

## **REFLEXIVE VIOLENCE: CHILD PORNOGRAPHY AND TERRORIST SPEECH AS FIRST AMENDMENT CARVE-OUTS**

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### ABSTRACT

*The criminality of possession of child pornography is not dependent on situational factors and not weighed against a First Amendment interest but is instead explicitly carved out. Increasingly, I see terrorist speech falling within the same type of blanket outlaw regime.*

*With great sovereignty and largely immune to criticism or review, the cybercrimes of child pornography possession and terrorist speech have moved from nominally analyzed for harm to patently outlawed, allowing law enforcement unique latitude in both investigation and enforcement of these prohibitions. The reflexive nature of this argument—that the criminality of the act resides in the definition of it—creates a self-reinforcing regime. I term this “reflexive violence.”*

*Both the creation of reflexive violence as a justification and its use as a logical device in theories of criminality are typical of cyberlaw and dangerous for the future of the First Amendment. We owe these areas of speech the critical eye of constitutional consistency. We owe them particular caution because these are areas of speech Americans instinctively dislike. We must ensure that we construct Internet law that we can live with—not siloed in exceptions, but instead created with values that we can apply reasonably and consistently throughout our First Amendment jurisprudence.*

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## I. INTRODUCTION

*[T]he Constitution is no simple contract, not because it uses a certain amount of open-ended language that a contract draftsman would try to avoid, but because its language grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once.*<sup>1</sup>

The First Amendment makes an absolutist guarantee: “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .”<sup>2</sup> Yet of course, we have many laws that restrict certain forms of speech. In 1942, the Supreme Court noted in *Chaplinsky v. New Hampshire*<sup>3</sup> that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise a Constitutional problem.”<sup>4</sup> Justice Murphy helpfully provided examples of types of speech not specifically protected by the Constitution: “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>5</sup>

1. David Souter, Harvard Commencement Remarks (May 27, 2010), <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/>.

2. U.S. CONST. amend. I. In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court held that speech on the Internet receives the same First Amendment consideration as other avenues of expression. *Id.* at 870.

3. 315 U.S. 568 (1942).

4. *Chaplinsky*, 315 U.S. at 571–72.

5. *Id.* at 572. In addition to criminal restrictions, there are also civil limits on speech. These include defamation, restrictions on commercial speech, restrictions for paid speech, and restrictions on government employees.

Generally, because of the compelling First Amendment interest in protecting speech, the laws that restrict speech are hinged upon context. For example, speech can be regulated depending upon the situation and location in which it is spoken (time, place, and manner restrictions).<sup>6</sup> Similarly, speech that has certain effects upon other individuals (especially private citizens) can be restricted. Such restrictions are demonstrated in the torts of defamation,<sup>7</sup> invasion of privacy,<sup>8</sup> and intentional infliction of emotional distress.<sup>9</sup> Further, the Court generally excludes from First Amendment protection speech that is likely to lead to physical harm—such as true threats,<sup>10</sup> fighting words,<sup>11</sup> and incitement to imminent lawless action.<sup>12</sup> In other words, as the *Chaplinsky* Court explained, “[i]t has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>13</sup>

The crime of child pornography possession is not dependent on situational factors and not weighed against a competing First Amendment interest, but is explicitly and perennially carved out.<sup>14</sup> Increasingly, terrorist speech—speech that expresses support for terrorist organizations or their causes—falls within the same blanket outlaw regime.<sup>15</sup> With great sovereignty and largely immune to

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6. See *Grayned v. City of Rockford*, 408 U.S. 104, 115–17 (1972) (describing the nature of time, place, and manner restrictions).

7. See, e.g., *United States v. Stevens*, 559 U.S. 460, 468–69 (2010) (noting that defamation has been a traditional exception to First Amendment protections).

8. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 459 (2011); *Cohen v. California*, 403 U.S. 15, 21 (1971).

9. See *United States v. Alvarez*, 132 S. Ct. 2537, 2561 (2012) (Alito, J., dissenting) (observing that “[t]he right to freedom of speech has been held to permit recovery for the intentional infliction of emotional distress by means of a false statement” as well as “for the even more modern tort of false-light invasion of privacy”).

10. See, e.g., *Watts v. United States*, 394 U.S. 705, 707–08 (1969).

11. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

12. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

13. *Chaplinsky*, 315 U.S. at 572.

14. The legal definition of child pornography can be found at 18 U.S.C. § 2256(8) (2012). Insofar as I refer to child pornography as a cybercrime, I am speaking of the possession, receipt, and distribution of child pornography as distinct from the act of assaulting a child to produce the sex abuse images. I recognize that many advocates dislike the term “child pornography” because its association to adult pornography may have a normalizing effect. I use the term in this article because it is employed in the relevant statutes.

15. In *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the standard for criminalization for the speech was whether “material support [was] coordinated with or under the direction of a designated foreign terrorist organization.” *Id.* at 31. In cases applying *Holder*, such as *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013), much of the “support” at issue is in fact speech in the form of online postings of chats and translations. *Id.* at 41. The speech is criminalized based on who the defendant is speaking to, forming in effect a blanket ban on his speech. See *id.* at 42–43. The *Mehanna* decision shows that “the government has functionally admitted that it doesn’t think terrorist sympathizers deserve free speech rights.” Mark Joseph Stern, *Translating Terrorism*, SLATE (Sept. 3, 2014, 6:49 AM), [http://www.slate.com/articles/technology/future\\_tense/2014/09/mehanna\\_at\\_the\\_supreme\\_court\\_is\\_tra](http://www.slate.com/articles/technology/future_tense/2014/09/mehanna_at_the_supreme_court_is_tra)

criticism or review, the (almost always cyber-based) crimes of child pornography possession and terrorist speech have moved from nominally analyzed for harm to patently outlawed, allowing law enforcement to go uniquely far in both investigation and enforcement of these prohibitions.<sup>16</sup>

While courts usually undertake strict scrutiny review for content-based speech restrictions,<sup>17</sup> they do not do so for child pornography and terrorist speech. Further, there is no need to demonstrate harm and no requirement that the free speech interest be weighed against other social or legal interests. Child pornography and terrorist speech are simply free speech carve-outs: the only relevant question is: Is it, or isn't it?

I term this binary conception of inscrutable and self-reinforcing criminality as “reflexive violence.” While these types of speech may be harmful and vile, it is still suboptimal to carve them out of our free speech jurisprudence entirely. This is particularly resonant in light of the Internet and its impact on speech. As we accept that the Internet is more than a new medium of communication and is a space in which actions occur, online speech can encompass more forms of harm. We need accordingly robust ways to provide replicable measurements or considerations for harms of speech and speech acts online.

This Article demonstrates that the creation of reflexive violence as a justification, and the use of it as a logical device in theories of criminality, is both typical of cyberlaw and dangerous for the future of the First Amendment.

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nslating\_jihad\_texts\_a\_crime.html.

16. See, e.g., U.S. SENTENCING COMM'N, THE HISTORY OF THE CHILD PORNOGRAPHY GUIDELINES 1 (2009) (“Congress has been particularly active over the last decade creating new offenses, increasing penalties, and issuing directives to the Commission regarding child pornography offenses.”). The increased interest in harshly punishing child pornography offenders can be charted to the rise of the Internet being used as a tool for offenders to easily access and trade illicit images. See, e.g., *Child Pornography Statistics*, THORN, <https://www.wearthorn.org/child-pornography-and-abuse-statistics/> (last visited Mar. 27, 2017) (noting that the National Center for Missing & Exploited Children “reviewed 22 million images and videos of suspected child sexual abuse imagery in its victim identification program in 2013—more than a 5,000% increase from 2007”). This surge in incidents of suspected child pornography is not unique to the United States; Japan experienced a forty-five percent increase in child pornography incidences from 2015 to 2016. *Japan Child Abuse, Pornography Cases Hit Record Highs in 2016*, JAPAN TIMES (Mar. 9, 2017), <http://www.japantimes.co.jp/news/2017/03/09/national/crime-legal/japan-child-abuse-pornography-cases-hit-record-highs-2016/>. Concurrently with this trend, in the terrorist speech realm we have seen “the tactic of preventative prosecution of potential terrorists, with principal reliance on the criminal statutes forbidding the provision of ‘material support’ to terrorists and terrorist organizations.” George D. Brown, *Notes on a Terrorism Trial—Preventive Prosecution, ‘Material Support’ and the Role of the Judge after United States v. Mehanna*, 4 HARV. NAT'L SEC. J. 1, 2 (2012). Preventative prosecution of terrorism “sometimes reaches beyond potential acts to identify and incapacitate the persons who might commit them.” *Id.* at 3. Because such persons are often identified through mere speech, preventative prosecution “risks becoming a form of status crime.” See *id.*

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

## II. THE CHILD PORNOGRAPHY CARVE-OUT

*By the mid-1980's, the trafficking of child pornography within the United States was almost completely eradicated . . . . Unfortunately, the child pornography market exploded in the advent of the Internet and advanced digital technology. The Internet provides ground for individuals to create, access, and share child sexual abuse images worldwide at the click of a button.*<sup>18</sup>

Generally, pornography is illegal only if it is also obscene as determined under the test developed by the Court in *Miller v. California*.<sup>19</sup> However, in the 1982 decision, *New York v. Ferber*,<sup>20</sup> the Supreme Court held that constitutional speech protections do not apply to child pornography—even when the material does not meet the *Miller* obscenity test.<sup>21</sup> The Court used many lines of reasoning to justify upholding the state's ban on child pornography. The first reason the Court provided was to support the legislature's determination that the public policy of the state demands the protection of children from sexual exploitation.<sup>22</sup> Another justification was the economic claim that the criminalization of the distribution of child pornography would shut down the market for such images.<sup>23</sup>

Twenty years later, in *Ashcroft v. Free Speech Coalition*,<sup>24</sup> the Court struck down as overbroad a provision from the Child Pornography Prevention Act of 1996 that allowed for prosecution of possession or distribution of what “appear[ed] to be” child pornography, without requiring that a real child victim be identified.<sup>25</sup> The *Ashcroft* decision demonstrates that the Court's justification for prohibition of speech in this area has come to revolve around a consideration of the victim: speech is criminal when a real child has been harmed in the production of the work.<sup>26</sup> That harm is considered per se present in every case that involves a real child.<sup>27</sup>

Child pornography's unique criminalization rationale has moved from the notion of child pornography as a documentation or a “record” of abuse in

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18. U.S. Dep't of Justice, *Child Pornography*, JUSTICE.GOV (June 3, 2015), <http://www.justice.gov/criminal-ceos/child-pornography>.

19. 413 U.S. 15 (1973). This three-pronged test requires that the work, taken as a whole, (1) appeals to the prurient interest, (2) portrays sexual conduct in a patently offensive way, and (3) lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. at 24.

20. 458 U.S. 747 (1982).

21. *Ferber*, 458 U.S. at 764.

22. *Id.* at 757–58.

23. *Id.* at 759–60.

24. 535 U.S. 234 (2002).

25. *Ashcroft*, 535 U.S. at 239–41.

26. *See id.* at 254 (noting that in the case of the pornographic material covered by *Ferber*, “the creation of the speech is itself the crime of child abuse” and that where there is no real child involved, no underlying crime exists).

27. *See, e.g., id.* at 245–46 (“The freedom of speech has its limits; it does not embrace certain categories of speech, including . . . pornography produced with real children.”).

*Ferber*,<sup>28</sup> to a notion of the image itself as violence; that is, every time the image is viewed, the child is again violated. The notion that child pornography is harmful is not new—the U.S. Attorney General’s Commission on Pornography wrote in 1986 that minors abused in child pornography images are permanently harmed.<sup>29</sup> However, there has been increasing focus upon harm to the child as a reason to criminalize child pornography despite First Amendment considerations.

### III. THE TERRORIST SPEECH CARVE-OUT

#### A. *Holder v. Humanitarian Law Project and the Binary of Terrorist Speech*

As with child pornography, the expression of support for terrorist organizations is considered to be more than speech—it is a speech act. In *Holder v. Humanitarian Law Project*,<sup>30</sup> the Supreme Court considered the Patriot Act’s prohibition on providing material support to foreign terrorist organizations.<sup>31</sup> The Court held that providing expert advice or assistance to foreign terrorist groups—as well as training, service, and other forms of assistance—may be proscribed speech.<sup>32</sup> In so finding, the Court noted that “[i]ndependently advocating for a cause is different from providing a service to a group that is advocating for that cause.”<sup>33</sup>

At the same time, however, the “service” in this case was in fact speech.<sup>34</sup> The plaintiffs sought to teach the Kurdistan Workers’ Party in Turkey and Liberation Tigers of Tamil Eelam in Sri Lanka how to peacefully resolve conflicts<sup>35</sup>—in other words, the plaintiffs wanted to speak to these groups.<sup>36</sup> Nevertheless, the Court held that restrictions of the material support statute

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28. *Ferber*, 458 U.S. at 747, 759 (“[T]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”).

29. See ATT’Y GEN.’S COMM’N ON PORNOGRAPHY, U.S. DEP’T OF JUSTICE, FINAL REPORT 411 (1986) (“To the extent that pictures exist of this inherently nonconsensual act, those pictures follow the child up to and through adulthood, and the consequent embarrassment and humiliation are harms caused by the pictures themselves, independent of the harms attendant to the circumstances in which the photographs were originally made.”).

30. 561 U.S. 1 (2010).

31. *Humanitarian Law Project*, 561 U.S. at 11–14 (considering the constitutionality of 18 U.S.C. § 2339B). The Patriot Act amended the statutory definition of providing “material support or resources” to a terrorist organization to include providing “expert advice or assistance.” Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, § 805(a)(2)(B), 115 Stat. 272, 377. Before the amendment, the definition had already included providing training and services to foreign terrorist organizations. 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4) (2000).

32. *Humanitarian Law Project*, 561 U.S. at 34–39.

33. *Id.* at 24.

34. See *id.* at 27–28.

35. *Id.* at 14–15.

36. *Id.* at 27 (noting that the plaintiffs wanted to speak to the groups and that whether they could do so depended on what they wanted to say).

were not vague, even as applied to speech.<sup>37</sup> Chief Justice Roberts wrote for the majority that material support “most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”<sup>38</sup> Further, the Court noted that it was not necessary to know whether there existed “specific intent to further the organization’s terrorist activities.”<sup>39</sup> Congress “chose knowledge about the organization’s connection to terrorism,” rather than specific intent, as the basis of the determination.<sup>40</sup>

The Court concluded that Congress had intended to prevent aid to such groups—even if the purpose of such aid was to facilitate peace negotiations or United Nations processes—because that assistance fit the law’s definition of material aid.<sup>41</sup> This finding was based on the reasoning that any assistance could help to legitimate the terrorist organization and free up its resources for terrorist activities.<sup>42</sup>

The decision in *Humanitarian Law Project* means that the United States has decided to criminalize speech regardless of context—and without considering the First Amendment protection interest—based solely upon who the speaker is speaking to and whether the subject has ties to an identified terrorist group.<sup>43</sup> This finding comes in spite of the majority’s evaluation in the case that the Court “must apply a more demanding standard” than the intermediate one described in *United States v. O’Brien*<sup>44</sup> because the statute at issue regulated speech on the basis of its content.<sup>45</sup> We might fairly have expected the Court to reach the opposite result in this case, as content-based prohibitions are, according to Supreme Court jurisprudence, subjected to the strictest scrutiny.<sup>46</sup>

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37. *Id.* at 20.

38. *Id.* at 26.

39. *Id.* at 16–17.

40. *Id.*

41. *Id.* at 36–38.

42. *Id.* Note that the case involved a pre-enforcement challenge in light of “a credible threat of prosecution,” *id.* at 16, implying that a post-enforcement challenge to the application of the material support provisions is not foreclosed.

43. Other countries criminalized terrorist speech before the United States, including Israel and the United Kingdom. For example, Israel’s Prevention of Terrorism Ordinance extends criminality to a person who “publishes, in writing or orally, words of praise, sympathy or encouragement for acts of violence . . . or [in] support of a terrorist organisation.” Prevention of Terrorism Ordinance, 5708-1948, § 4, 1 LSI 76, as amended (Isr.).

44. 391 U.S. 367 (1968). In *O’Brien*, the Court rejected a First Amendment challenge to a statute that placed a generally applicable ban on destroying draft cards, even where the card was destroyed as part of a demonstration against the draft. *O’Brien*, 391 U.S. at 375–77. In so doing, the Court applied “intermediate scrutiny,” under which “[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Turner Broad. Sys., Inc. v. FCC.*, 520 U.S. 180, 189 (1997) (construing *O’Brien*, 391 U.S. at 377).

45. *Humanitarian Law Project*, 561 U.S. at 27–28.

46. *See id.* at 45–46 (Breyer, J., dissenting) (canvassing First Amendment jurisprudence applying

B. *A Brief History of Fighting Words*

Until the 1970s, the only violent speech that was suppressed was that which was traced to a tangible harm: speech that, according to Justice Holmes in *Schenck v. United States*,<sup>47</sup> presented such a “clear and present danger” that regulation is justified since “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”<sup>48</sup> The “clear and present danger” test was coupled with the “bad tendency” test of *Abrams v. United States*<sup>49</sup> and *Whitney v. California*.<sup>50</sup> Both of these tests were replaced in 1969 by the “imminent lawless action” test introduced in *Brandenburg v. Ohio*.<sup>51</sup> The *Brandenburg* test distinguishes between speech that merely advocates for the usage of violent means to achieve political change and that which incites imminent lawless action, finding only the latter proscribable.<sup>52</sup>

During the period from the 1970s to the mid-1980s, the focus turned from political speech said to cause tangible harms to a different issue: relative value of the speech and intangible harms. During this period, the Court was willing to simply find some speech so low value as to be not worth protecting<sup>53</sup> and was

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strict scrutiny, and noting “doubt that the statute, as the Government would interpret it, can survive any reasonably applicable First Amendment standard”). Moreover, as we consider what to do in nonjudicial situations, these questions also apply to detainees. As I wrote in a 2009 Op-Ed:

No country has guarded speech so fiercely as America and yet now, as Guantanamo prisoners are beginning to be transferred and released, we confront the issue head-on: is dissident speech intolerable when it comes from terrorists? Who qualifies as a terrorist? What qualifies as dissident speech? And how are courts to treat this perimeter while it is in process of being drawn?

Merritt Baer, *Will We Put Guantanamo Detainees on Trial for Terrorist Speech?*, GLOBAL COMMENT (July 1, 2009), <http://globalcomment.com/will-we-put-guantanamo-detainees-on-trial-for-terrorist-speech/>.

47. 249 U.S. 47 (1919).

48. *Schenck*, 249 U.S. at 52.

49. 250 U.S. 616, 624 (1919) (“[T]he language of these circulars was obviously intended to provoke and to encourage resistance to the United States in the war . . . and, the defendants, in terms, plainly urged and advocated a resort to a general strike of workers in ammunition factories for the purpose of curtailing the production of ordnance and munitions necessary and essential to the prosecution of the war . . .”).

50. 274 U.S. 357, 371 (1927) (“[A] State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means . . .”), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Schenck*, *Abrams*, and *Whitney* all involved political speech.

51. 395 U.S. 444, 447–48 (1969).

52. *Brandenburg*, 395 U.S. at 447–49.

53. This increased willingness to censor low-value speech included the Court’s decision in *Miller v. California*, 413 U.S. 15 (1973), which introduced the test for labelling speech as obscene and thus not protected by the First Amendment. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”*, 58 B.U. L. REV. 685, 724 (1978) (“Once it is demonstrated that a book or film fits within the definition of obscenity in *Miller v. California* the prosecution’s task is complete; there need be no showing of any ‘clear and present danger’ or imminent lawless activity.” (footnote omitted)). In addition to obscenity, the Court found other categories of speech, such as commercial speech, to be of little value and only deserving of intermediate scrutiny. See, e.g., *Cent.*

also willing to proscribe speech based on a generalized intangible harm.<sup>54</sup> The Court thus expanded speech proscriptions and began tolerating a good deal of government regulation.<sup>55</sup>

Towards the end of the 1980s, courts began to frame their First Amendment review in terms of groups who had been and were still disadvantaged—racial and ethnic minorities, religious minorities, sexual orientation minorities, and women.<sup>56</sup> It was in this period that many debates about the regulation of depictions of groups of persons arose,<sup>57</sup> including pornography<sup>58</sup> and bias-motivated speech. As to the latter, Justice Scalia contended in *R.A.V. v. City of St. Paul*<sup>59</sup> that it is precisely the controversial nature of an unfavorable opinion

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Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–66 (1980). See generally Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015).

54. See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (finding that the First Amendment permits a public school to punish a student for giving a lewd and indecent speech at a school assembly even if the speech is not obscene); FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978) (noting that broadcasting has fewer First Amendment protections than other forms of communication because of its pervasive nature); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974) (“[T]he States . . . retain substantial latitude [under the First Amendment] in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”). Of course, the Court’s landmark child pornography opinion *New York v. Ferber*, 458 U.S. 747 (1982), also came down in this period. See *supra* notes 20–23 and accompanying text for a summary of the *Ferber* decision.

55. See generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2345–47 (2002) (noting the “new wave of censorship” that followed *Miller*’s expansion of permissible state regulation of “offensive” material).

56. The courts’ insistence in this period on protecting unpopular speech—even that which could constitute speech against a vulnerable group—is encapsulated in the Seventh Circuit’s decision in *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem.*, 475 U.S. 1001 (1986). In *Hudnut*, the court found unconstitutional an ordinance that defined pornography as “a practice that discriminates against women.” *Id.* at 324–25. The court noted that even assuming all of the harms of pornography posited by the government were true, all of these harms depend on how the speech is understood and interpreted by the viewer. *Id.* at 329 (“Yet [the negative effect of pornography] simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation.”). Thus, censoring speech on the basis of that speech’s possible ill effect on vulnerable groups would be paternalistic thought policing. See *id.* at 330 (“Racial bigotry, anti-semitism, violence on television, reporters’ biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.”).

57. See Steven Heyman, *Justice Scalia and the Transformation of First Amendment Jurisprudence*, ISCOTUSNOW (Feb. 27, 2016), <http://blogs.kentlaw.iit.edu/iscotus/justice-scalia-and-the-transformation-of-first-amendment-jurisprudence/> (“During the 1980s, however, some scholars and activists on the left started to propose restrictions on racist hate speech as well as violent and degrading pornography, on the ground that these forms of expression undermine the equality of women and minorities. In response, some conservatives began to develop a more libertarian position, which appealed to the First Amendment as a bulwark against what they regarded as the dangers of political correctness.”).

58. See, e.g., *Hudnut*, 771 F.2d at 324–25.

59. 505 U.S. 377 (1992).

that makes the speech require First Amendment protections against viewpoint discrimination.<sup>60</sup>

C. *Is Terrorist Speech Fighting Words or Is It Something Else?*

Our rationales for proscribing terrorist speech appear to conflict: by existing First Amendment logic, unprotected speech is either so low value as to not require protection or so dangerous as to incite imminent lawless action.<sup>61</sup> It must be either trash or poison; surely it cannot be both as one is irrelevant and one is highly relevant. But unpopular speech—especially political speech—is exactly what we expect the First Amendment to protect.

Moreover, the Supreme Court has historically protected nontraditional political speech. For example, flag burning cases usually revolve around the question of whether flag burning ought to be suppressed as a sacrilegious act or protected as an act of political, symbolic speech.<sup>62</sup> The Court has consistently found that flag burning is constitutionally protected free speech.<sup>63</sup> Applying the low-value speech framework, the Court's favored response to flag burners is counterspeech.<sup>64</sup> Such response can be traced back to Justice Brandeis's famous admonishment in *Whitney*: "[T]he remedy to be applied is more speech, not enforced silence."<sup>65</sup>

The perimeter of political speech is not clear, but it certainly extends to distasteful speech. While not the direct focus of this discussion, it is possible that terrorist speech resembles distasteful political speech more than we have accounted for. As *Atlantic* journalist Graeme Wood wrote, "[P]retending that [ISIS] isn't actually a religious, millenarian group, with theology that must be understood to be combatted, has already led the United States to underestimate it and back foolish schemes to counter it."<sup>66</sup> I do not suggest that ISIS or other

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60. See *R.A.V.*, 505 U.S. at 391–92. In *R.A.V.*, a teenager burned a cross on the lawn of a black family and was convicted under the St. Paul Bias-Motivated Crime Ordinance, which prohibited "plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 379–81. Writing for the majority, Justice Scalia found the St. Paul ordinance constitutionally overbroad because "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391. Justice Scalia thus "took the position that even very narrow forms of hate speech regulation violate the First Amendment." Heyman, *supra* note 57.

61. See *supra* Part III.B for a summary of this First Amendment precedent. For a thorough discussion of incitement doctrine as applied to terrorist speech, see Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 665–67 (2017).

62. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 404–06 (1989).

63. See, e.g., *United States v. Eichman*, 496 U.S. 310, 312 (1990); *Johnson*, 491 U.S. at 420.

64. See *Johnson*, 491 U.S. at 419 ("The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.")

65. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

66. Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

terrorist groups espouse a worthy viewpoint; I submit that in the United States, we protect speech that is not, in any current or neutral estimation, accurate and worthy.<sup>67</sup> We do so to preserve the consistency of a nation based on rights and laws.

#### IV. REFLEXIVE VIOLENCE

The Court has maintained a fairly strict test for finding that menacing speech falls within the unprotected realm. For example, in *NAACP v. Claiborne Hardware Co.*,<sup>68</sup> the Court upheld the constitutional protections for menacing speech, even when uttered in a context of violence, and where such speech was as thinly veiled as, for example, “[i]f we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”<sup>69</sup> The Court found that even this “emotionally charged rhetoric” did not “transcend the bounds of protected speech set forth in *Brandenburg*.”<sup>70</sup>

While for decades the Supreme Court remained in the post-1970s mode of fearing or disliking the idea of a thought police,<sup>71</sup> we now see a call to arms in the arena of silencing terrorist speech. *Humanitarian Law Project* represents the first time in First Amendment jurisprudence that a restriction on political speech has not failed the *Brandenburg* test.<sup>72</sup> In fact, the majority in *Humanitarian Law Project* did not reference the *Brandenburg* test whatsoever. Only Justice Breyer, writing in dissent, noted that “[n]o one contends that the plaintiffs’ speech to these organizations can be prohibited as incitement under *Brandenburg*.”<sup>73</sup> However, Breyer added the caveat that where activity is undertaken by an

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67. Under this rationale, the United States generally allows the free speech of highly objectionable groups like the KKK, the Nazi Party, and other white supremacist groups. We do so in contrast with certain other democratic nations. For a discussion of how other countries handle hate speech, see John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN. ST. L. REV. 539, 539 (2006) (“The extent of hate speech regulation in the world, including liberal democracies, sharply contrasts with that of the United States, where free speech interests prevail.”).

68. 458 U.S. 886 (1982).

69. *Claiborne Hardware*, 458 U.S. at 902. In *Claiborne Hardware*, the NAACP led a boycott of white merchants in Claiborne County, Mississippi. *Id.* at 900. The boycott was generally supported by nonviolent picketing and speeches, but some acts of violence did occur. *See id.* at 904–07. The Court found that although the acts of violence were not shielded by the First Amendment, there was no evidence that the inflammatory speech directly authorized or threatened acts of violence. *See id.* at 919–20 (“Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.”).

70. *Id.* at 928.

71. In Scalia’s terms, it is fear that “official suppression of ideas is afoot.” *R.A.V. v. City of St. Paul*, 505 U.S. at 377, 390 (1992).

72. *See* David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL’Y REV. 147, 149 (2012) (“For the first time in its history, the Court upheld the criminalization of speech advocating only nonviolent, lawful ends on the ground that such speech might unintentionally assist a third party in criminal wrongdoing. That result calls into question the continuing validity of the *Brandenburg* incitement test.”).

73. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 44 (2010) (Breyer, J., dissenting).

individual who knows (or is willfully ignorant of the fact) that such activity is “significantly likely” to assist terrorism, “[t]he act of providing material support to a known terrorist organization bears a close enough relation to terrorist acts that . . . it likely can be prohibited notwithstanding any First Amendment interest.”<sup>74</sup> Even Breyer, then, appears to erode *Brandenburg*’s distinction between speech that merely advocates violence and actual incitement to violence.<sup>75</sup> The speech would thus not be proscribed as words, but as actions.

Like child pornography jurisprudence, I see a shift in terrorist speech jurisprudence that can be traced to the rise of such speech on the Internet. I contend that the Internet creates a realm of “word acts” where we associate online speech with actions occurring in the physical world. It is true that real-time terrorist plots are planned online.<sup>76</sup> Further, the terrorism statute at issue in *Humanitarian Law Project* does not require imminence of danger but rather relies on the identity of the speaker to assess whether the speech constitutes “material support.”<sup>77</sup> Child pornography possession is a crime often transacted solely online, where the viewing of the image itself is taken to be a form of violence against the child victim.<sup>78</sup> In other words, these online occurrences are not considered speech but acts.

The reflexive nature of this argument—that the criminality of the act resides in the definition of it—creates a self-reinforcing regime. Reflexive violence presumes the presence of a threat we fear, and because of that fear, we do not investigate or question the presence of the threat. Proscribing certain categories of speech without any requirement of a barometer or metric that provides a process of evaluation—or any set of considerations justifying the proscription whatsoever—is the kind of totalitarian solutionism that we associate with regimes much less free than ours.

#### V. CHILD PORNOGRAPHY AND TERRORIST SPEECH ARE POLITICALLY UNTOUCHABLE

I see the jurisprudence surrounding child pornography and terrorist speech as potentially connected. Our courts and lawmakers are now in the business of

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74. *Id.* at 56–57.

75. See Owen Fiss, *The World We Live In*, 83 TEMP. L. REV. 295, 306 (2011) (arguing that Breyer’s dissent, like the majority opinion, falls short of First Amendment requirements).

76. See, e.g., U.N. OFFICE ON DRUGS & CRIME, THE USE OF INTERNET FOR TERRORIST PURPOSES 8–11 (2012), [https://www.unodc.org/documents/frontpage/Use\\_of\\_Internet\\_for\\_Terrorist\\_Purposes.pdf](https://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf); Paul Tassi, *How ISIS Terrorists May Have Used PlayStation 4 to Discuss and Plan Attacks*, FORBES (Nov. 14, 2016, 6:17 PM), <https://www.forbes.com/sites/insertcoin/2015/11/14/why-the-paris-isis-terrorists-used-ps4-to-plan-attacks/>. See generally Tsesis, *supra* note 61, at 654–62.

77. See *Humanitarian Law Project*, 561 U.S. at 26 (“Congress has prohibited ‘material support,’ which most often does not take the form of speech at all. And when it does, the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations.”).

78. See *supra* notes 20–29 and accompanying text for a discussion of child pornography jurisprudence.

assigning weight and priority to human life. The most innocent lives are perceived to be the most undeserving of bad outcomes. Children are generally viewed to be more innocent than adults.<sup>79</sup> As the Court wrote in *Ferber*, “It is evident beyond the need for elaboration that a state’s interest in ‘safeguarding the physical and psychological wellbeing of a minor’ is ‘compelling.’”<sup>80</sup> In the crimes of terrorism and child pornography, there is a sense of moral indignation and violation to which we take offense.

Because we take a particular dislike to both these categories of speech, each has also taken on a political color that makes opposition of their carve-out treatment difficult. As one *New Yorker* article observed, “Child-pornography sentencing laws have been passed rapidly, with little debate; it’s nearly impossible, politically, to object to harsh punishments for perverts.”<sup>81</sup> Similarly, in regards to terrorism, candidates for office often imply that the current administration is not being as aggressive as it should be when it comes to prosecuting those who lend material support to terrorists.<sup>82</sup> In reality, however, “it is very hard to see how FBI and DOJ could be more aggressive on a systemic basis . . . in the use of material support statutes.”<sup>83</sup> This is dangerous—not for child pornographers or terrorists, but for all of us—because it triggers a strong political reaction that resists a critical view.

We have often reassessed our First Amendment protections during times of war. As Justice Frankfurter wrote in *Dennis v. United States*<sup>84</sup> in 1951: “The right of a government to maintain its existence—self-preservation—is the most pervasive aspect of sovereignty.”<sup>85</sup> Of course, in making this observation, Frankfurter was affirming a conviction under the Smith Act for leaders of the Communist Party of the United States.<sup>86</sup> The Smith Act authorized criminal penalties for individuals who advocated for the overthrow of the U.S. government or who organized or were members of any group that advocated for such overthrow.<sup>87</sup> *Dennis* is generally considered part of a body of embarrassingly shortsighted case law in an era of pervasive fear.<sup>88</sup> It serves as a

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79. It was not always so: our attitudes toward children have shifted dramatically over time. At the turn of the century, children were perceived—and portrayed in stories and illustrations—to be miniature adults, perhaps less physically or mentally competent but not more deserving of indulgence or forgiveness. See generally HUGH CUNNINGHAM, *THE INVENTION OF CHILDHOOD* (2006).

80. *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

81. Rachel Aviv, *The Science of Sex Abuse*, *NEW YORKER* (Jan. 14, 2013), <http://www.newyorker.com/magazine/2013/01/14/the-science-of-sex-abuse>.

82. See, e.g., Bobby Chesney, *Trump’s Call for More Aggressive Material Support Prosecutions*, *LAWFARE* (Aug. 16, 2016, 12:34 AM), <https://www.lawfareblog.com/trumps-call-more-aggressive-material-support-prosecutions> (“Trump thus implies that DOJ is not currently as aggressive as it might and should be when it comes to material support prosecutions.”).

83. *Id.*

84. 341 U.S. 494 (1951).

85. *Dennis*, 341 U.S. at 519 (Frankfurter, J., concurring).

86. *Id.* at 517–18.

87. See *id.* at 496–97 (majority opinion).

88. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 454 (1969) (Douglas, J., concurring) (“[T]he

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reminder that the contemporary political climate should not lead to deviation from well-established First Amendment protections.

It would seem a dangerous law that proscribes a certain iteration of speech while simultaneously self-justifying the proscription without relying on any form of balancing test. Indeed, our duty to democratic speech might just as easily lead one to consider carve-outs as the most in need of ongoing review. It seems at odds with the very foundation of our free speech jurisprudence—and its underlying rationale that freedom of speech allows us to transcend contemporary fears—that areas we dislike or fear the most require the least amount of scrutiny.

#### VI. INTERNET SPEECH LAWS MATTER BECAUSE THE INTERNET IS WHERE ACTIONS OCCUR TODAY

America is a force for openness, particularly in the international Internet setting. The Internet is a man-made word landscape that we continually construct. Marginal areas of real-world law are not only defining what we consider to be acceptable speech but also what we consider to be the appropriate gauge or process for determining that speech is unprotected. From where we stand today in online speech jurisprudence—and especially in light of the still-developing law enforcement precedents regarding online surveillance—it is a short (and often highly politicized) journey for restrictions on speech to reach further and further into our personal devices and data trails.

This concern is more nuanced than the general threat that we are getting closer to living in a surveillance state. Given that private companies own and operate the majority of the Internet's infrastructure, a surveillance state is more related to the collection and retention—and thus, the visibility—of data. My concern here is for the role of the First Amendment in protecting online speech; that is, where we draw the line between proscribable and nonproscribable speech when such speech is made primarily on the Internet. I share the communal disgust for images like child pornography, and I recognize the danger in online speech to known terrorists. But the reflexive, consequentialist justification that speech is not speech because it is illegal—that is, it is illegal because it is subject to a carve-out, and it is subject to a carve-out merely because lawmakers say so—is dangerous for the rule of law.

We are seeing a blurring of the physical and nonphysical worlds in actions and speech. We are a country that conducts more and more of its actions online

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[clear and present danger] test was so twisted and perverted in *Dennis* as to make the trial of those teachers of Marxism an all-out political trial which was part and parcel of the cold war that has eroded substantial parts of the First Amendment.”); David Rudovsky, *Reply of Professor David Rudovsky to Professor Stephen I. Vladeck, “The Field Theory: Martial Law, the Suspension Power, and the Insurrection Act”*, 80 TEMP. L. REV. 441, 446 (2007) (“Over the next several years [after *Dennis*], the Court upheld legislative investigations of ‘subversive’ organizations and individuals and the exclusion of members of the Communist Party from the bar, the ballot, and public employment. During the same period, as the ‘Red Scare’ diminished, the Court began the process of limiting the earlier decisions restricting First Amendment rights.”).

in the form of speech acts. As we see with terrorist speech and child pornography, speech can be deemed harmful in itself. Whereas in the last century, the Court held that action can be speech,<sup>89</sup> in this century the Court appears to be inclined to find that speech can be action.<sup>90</sup>

Again, I find child pornography and terrorist speech morally repugnant. But precisely *because* we are American, we owe to these areas of speech the critical eye of constitutional consistency to ensure that we construct Internet speech laws that we can live with—laws based on values that we apply throughout our First Amendment jurisprudence and not siloed in exceptions. A system of jurisprudential precedent means that carve-outs are likely to be upheld time and again, thus allowing them to slip toward the heart of free speech itself, whether or not such speech is made on the Internet. To protect free speech as a whole, we have a duty to defend speech that we may dislike but must tolerate so long as we wish to live in a free society, both on- and offline.

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89. See *supra* notes 59–60 and accompanying text for an example of such a holding in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

90. See *supra* notes 43–46, 71–75 and accompanying text for an example of such a holding in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).