25.
127 Gilbert v. Minnesota, 254 U.S. 325 (1920) (Brandeis, J., dissenting); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting); Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (in which Judge Hand protected inflammatory opinion, political agitation, and expressions of sympathy for people convicted of conspiring to resist the draft).
importantly, their poetic defense of free speech helped to establish it as a core value in
the mythology of America.129

By 1931, the Court had begun enforcing speech rights.130 In World War II, free
speech had come to be more protected than it had been in the First World War.131 The
period between World War I and the Cold War, then, was a period in which modern First
Amendment law was being created. Whether speech can be restricted or not came to be
determined less by the context in which the speech occurred and more by the likelihood
that the speech would lead to some imminent bad conduct.132 This period led to
Brandenburg v. Ohio in 1969, which reflected the imminence thread from the World War
I cases, but also did away with a lot of former case law that was ambiguous or, by
contemporary free speech standards, wrongheaded.133 Brandenburg became the central
case when dealing with the criminalization of speech. It is not, however, the whole story,
nor is it uncontroversial.

Brandenburg’s immanency test evolved from the clear and present danger test.
Prior opinions, in which the Court applied the clear and present danger test, leave unclear
just what “danger” was envisioned. The danger had been described variously as the
danger of an “immediate threat to public safety, peace, or order,”134 of “action of a kind
the State is empowered to prevent and punish,”135 and of an extremely serious and

129 Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S.
652 (1925) (Holmes, J. dissenting); Gilbert v. Minnesota, 254 U.S. 325 (1920) (Brandeis, J., dissenting);
Schaefer v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J.,
dissenting).
130 Stromberg v. California, 283 U.S. 359 (1931); LEWIS, supra note 143, at 39.
131 LEWIS, supra note 30, at 113.
132 Kantor, supra note 47, at 757.
133 See Montgomery, supra note 47, at 157.
imminent “substantive evil.” Obviously, Brandenburg maintains the spirit of these prior opinions while narrowing prohibitable speech to that which is likely and intended to cause imminent lawless action. The additional underlying notion in Brandenburg is that such lawless action must be quite serious, even violent, for the speech to be prohibitable.

In 2005, Lee Bollinger wrote that the Brandenburg test is “about as speech-protective as we’re going to get in the real world.” As a result, we should not expect speech protections to expand from where they are now. The danger, then, is not in expansion, but in retraction of speech rights. Some have argued that Brandenburg may not and should not apply during the war on terror. Others have noted that during this war on terror free speech violations have accelerated dramatically, as have feelings among Muslim populations that they need to watch what they say. To many, this is the government’s typical response in times of crisis.

Terrorism has engendered this crisis, but so too has the advent of CMC. Today as in the past, the debate is framed as a fight over greater speech rights versus lesser speech rights. Speech rights become a zero sum game: every lost right is a gain for censorship and repression, and every right won is a loss for security, stability, and safety.

Brandenburg’s centrality enables this because it does not, and cannot, address the specific characteristics of certain speech, especially novel speech, like online speech relating to

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137 Bollinger, supra note 30, at 425.
138 Id.
140 LEWIS, supra note 30, at 162.
142 Sidhu, supra note 29, at 376.
143 BOLLINGER, supra note 32, at 189-90; Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 HARV. L. REV. 932, 937-38 (1919); Kantor, supra note 47, at 765.
terrorism. Brandenburg was intended to protect all types of speech very broadly. In general, this serves the theoretical bases of free speech quite well. When novel speech appears, however, Brandenburg’s virtues may render it useless in determining whether and how to address such speech. Other cases offer some guidance.

Beyond the well-worn path of whether wartime allows for greater speech restrictions\textsuperscript{144} lies the larger question of whether circumstances in general could or should alter Congress’ ability to restrict speech.\textsuperscript{145} The question remains unsettled. In \textit{Dennis v. United States}, Justice Frankfurter wrote that “the scope of a restriction [upon governmental authority] may depend on the circumstances in which it is invoked. The First Amendment is such a restriction.”\textsuperscript{146} He went on, however, to note that the First Amendment “exacts obedience even during periods of war; it is applicable when war clouds are not figments of the imagination no less than when they are.”\textsuperscript{147} Every time the United States enters a crisis, a belief surfaces that this time things are different and speech ought to be more restricted than it was prior to the crisis. In the long run, however, the twentieth century has witnessed a gradual and far-reaching expansion of speech rights. Despite this, circumstances do have a role to play in formulating speech rights.

Speech \textit{rules} should not change as a result of circumstance, but circumstance may alter the \textit{application} of those rules. This presumes, of course, that we are satisfied with our speech rules. This satisfaction comes in part from the ability of our rules to address

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\item[\textsuperscript{144}] Near v. Minnesota, 283 U.S. 697, 716 (1931); Abrams v. United States, 250 U.S. 616, 627-28 (1919) (Holmes, J., dissenting); Frohwerk v. United States, 249 U.S. 204, 208 (1919); Schenck v. United States, 249 U.S. 47, 52 (1919); Masses Pub. Co. v. Patten, 244 F. 535, 538 (S.D.N.Y. 1917).
\item[\textsuperscript{145}] Dennis v. United States, 341 U.S. 494, 520 (1951) (Frankfurter, J., concurring); Schenck, 249 U.S. at 52.
\item[\textsuperscript{146}] Dennis, 341 U.S. at 520 (Frankfurter, J., concurring).
\item[\textsuperscript{147}] Id.
\end{itemize}
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novel circumstances. Unfortunately, many people are not satisfied with Brandenburg. Part of their complaint is that Brandenburg doesn’t address the threat of online speech that supports terrorism.

Such speech, it is said, serves to recruit impressionable people. Americans are targeted, and the Saudi Arabian government has started to formally counter extremist online speech with moderate speech. Because it takes a lot to convert extremist beliefs into terroristic actions, Brandenburg protects online recruitment speech because imminent lawless action is not likely or intended. It may, however, be that the speech is intended to persuade the listener to engage in future violent activity. An Illinois District Court discussed the issue of persuasion in 1918, when a defendant was charged with interfering with the operation and success of the military. A local committee in charge of patriotic activities had noticed that the defendant’s name wasn’t on the list of Liberty Loan or thrift stamp subscribers. Members of the committee asked the defendant about this. He said that he didn’t want the war to continue, that the government was wrong, and that if enough people did what he did, the government would have to make peace with the enemy. Dismissing the charges, the court wrote that “[a] citizen has a legal right not to buy or subscribe during the great drives, for any reason that is satisfactory to him, provided he does not attempt to get others to accept his views, for the purpose of interfering with the operation of the military establishment of the United States.”

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149 Boucek, supra note 122.
151 Id. at 270-71.
152 Id. at 272-73.
The charges were dismissed because the defendant didn’t actively attempt to persuade others of his position. He merely responded to the committee’s question. Since 1918, the Supreme Court has clarified that active persuasion, even that which is designed to convince someone to commit a crime, is protected.\(^{153}\) This is exactly what terror recruitment speech is designed to do. What if online speech is fundamentally more persuasive that its real-world counterpart? This potential virtual brainwashing is at the heart of concern over online terroristic speech. If online speech is fundamentally more influential, our current speech rules may be inadequate to address the danger of online recruitment.

The purpose of recruitment speech may also be a factor in determining speech rules. Prior to Brandenburg, the Court had held that it was permissible to advocate the government’s overthrow by lawful means. If the speech advocated overthrow by unlawful means, however, then the speech was prohibitable.\(^{154}\) Brandenburg rendered this distinction irrelevant. Brandenburg simplified the analysis, but the advent of speech supporting terrorism has amplified the complexity of speech. As noted above, terrorism exists in a complex web of political, social, and historical relations. When terrorists speak, they often have legitimate complaints and poignant observations. Just as often, however, their speech is violent, nihilistic, and baseless. These two threads of speech inevitably intertwine. For example, at one level, Al Qaeda has expressed its interest in expelling the United States from Saudi Arabia and the Middle East because of what it

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\(^{153}\) Hess v. Indiana, 414 U.S. 105, 108 (1973) (“advocacy of illegal action at some indefinite future time…is not sufficient to permit the State to punish…speech.”); Yates v. United States, 354 U.S. 298, 327 (1957) (“Every idea is an incitement”); Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (“The guaranties of civil liberty [include the right] to teach a persuade others by the communication of ideas.”).

perceives to be American meddling in regional affairs that severely harm the physical and
spiritual health of Muslims. Knowing nothing more, this speech seems to be a reasonable
response to the American presence. Bin Laden, and therefore Al Qaeda, also has said
that Americans should be targeted and killed wherever they are found. This fatwa
includes children and other Americas who are wholly innocent of America’s perceived
meddling in the Middle East.

What is to be done with this speech? We want to protect people’s right to speak
out against the government, but why should we protect the advocacy of indiscriminate
mass murder? Lee Bollinger asked the same question of the Nazi march in the
predominantly Jewish town of Skokie in the 1980s. His initial position was that some
speech is so obviously lacking in truth value that we should feel comfortable prohibiting
it. In other words, by the 1980s it was recognized that Nazi ideas contributed nothing
to the pursuit of truth. There was therefore no reason to protect their expression.

Bollinger and other theorists ultimately rejected this initial position. For many
reasons, even obviously extreme and baseless speech ought to be protected. In the case
of terrorism, such speech should be protected for the same reasons. Of course, when
extreme speech threatens to result in violent action or brainwash impressionable people
into the fold, restrictions should be considered.

155 Al Qaeda’s Fatwa, ONLINE NEWSHOUR,
156 BOLLINGER, supra note 32, at 3-4.
157 Id. at 9, 34-35.
158 Bollinger, for example, argues that protecting such speech compels society to practice tolerance, and
thereby adds something important to its identity. Id. at 9. There is also the practical argument that by
protecting extremist speech, law enforcement can target its investigations at the speakers.
In a time when general Internet speech freedoms are threatened and terrorism has been used to usher in changes to criminal law broadly, this question is particularly pressing. To trace the contours of any appropriate new restrictions, the psychological effects of CMC on potential recruits should be explored.

V. The Psychology of Internet-Based Communication

Is CMC fundamentally different than real-world speech, or is the difference merely in the medium of communication? Does CMC especially facilitate influence toward violent and extreme mindsets? Do CMC and its influence over its recipients lead to real-world conduct? If the answer to all of these questions is yes, then we should consider restricting terror-related CMC more than we restrict similar real-world speech. This section explains why cyberspace may be as safe or even safer for impressionable people than the real world. At the very least, those who argue for greater restrictions on terror-related CMC will find little support for their views from the field of psychology.

What is the Internet? If you’re sure you know, you probably don’t. The “Internet” is a network that connects thousands of computers around the world. It is the foundation for the World Wide Web, which enables graphics, rather than text, to be distributed to other computers. The Internet, strictly speaking, does not include online speech forums (also called Bulletin Board Services) or conferencing/information services like America Online (AOL) and CompuServe. When we use the word Internet, we generally are referring to cyberspace, which encompasses all of these structures of

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159 See JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT (2008).
161 MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 6-7 (2003).
162 Id. at 5-6.
electronic communication.\textsuperscript{163} This article is concerned with CMC, which by definition includes all communication that takes place electronically. That means online forums, e-mail, websites, online newspapers, list-servs, newsgroups, chats, instant messages, and metaworlds like Second Life.\textsuperscript{164} It even includes communication that takes place via online, networked video games.\textsuperscript{165} The term “Internet” is shorthand for everything that exists electronically.

All of these forms of communication help to create a cyberspace as rich and “real” an experience as the real-world is. We can, therefore, think of cyberspace in real-world terms: there are main American thoroughfares of communication, populated by news sites like nytimes.com, shopping sites like gap.com, and entertainment sites like hulu.com. Other countries have similar grand boulevards of cyber-activity. There are kid-friendly places in cyberspace, just as there are in the real world. There are red light districts, populated by legal, but often offensive, sites that provide pornography, drug paraphernalia, and so forth. There are also back alleys, secret parties, and a lot of illegal activity occurring in cyberspace, just as it does in the real world. In both underworlds, passwords are key and who you know may get you into some of the most tantalizing places.

It is surprising how similar cyberplaces and real-world places are in terms of their location and accessibility.\textsuperscript{166} Everyone knows how to get to nytimes.com, just as everyone knows how to get to their local real-world newsstand. Anyone can buy the paper, and anyone can view the site. Red light districts are a little harder to find, in both

\begin{footnotesize}
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\item \textsuperscript{163}Id. at 6.
\item \textsuperscript{164}WALLACE, supra note 5, at 4-8.
\item \textsuperscript{165}LESSIG, supra note 34, at 126.
\item \textsuperscript{166}GODWIN, supra note 161, at 1 (cyberspace is a “frontier” and a “territory”); Landman, supra note 6, at 5161.
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the real world and online. Kids would need someone to direct them to both, and access to
both is often—but not always—restricted by ability to pay and age requirements (though
age requirements online are very easy to circumvent). The back alleys and secret parties
are much harder to find; in both the real world and in cyberspace, one will rarely, if ever,
stumble upon these places. The speech that this article is concerned with takes place
primarily in these back alleys and, to a lesser extent, the red light districts.

CMC in support of terror (and in support of less extremist and violent viewpoints
logically related to terror) exists on obscure websites, often with non-intuitive URLs.
Many of these websites may appear to be moderate or politically militant, but don’t
appear to be openly advocating any illegal action.167 These sites may link to other sites
that edge toward terrorism, forums in which the participants more openly discuss current
issues in disturbing ways, or places requiring a password to enter. Most of these sites
tend to pop up, and then disappear. The more moderate the site, the more stable it will
be. In cyberspace, you may stumble upon a back alley, but you probably won’t get
through the first door. Unless your hosts want you there, you most certainly won’t get
through subsequent doors.168

This view of cyberspace is important when it comes to online recruitment for
terrorism because a concern is that cyberspace provides “unmediated access to huge
potential audiences…[and] it magnifies the potential harm cause by irresponsible
speech.”169 There is an underlying notion that cyberspeech facilitates influence to such a

167 One such prominent website is the Islamic Thinkers Society, www.islamicthinkers.com.
168 See Mattison, supra note 4.
169 RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 93 (2001); see also Aaron White, Crossing the
Electronic Border: Free Speech Protection for the International Internet, 58 DEPAUL L. REV. 491, 495
(2009) (“The Internet’s ‘unmediated nature’ allows extremist groups to…promote ‘recruitment for violent
acts.’”).
degree that the process can be called brainwashing. To make matters worse, such speech goes unnoticed because cyberspace is unregulated and cyberspeech is unobserved by the government.

While online recruitment activities probably do bear fruit, the nature of cyberspace isn’t as insidious as people claim, and it may not provide the qualitative boost to terror enrollment that is suggested. Cyberspeech is not unmediated or unregulated. As for regulation, Brandenburg provides a floor. The structure of cyberspace provides an additional level of regulation. Most of our online speech takes place in privately owned spaces, like AOL chat rooms, Second Life, and websites. Because they are privately owned, the First Amendment does not usually apply to them, and so there is, essentially, no mandated free speech. Speech can slip through the cracks, as it does, but the current structure of cyberspace tends toward regulation. Many think that cyberspace will become even more regulated in the future.

As for mediation, cyberspace may be the most filtered and checked communications technology the modern world has known. The fact that its most disturbing aspects are hidden away in back alleys and behind locked doors is one form of mediation: people who arrive at certain cyberdestinations tend to want to have arrived there. In this way, cyberspace may be a more self-selected environment for viewing information than is the real world. Lawrence Lessig puts it this way: “In real space…however much I’d like to ignore homelessness, I cannot go to my bank without

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171 Landman, supra note 6, at 5172.
confronting homeless people on the street…All sorts of issues I’d rather not think about
force themselves on me.” Lessig worries that one’s ability to filter out messages in
cyberspace may be too effective, removing as it may important, but unsettling,
information from the user’s consciousness.

Another way to put this is that cyberspace allows users to select their own
community. Cass Sunstein is ambivalent about this. He notes that cyberspace allows
people to escape their communities with the click of a mouse, but that cyberspace just as
easily lets users remain in the comfort of the familiar. One study suggests, however,
that cyberspace users are “not burrowing down in comfortable nests. They’re cruising far
and wide looking for adventure, information, combat and arousal.”

When speaking of terrorist recruitment, there is a notion that impressionable
young people are wandering in cyberspace, and casually find or are directed to
recruitment forums, “jihadi videos,” and militant religious tracts. The need for the
impressionable youth to actively seek out this information undercuts the view of him as a
passive and unwitting recipient of recruitment propaganda. He (and it usually is a he) has
agency in the matter, and so the need for terror organizations to recruit, turn, or even
“brainwash” him is lessened. If he becomes a terrorist, it is he who made the call, not the
CMC he was exposed to.

Cyberspace enables users to exercise their agency in ways that older media like
television and radio never could. These older forms were one-way transmitters of
information. Cyberspace, on the other hand, is about communication. Information is not

174 LESSIG, supra note 34, at 259.
unidirectional. Rather, it is a two-way street or is multidirectional.177 Mike Godwin has described cyberspace as “more like a town hall meeting, albeit one in which everyone has a chance to speak, no one is shouted down, and everyone has time to develop and explain his or her ideas.”178 In cyberspace, content isn’t pushed into a user’s home; it is pulled there by the user.179

This multidirectional communication is an additional mediating force. When a user comes across terror recruitment material, he is able to interrogate and counter it. This is not, it must be said, an unequivocal good. By enabling users to counter terroristic messages, it reveals to terror recruiters the exact concerns that users have. This gives recruiters the chance to tailor their message to the user, and engage the user in one-to-one dialog in quite personal forums like chat rooms. For example, a user may express concern that the Qur’an declares the 9/11 attacks to be religiously forbidden. Terror recruiters are ready with answers. Another user may be untroubled by the 9/11 attacks, but thinks that he cannot travel to Iraq to fight because his local imam has forbidden it. Terror recruiters will have a tailor-made answer for that. What does happen, however, is that the potential recruit has the power to think, and speak, for himself. Cyberspace doesn’t guarantee freedom from wrongheaded brainwashing. It does, however, create perhaps the truest possible marketplace of ideas the world has ever seen.180

In cyberspace, we can influence others, but we can also shape our own behavior.181

178 GODWIN, supra at 8.
179 Id. at 75.
180 LESSIG, supra note 34, at 237; NUNZIATO, supra note 172, at xiii.
181 WALLACE, supra note 5, at 4.
Another mediating factor is that cyberspace is replete with authorities who manage, restrict, and promote certain messages. These authorities include editors of newspapers, moderators of forums, governments, and others. All of these authorities have an interest in staying in business and not getting arrested. Those who are linked to illegal behavior and are involved in spreading terror-related CMC will tend to manage their online space to provide particularly disturbing speech only to those who have already bought into it. As the recruitment potential of terror-related CMC increases, the online exposure and detectability of terrorists also increase.

Cyberspace brings with it other realities that, while they aren’t strictly mediating factors, do call into question the effectiveness of terror-related CMC. The most discussed feature of CMC is the relative anonymity of participants. Anonymity may bring with it the reduced functioning of norms and an increase in disinhibition. This cuts both ways when it comes to terror-related speech. If my default norm includes western views, democratic government, and a stable society, my disinhibition may lead me towards terror-related speech. If my default norm, however, includes religious conflict, death, and deprivation—if I am, for example, a young man in Palestine or Afghanistan—I may rebel against this norm and promote peace and democracy. More on this below.

Along with anonymity comes the reach of cyberspace—what someone says in Iowa can instantly be read in Mongolia. This too cuts both ways. It may be that geographic distance between online communicators decreases the effectiveness of a message: an Al-Qaeda member in Iraq who is speaking with someone in Peoria is likely

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182 Id. at 9.
183 Government in particular can, and sometimes does, monitor and censor online speech. GOLDSMITH & WU, supra note 2, at 84, 92, 95.
184 Id. at 9.
to have less of an effect on that person than someone who lives next door. On the other hand, spammers know that if you send e-mail to millions of people, one will bite. Incendiary speech advocating illegal violence may be no different. Even if it’s not likely to move any single person to action, it may be very likely to move one in one million.185 Terrorist groups can play these odds in cyberspace, and they may gain a small number of adherents who can do great harm.

These characteristics of cyberspace suggest that the online world, while not completely safe, is at least no more dangerous than the real world. Like the real world, cyberspace contains a number of borders, mediators, and authority figures that shape and guide conversations. The online world is clearly not meant for all ages, but neither is it a wild west marketplace of seductive ideas, where users check their agency at the door and participate at their own risk. Users can and do shape their online experience. How they interact with others online is a complex inquiry, and until recently, research into the effect of CMC on users’ psychology and behavior was sparse.186 Recent psychological studies are, however, helpful in determining which online speech should be protected, and which speech should be restricted or at least viewed with concern.

Consider a cyberspace user. He is located in a particular real world geography, has been raised on certain values, has a certain type of friends, and has witnessed various events throughout his life. All of these factors combine to create what I will call the user’s original set of norms and assumptions. A white, middle class American male who considers himself a devout Christian and comes from an intact family will probably have a much different original set than a poor Arab Muslim male who lives in Egypt and

185 Sunstein, supra note 4, at 370.
186 WALLACE, supra note 5, at 2.
whose father is a member of the Muslim Brotherhood. Both of these people will have
different original sets than someone living in Kabul, Afghanistan, whose family was
killed by a NATO airstrike. One’s original set will determine what one considers to be
acceptable or moral beliefs and actions, and what one believes to be unacceptable and
immoral.

One’s original set will shape his view of Al-Qaeda, Iraqi and Afghan
insurgencies, American and allied military actions in the Middle East, jihad, “terrorism,”
and violence in general. The white American male is more likely than the Arab Egyptian
or the Afghan orphan to view American actions in the Middle East as good. The
Egyptian and Afghan are more likely to see Muslim insurgents as freedom fighters and
true holy warriors.

As these people interact with the world, they encounter speech that challenges
their original sets. The American is challenged to accept the view of Muslim insurgents
as legitimate fighters against an occupying force, and the other two will be challenged to
recognize that 9/11 was a horrendous crime and prohibited in Islam. They will then be
challenged to recognize that Osama bin Laden is not necessarily the holy man their
original set may tell him he is.

Terrorist recruitment exists on the level of belief and the level of action. As for
belief, it can cause people to abandon their original, nonterroristic sets and assume

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I use the pronoun “he” throughout this article because males are typically the target of terrorist
recruitment efforts. I recognize that although this is still the norm, it is no longer entirely true. Samantha
Brletich, Extremist Groups Recruiting Women for Central Asian Terror, DIPLOMATIC COURIER, Nov. 12,
asiatic-terrorism; Khaled Al-Shallahi, Al-Qaeda recruiting women as suicide bombers, warns expert, SAUDI
Ravi Somaiya, Worries at British Universities Over Extremists Recruiting Women Students, NEWSWEEK,
women.html.
adopted sets of norms and assumptions. This adopted terroristic set is characterized by
demonization of the West, a celebration of jihadis and Al-Qaeda as true holy warriors,
and so forth. As for action, terrorist recruitment can work on people who share terrorists’
outlook, either as their original or adopted set, to act on their beliefs. Such action may
include joining a terrorist organization, fighting in Iraq or Afghanistan, or committing
terrorist acts abroad.

The concern is that cyberspace changes the qualitative nature of recruitment to
greatly facilitate both of these types of recruitment. It is unclear that cyberspace does
that. When the focus is on changing someone’s set of norms and assumptions, CMC may
facilitate recruitment, but it may just as readily hinder it. Although it is true that CMC
may allow people to become disinhibited,\(^\text{188}\) this may mean that people feel freer to speak
their minds online than they do in the real world.\(^\text{189}\) This reduction in the tendency to
conform to a group\(^\text{190}\) can cut both ways: if one’s original set is characterized by
moderation, conciliation, and nonviolence, disinhibition may lead to the adoption of
extremist views. If one’s original set is one of violence and intractable religious strife,
disinhibition may free that person to speak out against such extremist views.

The danger of CMC isn’t that it causes users to assume extremist adopted sets.
There is no consistent evidence that it does.\(^\text{191}\) Rather, the danger is that people who are
predisposed to extremist ideas will congregate in cyberspace. Their views might not
change, but they will join their own extremist cohorts and cease to consider contrary

\(^{188}\) WALLACE, supra note 5, at 3.
\(^{189}\) Id. at 82.
\(^{190}\) Id. at 61.
\(^{191}\) Kai Sassenberg & Kai J. Jonas, Attitude change and social influence on the net, in THE OXFORD
HANDBOOK OF INTERNET PSYCHOLOGY 276 (Adam Joinson et al. eds., 2009).
views. This is a problem when it comes to terrorism, but many people believe that it lies in the nature of CMC. Rather than focusing on how CMC causes people to adopt extreme views, the focus should be on how people use CMC to serve their own already-held extremist views.

There is evidence that the psychology involved in CMC may in fact hinder the terror recruitment process. The fact that most people online speak anonymously or adopt *noms de cyberspace* facilitates online disinhibition. Anonymity may allow some people to say wacky things online, but there is little support for the assertion that anonymity leads to the type of disinhibition that would cause a user to adopt extremist views. Typically, in fact, people’s online personae usually closely resemble their personae in the real world.

Along with anonymity, trust is another factor. One researcher has noted that CMC relationships start at a disadvantage when it comes to persuading someone to do something or adopt a view. CMC discourages trust in the person with whom someone is communicating because it doesn’t allow certain cues indicating trustworthiness to be communicated. As time goes on, trust may increase, but recruiters will have to overcome the initial distrust held by recipients of their message.

Physical isolation is another characteristic of CMC. People engaging in CMC are isolated from each other, and from other people. When one is isolated from the person

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192 Id. at 279; Tom Postmes, *The psychological dimensions of collective action, online*, in *THE OXFORD HANDBOOK OF INTERNET PSYCHOLOGY* 175 (Adam Joinson et al. eds., 2009); WALLACE, supra note 5, at 78.
193 WALLACE, supra note 5, at 9.
195 Postmes, supra note 192, at 178.
197 Id. at 45.
with whom he is communicating, his attention tends to be focused on himself or another object of his interest, and he does not succumb to others’ efforts to direct his attention. CMC is, therefore, more likely to be directed to the self. Private self-awareness is more salient than in real-world communication.\footnote{Sassenberg & Jonas, supra note 191, at 275.} A user may receive extremist propaganda, but focus not on what the recruiters want him to, but on his own needs. This may reduce the effect of the recruitment message.

One model of online behavior, called SIDE (“Social Identity Model of Deindividuation Effects”), uses factors like anonymity to predict the influence of CMC under various circumstances. SIDE predicts that when personal identity is salient, CMC will lead to less social influence than real-world communication. Conversely, SIDE predicts that when social identity is salient, CMC will result in greater social influence.\footnote{Id. at 277.} Interestingly, anonymity seems to reinforce one’s identification with a group.\footnote{Russell Spears, et al., CMC and social identity, in THE OXFORD HANDBOOK OF INTERNET PSYCHOLOGY 257 (Adam Joinson et al. eds., 2009).}

Therefore, a terrorist recruiter would be wise to stress the relevance to wider society of his views, rather than how his views can help the specific person with whom he is communicating. Expressing a sense of injustice or deprivation against some group also seems to positively affect influence via CMC.\footnote{Postmes, supra note 192, at 169.} Rumor also spreads well in cyberspace,\footnote{Id. at 176.} and a recruiter may use that to his advantage.\footnote{Consider the doubt among some Muslims (and other conspiracy theorists) that 9/11 was committed by Muslims, and that it may have been committed by the United States government or the Jews. 9/11 conspiracy theories, WIKIPEDIA, http://en.wikipedia.org/wiki/9/11_conspiracy_theories.}

This is, of course, exactly what terrorist recruiters do. They adopt \textit{noms de guerre/noms de cyberspace} and couch their arguments in terms of the worldwide Muslim
community. They discourage recipients of the recruitment propaganda from thinking about themselves, and encourage them to sacrifice themselves for the good of the group. Clearly, a sense of injustice against Muslims pervades terrorists’ message.

While such propaganda surely convinces some to adopt extremist views, the nature of CMC suggests that it is no more dangerous than real-world speech. Furthermore, certain types of CMC may be more dangerous than other types. Some propaganda may actually backfire, causing recipients to rebel against messages promoting terror. It may be that most often terrorists’ CMC is an object of curiosity, and maybe some sympathy, but that it will remain ineffectual in recruiting acolytes. The influence of CMC on participants is mixed, and is quite similar to its real-world counterpart.204 Participants may, in fact, affect CMC a lot more than CMC transforms its participants.205

VI. Conclusion

When it comes to online terrorist recruitment and propaganda, the prevailing vision of the problem is inaccurate. Online recruitment is often seen as a form of brainwashing, facilitated by the nature of CMC. Young, impressionable people are drawn in to these sites on their way to mtv.com, and all of a sudden they find themselves travelling to Iraq to kill American soldiers or planning domestic attacks on civilians. Moreover, online speech sympathetic to terrorism is considered to lack any legitimate value. This view is wrong on both counts.

Online speech is not vastly different than real-world speech. Where there are differences, they work against terror recruiters as often as they work for them. In the end,

204 Postmes, supra note 192, at 168.
205 Id.
CMC may not be a particularly effective medium for recruitment, at least when it comes to turning moderate people into extremists. Instead, cyberspace links people who already hold extremist views. This allows them to share information, encourage each other to action, obtain financing, and otherwise engage in criminal activity.

This distinction is important for at least three reasons. First, as psychologists continue to explore the effect of CMC on social influence and extremist norms and assumptions, they will continue to map the border between speech that actually can “convert” someone to extremist views, and speech that, while disturbing, is largely ineffectual. As this knowledge filters through society, parents, forum moderators, and other authorities will be able to monitor online speech in an effective way. They will be given the knowledge they need to spot truly dangerous speech, and they will be able to police the impressionable people in their own communities, guiding them away from extremism. Where law enforcement doesn’t have the reach or legal right to go, these other authorities can go.

Second, law enforcement can go many places. A lot of online speech today is monitored by law enforcement agents without violating the First Amendment and without letting computer users know that surveillance is taking place. This is a disturbing fact, particularly in America, where privacy and free speech are highly valued. As we learn, however, what type of speech is truly dangerous in terms of recruitment, law enforcement can target its surveillance at this type of speech. In doing so, law enforcement will be more efficient and it will leave a greater number of people free to speak privately online. The First Amendment is served whenever law enforcement is able to pinpoint and watch out for speech that is truly dangerous. A knock-on effect could be that Muslim
communities warm to the presence of law enforcement in their communities, knowing as they would that the agents are there to observe only the speech that is dangerous, and are doing so with as limited a focus as possible. Such communities may then feel freer to inform the police of suspicious activity.

Third, the First Amendment is currently in play, and to navigate this latest speech crisis, we need to know the effect of the speech we’re targeting. Speech related to terrorism is embedded in political, historical, and social realities, discussions of which should surely be protected. Even when terror-related speech becomes quite divorced from these subjects of “core” speech, there are many advantages to protecting as much speech as possible. By protecting it, we let possible terrorists into the light of day, where law enforcement can observe them. We learn what their messages are, so that moderate voices can counter them. We promote the central values that Americans hold: individual responsibility, anti-paternalism, and liberty.

We are entering a new era, characterized in large part by the advent of cyberspace and the evolution of terrorism. Both are changing rapidly, which promises new challenges to free speech. It will be a very interesting 21st century. Cyberspace, terrorism, and speech present a number of questions. How we answer them will determine the world’s freedom to speak online, people’s safety from terrorists, and whether marginalized groups will be heard in forums that respond to legitimate grievances. Knee-jerk reactions to disturbing speech ultimately help no one. The better route is to recognize the value in terror-related speech (which isn’t always there) and protect it, but also acknowledge that CMC may have novel effects on participants that
require us to revisit speech rules. In this new era of communication, we need to know whether, and to what extent, speech is the same as it ever was.