

# Policing Speech on the Airwaves: Granting Rights, Preventing Wrongs

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When a speaker expresses general revolutionary rhetoric or denigrates various domestic “enemies,” the speech is protected as a necessary byproduct of a vibrant democracy. Such expression has historically come from both left- and right-wing perspectives. Suppose, however, that a media personality on radio or television repeatedly informs the audience that the President is permitting Mexicans and Vietcongs to cross the border from Mexico with bombs that will destroy the bridges over the Mississippi River, and urges listeners to “load those weapons . . . and take care of the problem.”<sup>1</sup>

Two ingredients have now been added to the original revolutionary-rhetoric example: The message is on the airwaves, and the speaker has urged specific acts of assault and murder. Such speakers have not anointed themselves. The Federal Communications Commission (FCC) licenses broadcasters, granting them pecuniary rights<sup>2</sup> and special status—the prestige and opportunity to influence a vast unseen audience.<sup>3</sup>

Should the FCC take steps to prevent repeated advocacy of specific violent acts on the airwaves?<sup>4</sup> If so, it must meticulously differentiate between mainstream government critics who are exercising First Amendment rights of

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1. *In re* Applications of Charles C. Babbs and Nellie L. Babbs, Cattle Country Broadcasting, 58 Rad. Reg. 2d (P & F) 1109, 1125-26 (1985).

2. *See, e.g.*, Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 272 (1992) (discussing government grants of property rights in broadcast licenses).

3. The sole focus of this Article is the appropriate standard for the licensed areas of television and radio. Licenses confer significant economic and status advantages, *see* Sunstein, *supra* note 2, and the FCC maintains a “nationwide fleet” of mobile direction-finding vehicles to detect and prevent unlawful radio transmissions. *See* OFFICE OF THE FED. REGISTER & NAT’L ARCHIVES & RECORDS ADMIN., U.S. GOV’T MANUAL 540 (1995-96 ed.) [hereinafter U.S.G.M.].

The First Amendment calculus appropriate for the Internet, which is not similarly licensed and where participants communicate on an equal plane, is beyond the scope of this Article.

4. This Article explores the FCC’s regulatory authority over licensees that present speakers who repeatedly incite violence. It does not consider the question of whether other sanctions against such speakers are appropriate or available.

dissent, and inciters of murder and sabotage. This Article proposes a new test to guide the FCC in that endeavor.

Part I begins with an overview of communications law and the FCC's erratic enforcement efforts—what it has chosen to regulate unhesitatingly (e.g., dangerous hoaxes and indecency) and what it has ducked. The next sections will analyze the inadequacy of the Supreme Court's incitement jurisprudence. The 1969 *Brandenburg v. Ohio*<sup>5</sup> decision held that advocacy could be proscribed only when it is "directed to . . . producing imminent lawless action" and is likely to have such a result.<sup>6</sup>

This formulation is both overinclusive and underinclusive. On the one hand, the Justices would punish advocacy of civil disobedience such as an immediate trespass at an IRS office. On the other hand, they would protect inciters of a bombing that requires lengthy and complex preparation. One of the reasons for this anomaly is that the Court's "political speech" calculus was devised in response to stump speakers addressing particular audiences and is unsuited to media personalities inciting a wide variety of anonymous listeners.

Part II of the Article presents and illustrates the proposed media test, which seeks to distinguish a call for non-violent protest from an exhortation to murder, and reasoned argument from relentless creation of panic. Subsequent sections treat a number of potential objections to the test and discuss implementation of it in the context of the FCC's position as an independent agency within the Executive Branch.

## I. FCC AUTHORITY TO PRECLUDE SOLICITATION OF ILLEGAL CONDUCT

The electronic media were originally viewed as a means of promoting safety and education.<sup>7</sup> The FCC's initial vision of how television would affect the country was encapsulated by Chairman Paul Parker in 1945. The broadcasters who were given licenses by the agency would help to "drive out the ghosts that haunt the dark corners of our minds—ignorance, bigotry, fear."<sup>8</sup> Fifty years later, these ghosts are still present. Far from driving them out, some media personalities have fostered them.<sup>9</sup> Fear-inducing misinforma-

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5. 395 U.S. 444 (1969) (per curiam).

6. *Id.* at 447.

7. See 47 U.S.C. § 151 (1994).

8. Reed Hundt, Speech Delivered to the National Press Club (July 27, 1995), available in 1995 FCC LEXIS 5084 at \*4.

9. A radio speaker reportedly has asserted that the Federal Emergency Management Agency is setting up secret concentration camps for citizens. See ANTI-DEFAMATION LEAGUE, BEYOND THE BOMBING: THE MILITIA MENACE GROWS, U.S. Newswire, June 19, 1995, available in LEXIS, News Library, Curnws file; David Van Biema, *He Was a Boy Who Liked to Jump Out of the Woods and Scare People*, TIME, June 26, 1995, at 61. Another has been quoted as warning the audience that government agents known as "black eagles" have biochips planted in the base of their necks and have been programmed as "goon squads" installed in underground bases around the nation. See Sheila Wissner, *At the Movement's Extreme, Conspiracy Theories Fuel Militias' Worst Fears*, TENNESSEAN, Sept. 5,

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tion can be a powerful trigger for unlawful action if it is combined with incitement.<sup>10</sup>

The FCC has recognized that there is no constitutional right to be granted or to retain a license when it would not be in the public interest. Congress has given the Commission authority to punish broadcasters and cable operators for content-based offenses such as transmitting fraudulent matter, indecency, obscenity, and incitement to riot. Yet the agency has been reluctant to police misuse of the airwaves when a speaker urges assault and murder.

### A. *The FCC's Statutory Powers*

#### 1. *Congressional Directions*

If there is a bar against FCC regulation of speech that urges sabotage or murder of domestic "enemies," that bar is not built into the congressional scheme that establishes the Commission's powers. The Communications Act of 1934,<sup>11</sup> the Cable Communications Policy Act,<sup>12</sup> and the Cable Television Consumer Protection Act<sup>13</sup> give the agency far more than authority to insure that two competing broadcasters cannot use the same frequency (or channel) simultaneously. Congress has specified that the FCC's crucial technocratic functions<sup>14</sup> must be exercised in "the public interest"<sup>15</sup> and—significantly—

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1995, at A1. Large numbers of listeners consider such talk radio shows to be credible sources of information. See Dennis B. Roddy, *Ears to the Ground, Armed Militias Spring Up to Resist One-World Takeover*, COMM. APPEAL (Memphis), Feb. 21, 1995, at A1.

Commentators have noted that "the less people know, the less likely they are to trust the government, to vote or to otherwise participate." See Sharon Schmickle, *Voices of Democracy*, STAR TRIB. (Minneapolis-St. Paul), May 12, 1996, available in 1996 WL 6912759 (discussing research of political scientists Michael Carpin and Scott Keeter). Knowledge gaps and apathy amplify the voices of vigorous but relatively small groups. See *id.* Such gaps occur in a wide range of subject matter, including history, current events, and science. Studies and polls have indicated that 75% of college graduates did not know that Italy and Japan were Germany's two principal allies in the Second World War. See *New Poll Finds Ignorance Among U.S. College Students*, VANCOUVER SUN, June 1, 1996, available in 1996 WL 5009749. Most Americans surveyed in 1995 believed that the federal government gave out 15% of its budget to other countries and said that the government should not spend more than 5% on foreign aid. In actuality, the spending figure is about 1%. See Dean Solov, *It's the Vote, Stupid*, TAMPA TRIB., Oct. 20, 1996, available in 1996 WL 1089244. When the people surveyed were asked to name the Vice President of the United States, 40% could not do so. See *id.* Less than half of American adults knew that the earth orbits the sun annually. See Paul Recer, *Americans Lack Scientific Knowledge*, TULSA WORLD, May 24, 1996, available in 1996 WL 2022739.

10. See *supra* note 1 and accompanying text. The broadcasts also urged, "If a Jew comes near you, run a sword through him." Frank T. Csongos, *Opponents of Broadcast Deregulation Use Graphic Example*, UPI, Aug. 4, 1983, available in LEXIS, Nexis Library, UPI file; see also *Anti-Jewish Radio Broadcasts Legal, FCC Rules*, L.A. TIMES, Apr. 27, 1985, § 1, at 2.

11. Act of June 19, 1934, ch. 652, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 151-613 (1994)). The Act created the Federal Communications Commission. See *id.* When television stations began operations, the definition of "radio" expanded to include television broadcasting. See 47 U.S.C. § 153.

12. Pub. L. No. 98-549, 98 Stat. 2870 (1984) (codified at 47 U.S.C. §§ 521-32 (1994)).

13. *Id.*

14. The Commission allocates use of the radio spectrum, as well as regulating the award and renewal of licenses and various technological aspects of broadcasting. See R. TERRY ELLMORE,

“for the purpose of promoting safety of life and property through the use of wire and radio communications.”<sup>16</sup> The FCC is charged with safeguarding the electronic media as a reliable and objective source of information rather than as a source of murder instruction.

Communications law, tracking Supreme Court interpretations of the First Amendment, establishes speech hierarchies and correlative penalties. Cable operators are liable under federal and local law for promulgating incitement, obscenity, and slander, unless the offensive expression emanates from channels assigned to public, educational, and governmental (PEG) users.<sup>17</sup> As the Court recently held in *Denver Area Education Telecommunications Consortium v. FCC*,<sup>18</sup> the operators’ editorial control over such PEG channels is minuscule.<sup>19</sup>

BROADCASTING LAW AND REGULATION 36-57 (1982). Currently, the FCC is handling the release of radio spectrum portions for emerging technologies, see James Daly, *Politics Threaten Debut of Communication Tools*, *COMPUTERWORLD*, Aug. 17, 1992, at 57, and for considering the assignment of spectrum for digital television to broadcasters, see Edmund L. Andrews, *Dole Steps Up Criticism of Telecommunications Bill*, *N.Y. TIMES*, Jan. 11, 1996, at D2. FCC chairman Reed E. Hundt favors requiring those who receive a digital channel to “serve the public in a specific, quantifiable, measurable, reliable, guaranteeable way,” such as devoting at least five percent of the airtime to public-interest programming. Mark Landler, *Capitol Hill Fiat on HDTV Isn’t the Last Word*, *N.Y. TIMES*, July 1, 1996, at D1.

Technical and antitrust concerns were the impetus for the Communications Act of 1934, which essentially re-enacted and expanded the Federal Radio Act of 1927. See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137 (1940) (“Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field.”).

15. 47 U.S.C. § 307(c) (1994) (requiring action consistent with “public interest, convenience, and necessity”); see also 47 U.S.C. § 303(g) (1994) (stating that powers and duties of Commission are to “generally encourage the larger and more effective use of radio in the public interest”).

16. 47 U.S.C. § 151 (1994).

17. See 47 U.S.C. § 559 (1994) (prohibiting cable transmission of material that is obscene or “otherwise unprotected” by Constitution and making cable operators liable to fines and imprisonment for any such transmission). 47 U.S.C. § 532(h) now prohibits these transmissions on leased access channels as well. See also 47 U.S.C. §§ 531(e) (1994) (forbidding operator editorial control over PEG channels subject to 47 U.S.C. § 544(d)); 47 U.S.C. § 544(d) (1994) (permitting franchising authority and cable operator to specify in franchising agreement or renewal that services “obscene or . . . otherwise unprotected by the Constitution” will not be provided or should be subject to specified conditions).

18. 116 S. Ct. 2374 (1996). *The Cable Television Consumer Protection and Competition Act of 1992*, Pub. L. No. 102-385, 106 Stat. 1460, 1486, §§ 10(a)-(c) (1992 Act) had: (a) permitted operators to ban “indecent” (sexually explicit but constitutionally protected) programming from leased access channels; (b) required them to segregate any indecent programming that they chose to allow, providing it to viewers only upon written request; and (c) accorded similar editorial discretion to ban inciting, indecent, or obscene programming from PEG channels. In *Denver Area Consortium*, the Supreme Court upheld section 10(a) of the 1992 Act, permitting cable operators to exercise discretion over whether to transmit indecent leased access programming. See 116 S. Ct. at 2390. However, the Court struck down sections 10(b) and (c) as violative of the First Amendment. See *id.* at 2394, 2397.

The Court’s reasoning for these holdings was badly fractured, with a majority joining only the proposition that the “segregate and block” provisions of section 10(b) were not sufficiently narrowly tailored to survive any of the various levels of scrutiny that the individual Justices applied to them. See *id.* at 2394.

19. See *supra* note 18. Section 10(c) of the 1992 Act had directed the FCC to draw up regulations allowing operators to ban, inter alia, “material soliciting or promoting unlawful conduct.” Some speech

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These statutes show us the kind of speech that the legislature considered to be of “low value,”<sup>20</sup> and therefore provide clues to resolving an apparent contradiction in the FCC’s regulatory mandate. On the one hand, Congress restrained the agency from engaging in pre-broadcast “censorship”<sup>21</sup>—although the applicable provision refers to interference with “the right of free speech,” indicating that unprotected expression can be proscribed. On the other hand, the FCC is empowered to suspend the license of operators who cause or aid a violation of any statute that the Commission administers.<sup>22</sup> That could include the federal prohibition against the use of radio or television to incite a riot.<sup>23</sup>

Despite its awkward accretion, this congressional scheme affirms the FCC’s authority to make content-based decisions. The agency is explicitly charged, for example, with preventing transmission of fraud<sup>24</sup> and obscenity.<sup>25</sup> In

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promoting unlawful conduct is unprotected, *see* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *infra* Subsection I.B.1. *Denver Area Consortium* failed to explain why section 10(c) of the 1992 Act could not be redacted to save those portions regulating such constitutionally unprotected speech. Although section 10(c) was struck down, the FCC’s implementing regulations are still notable as an indication of how it might approach a similar (but constitutional) provision in the future, or as a guide it might take into account in assessing whether a licensee is operating in the public interest. *See supra* notes 15-17 and accompanying text. The FCC concluded that the phrase “unlawful conduct” should be read broadly. *See In re* Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 2638, 2641 (1993). Speech that “would constitute unlawful solicitation of a crime or would be otherwise illegal,” included materials that are “likely to incite an immediate breach of peace or otherwise incite imminent unlawful action.” *Id.* A Report and Order is the official notification of the Commission’s final decision on a rule and includes an explanation of its reasons after discussing pro and con arguments. *See* JOHN R. BITTNER, *BROADCAST LAW AND REGULATION* 51 (1982).

20. *See infra* notes 95-97 (discussing judicial confirmation of this speech hierarchy) and accompanying text.

21. 47 U.S.C. § 326 (1994). While section 326 expressly refers to radio communications, section 153(b) defines “radio communication” as including “signals, pictures, and sounds of all kinds,” thereby making the censorship proscription applicable to television broadcasts as well. *See, e.g., Zamora v. CBS*, 480 F. Supp. 199, 205 (S.D. Fla. 1979) (dismissing tort suit against broadcasting company alleging that television violence had caused minor to become addicted to violent behavior). The prohibition against censorship does not, however, prevent the Commission from reviewing completed broadcasts in order to perform its regulatory duties. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 735, 737 (1978); *infra* note 46 (further discussion of *Pacifica*).

22. *See* 47 U.S.C. § 303(m)(1)(A) (1994).

23. *See* 18 U.S.C. § 2101(a)(1) (1994). Such an argument is buttressed by the congressional prohibition against the use of cable to transmit material that is not covered by the First Amendment. *See* 47 U.S.C. § 559 (1994); *supra* notes 16-17 and accompanying text. The word “riot” is defined as acts which constitute a clear and present danger of injury to property or persons, but this definition excludes mere advocacy of ideas or “expression[s] of belief, not involving advocacy of any act . . . of violence . . . [for the right to commit such act].” 18 U.S.C. § 2102 (1994).

The FCC currently takes a narrow view of its authority to proceed on the basis of statutes outside communications law, although it acknowledges that it should consider such statutes when they relate to the policies underlying the Communications Act. *See In re* Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1186-87 (1986); *see also FCC v. RCA Communications*, 346 U.S. 86, 91-92 (1953) (indicating that although Commission must consider economic factors such as competition as part of public interest standard, Commission may nevertheless ignore policies underlying Sherman Act, 15 U.S.C. §§ 1-7 (1994), and Clayton Act, 15 U.S.C. § 18 (1994), if public interest so dictates).

24. *See* 18 U.S.C. § 1343 (1994).

view of its broader “public interest” stewardship, these specific mandates do not exclude action on a more significant plane to protect life and property.<sup>26</sup>

The rationale for such action was trenchantly expressed by Chief Justice Burger, then serving on the Court of Appeals for the District of Columbia Circuit:

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable obligations. A newspaper can be operated at the whim or caprice of its owners; a broadcast station cannot. After nearly five decades of operation the broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust subject to termination for breach of duty.<sup>27</sup>

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25. See 18 U.S.C. § 1464 (1994). This section does not apply to cable transmissions because it refers to radio communication rather than wire communication. See 47 U.S.C. § 153 (1994) (defining terms). However, authority to prevent obscene transmission on cable does flow from 47 U.S.C. § 559 (1994), which was adopted as part of the Cable Communications Policy Act of 1984, and 47 U.S.C. § 558 (1994), which provides for criminal penalties for such transmissions.

26. See *supra* note 16 and accompanying text.

27. *United Church of Christ v. FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966). The Chief Justice later quoted himself in writing for the majority in *CBS v. FCC*, 453 U.S. 367, 395 (1981). See also *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) (noting that broadcast licensees serve as fiduciaries for public).

A brief exploration of the differences between broadcasting, cable, and newspapers will highlight some reasons for continued FCC regulation of the non-print media. Although the basic congressional scheme has developed rather awkwardly, as indicated above, the courts have accepted it because governmental supervision reduces the risk of technological chaos and misuse of a publicly granted monopoly. See *supra* note 15.

In what sense is the public domain at stake in broadcasting? The original rationale—scarcity of broadcast frequencies—has become increasingly inapplicable to cable. See, e.g., *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 639-40 (1994) (rejecting relaxed standard of scrutiny favored in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), as inappropriate for cable television, which does not suffer from same scarcity of broadcast frequencies); *FCC v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984) (expressing doubt about scarcity rationale set out in *Red Lion*). The availability of coaxial cable lines that can provide numerous new channels, as well as the emergence of fiber optics and digital compression, have led the Supreme Court to declare that “soon there may be no practical limitation on the number of speakers who may use the cable medium.” *Turner*, 395 U.S. at 639. Nonetheless, the number of cable companies operating in a particular geographical location is limited by economic factors. In many areas only a single company can survive, creating what the Tenth Circuit has called “medium scarcity.” See, e.g., *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1378 (10th Cir. 1981) (finding that government restrictions on cable operator’s permit must be evaluated in light of anticipated effects of medium scarcity created by cable operator’s use of valuable and limited part of public domain). Because cables are laid under or along public streets, “a city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur. Thus, government and cable operators are tied in a way that government and newspapers are not.” *Id.* at 1378. This involvement was also recognized in *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 116 S.Ct. 2374 (1996); see also, Robert E. Riggs, *Indecency on the Cable: Can It Be Regulated?*, 26 ARIZ. L. REV. 269, 306 (1984) (discussing Tenth Circuit idea of “medium scarcity”).

Cable has been described as standing somewhere between newspapers, which cannot be licensed by the government, see *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931), and the broadcast media. *Turner Broadcasting System v. FCC*, the Supreme Court’s 1994 pronouncement on the subject, rejected the notion that cable was analogous to either. *Turner*, 512 U.S. at 637-39, 653-67. The Court devised escalating First Amendment requirements for regulation in the three areas. The deferential review given to radio and television broadcast regulation is inappropriate (on technological grounds) to cable. On the other hand, cable can also be differentiated

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The congressional directions given to the FCC, with grace notes of rhetoric supplied by the Supreme Court, impose convoluted obligations.<sup>28</sup> Nonetheless, the statutory language indicates that the agency has the power to prevent licensees from becoming purveyors of incitement to sabotage and killing.

### 2. *The FCC's Enforcement Efforts*

The Commission's willingness to circumscribe speech, as demonstrated in its own opinions and orders, has been somewhat erratic. It has performed flip-flops about hoaxes and harassment, enthusiastically denounced indecency, yet pulled away from regulating calls for violence.

In the content-based area of regulating dangerous hoaxes, the Commission has shown increasing awareness of its responsibility to protect the public. After declaring in 1985 that cautioning broadcasters not to air "scare announcements" was unnecessary,<sup>29</sup> the agency subsequently changed its position and proceeded against several stations that had induced fear through misinformation.<sup>30</sup> Sanctions were applied where a radio broadcast announced, "Attention, attention . . . . The United States is under nuclear attack."<sup>31</sup>

The FCC's reasoning was that preexisting public anxiety about war and catastrophe could be fanned into widespread panic by such an assertion. Current broadcasts of a program like *War of the Worlds* without language identifying it as fiction would "violate our general policy requiring licensees to program their stations in the public interest."<sup>32</sup>

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from the print medium with its concomitant "strict scrutiny" of governmental intervention. If the *Gazette* is the only daily newspaper in town, local residents can nonetheless get weekly papers or dailies from a neighboring city. But if a consumer contracts for cable television, the physical connection between her television set and the cable network gives the operator "bottleneck, or gatekeeper, control" over the available programming. *Id.* at 623. Cable regulation must generally be accorded no more than an intermediate level of scrutiny. *See id.* at 661-62. *Turner Broadcasting System v. FCC*, No. 95-992, 1997 WL 141375, at \*5, \*19 (U.S. Mar. 31, 1997), subsequently applied this intermediate standard to the so-called "must-carry" provisions of Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, which mandated that cable television systems dedicate some of their channels to local broadcast television stations. However, *Denver Area Consortium* avoided labeling the standard of scrutiny applicable to cable. *Denver Area Consortium*, 116 S. Ct. at 2389; *see supra* note 18.

28. *See supra* notes 15-18, 21-25 and accompanying text.

29. Elimination of Unnecessary Broadcast Regulation, 57 Rad. Reg. 2d (P & F) 939, 941 (1985). The example cited—an invasion by amoebas—was dismissed as an "obvious" hoax that warranted no cautionary FCC notice. *See id.* A general policy statement about dangerous hoaxes was deemed unnecessary. *See id.*

30. *See infra* notes 31-33 and accompanying text.

31. Emmis Broad. Corp., Licensee, KSHE (FM), 6 F.C.C.R. 2289 (1991). A Notice of Apparent Liability assessing a \$25,000 forfeiture under section 503(b) of the Communications Act, 47 U.S.C. § 503(b) (1994), was sent to the station.

32. *Id.* *See infra* note 212 and accompanying text for a discussion of the invasion scenario in *War of the Worlds*.

The FCC also admonished a radio station for claiming that its talk show host had been shot in the head, causing police to rush to the scene, *see* North American Broad. Co., Licensee, Radio Station WALE (AM), 7 F.C.C.R. 2345 (1992), and another broadcaster for airing a false murder confession, *see* Radio Station KROQ-FM, 6 F.C.C.R. 7262 (1991).

Ultimately, the Commission developed a narrower three-part rule forbidding the broadcast of false information concerning a crime or catastrophe.<sup>33</sup> This rule is transgressed if: (1) the licensee or permittee knew the statement was false; (2) damage resulted immediately after the broadcast; and (3) the harm was foreseeable.

To what extent could regulation relating to deliberate incitement of violence be based on the FCC's anti-hoax rule? Suppose a media personality urges that sabotage be committed to resist a secret "new world order"<sup>34</sup> that is aided by National Guard troops, Los Angeles street gangs, and Nepalese Gurkhas,<sup>35</sup> or that killing the President will "cleanse" the government.<sup>36</sup> The first prong, requiring knowledge of falsity, is less relevant in the incitement context because misinformation would merely be the tool for the speaker's goal of causing sabotage or murder. The second prong, foreseeability, is also less significant with respect to incitement cases because—in addition to playing on audience emotion—the speaker galvanizes the listeners to engage in particular criminal conduct against specified targets. Those taking up the challenge need not be a mob—a few people would constitute a sufficient threat.<sup>37</sup>

As to the third prong, relating to actual damage,<sup>38</sup> the distinction between hoaxes and incitement becomes even sharper. The motivation of a hoaxer claiming that the country is under nuclear attack could be publicity, higher ratings, or creation of drama; to require a damaging result would protect (indeed, overprotect) a broadcaster who might be yielding to an immature impulse. The architect of a bombing or murder deserves no such indulgence even if her effort should fail.

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33. See 47 C.F.R. § 73.1217 (1996). The Commission noted that a rule was needed to increase the possibility of sanctions, but that a narrow approach to coverage was taken in deference to First Amendment strictures. See *In re* Amendment of Part 73 Regarding Broadcast Hoaxes, 7 F.C.C.R. 4106 (1992).

34. Cf. *Prime Time Live* (ABC television broadcast, Apr. 25, 1995). Two former militia members charged that a radio speaker had privately planned the bombing of Russian-made tanks on a U.S. army installation to prevent their use in a "new world order" takeover of the country. The former militia members warned the FBI, which acknowledged receiving the warning, and the sabotage attempt was not made. See *id.*

The media speaker denied the allegation, see *id.*, attributing it to personal animus about an unrelated dispute. See Joseph Mallia, *Radical Denies Inciting Suspect*, BOSTON HERALD, Apr. 25, 1995, at 7.

35. See Susan Schmidt & Tom Kenworthy, *Michigan Fringe Group's Leader Has National Reputation*, WASH. POST, Apr. 25, 1995, at A5 (reporting description of radio speaker's assertions that these entities are serving plot by United Nations and U.S. government to force America into "new world order").

36. Cf. *infra* note 101 and accompanying text.

37. See *infra* notes 84, 101 (discussing Francisco Duran's attempt to kill President Clinton).

38. The FCC was troubled about whether a licensee should be excused from liability "by virtue of the fact that a grossly irresponsible broadcast does not cause as great a degree of damage as it otherwise might," and whether a rule premised on actual harm would serve as a sufficient deterrent to such conduct. *In re* Amendment of Part 73 Regarding Broadcast Hoaxes, 6 F.C.C.R. 6935, 6936 (1991) (Notice of Proposed Rule-Making). However, the Commission's final regulation included the actual-damage requirement.

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Nevertheless, the anti-hoax rule provides an analogy and signals the FCC's willingness to acknowledge that the First Amendment does not require blind content-neutrality,<sup>39</sup> particularly where a speaker is misusing the airwaves to terrorize citizens. Yet this willingness has not carried over to the Commission's current position on preventing harassment of individuals.

The FCC's original view was that licensees must take reasonable steps to prevent harassment of members of the public. This sentiment was expressed in a case where a New York City television station wanted to move its transmitter to the World Trade Center.<sup>40</sup> The station urged viewers to phone a named official to register their protests against his agency's refusal to allow the move. After his number was repeatedly given verbally and visually to the audience, this official received threatening phone calls. Because the station later discontinued the offending conduct, the Commission confined its reproof to a policy statement. However, it referred to an earlier FCC opinion<sup>41</sup> dealing firmly with a radio station that had broadcast the telephone number of an individual in connection with a disputed local issue. The station was asked to demonstrate that it would not permit future use of its facilities to cause harassment<sup>42</sup> and was advised that this conduct "raise[d] serious questions regarding [its] responsibility as a licensee."<sup>43</sup>

The FCC's oversight of harassment was abandoned in the 1980s. A principal reason given for this retreat was that the distinction between harassing calls and legitimate expressions of disapproval "can be fine indeed"<sup>44</sup>—a line-

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39. See *In re* Amendment of Part 73 Regarding Broadcast Hoaxes, 7 F.C.C.R. 4106, 4108 & n.21 (1992) (citing *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976) (holding that televised threats of political assassination are punishable without violating First Amendment)); see also *United States v. Irving*, 509 F.2d 1325, 1330 (5th Cir. 1975) (holding false threat of hijacking punishable without violating First Amendment). The Supreme Court has allowed for statutory proscriptions that need not completely bow to the First Amendment. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (false or deceptive advertising); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation of private individuals); *Miller v. California*, 413 U.S. 15 (1973) (obscene words); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

40. See *In re* Complaint of Port of New York Authority Concerning Licensee Responsibilities of Trans-Tel Corp., Television Station WXTV, 33 F.C.C.2d 840 (1972).

41. See *In re* Complaint by Dewey M. Duckett, Jr. Concerning Fairness Doctrine by Station WQXL, 23 F.C.C.2d 872 (1970).

42. See *id.* A statement of future policies and procedures to implement this goal was to be submitted within ten days. See *id.* at 873.

43. *Id.* The Commission noted that its letter and the station's response would be put in "the appropriate file . . . where it will be available for further reference" and that the station should have known that the targeted individual would be threatened. *Id.*

44. *In re* Elimination of Unnecessary Broadcast Regulation, 54 Rad. Reg. 2d (P & F) 1043, 1055 (1983). As the Commission acknowledged, however, many states have criminalized the making of harassing phone calls. See, e.g., N.Y. PENAL LAW § 240.30 (McKinney 1992) (aggravated second-degree harassment). This legislative judgment should arguably heighten rather than lessen FCC concern over any calculated effort to cause such conduct. See *infra* note 222.

drawing dilemma that is far less evident in the case of an explicit instruction to murder.<sup>45</sup>

The agency has shown greater interest in shielding audience members from obscenity and indecency than it has in protecting citizens from media-instigated telephone threats.<sup>46</sup> Although these priorities may be misaligned (which of the two hazards would you prefer to avoid?), the FCC's anti-indecency campaign reveals a significant point. The agency is capable of mobilizing when it determines that (1) the cause is right; and (2) the courts permit.<sup>47</sup> Are these conditions met when radio or television stations broadcast incitement to maiming, killing, and sabotage? The FCC has exhibited considerable reluctance to regulate such solicitations, quite apart from any doubt about its power to do so.

On the one hand, the Commission recognizes the value (and protected status) of free speech for broadcasters—the just cause of non-censorship.<sup>48</sup> On

45. Under the test proposed in this Article, the incitement must be express rather than implicit. *See infra* notes 170-172.

46. The FCC's position is comfortably supported by the Supreme Court's exclusion of obscene material from First Amendment protection. *See Miller v. California*, 413 U.S. 15, 23 (1973) (permitting prohibition when material, taken as whole, is patently offensive under contemporary community standards, appeals to average person's prurient interest, and lacks serious literary, artistic, political or scientific value). It is also supported by the Criminal Code of the United States, which explicitly prohibits broadcast stations from presenting obscene or indecent material. *See* 18 U.S.C. § 1464 (1994). In 1987, the Commission announced that it would take action against broadcasters who purvey indecency (constitutionally protected speech) at a time when there is a "reasonable risk" that children could be in the audience. *See New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licenses*, 2 F.C.C.R. 2726, 2726 (1987). The Commission has, for example, invoked indecency standards to levy large fines on stations presenting *The Howard Stern Show* during daytime hours. *See infra* Section II.B. The Supreme Court has held, however, that some "safe harbor" for adult viewing must be provided. *See, e.g., Sable Communications of California v. FCC*, 492 U.S. 115 (1989) (holding ban on indecent telephone messages violated First Amendment because denying adult access to messages went beyond least restrictive means necessary to serve compelling interest of protecting children); *see also Action for Children's Television v. FCC*, 58 F.3d 654, 664-67 (D.C. Cir. 1995), *cert. denied*, 116 S. Ct. 701 (1996) (analyzing "safe harbor" provisions of FCC ban on indecency to see if it met "least restrictive means" requirement).

The word "indecent" has been given a broader reach than the word "obscene" in the context of broadcasting. *See FCC v. Pacifica Found.*, 438 U.S. 726 (1977). *Pacifica* held, *inter alia*, that although indecency is coextensive with obscenity in books and movies, it encompasses more than obscenity when applied to broadcasting because parents have greater difficulty in supervising children's at-home listening access. *See id.* at 748-50. The decision also noted that the prohibition against FCC censorship, *see* 47 U.S.C. § 326 (1994), does not prevent the Commission from reviewing completed broadcasts in order to perform its regulatory duties. *See Pacifica*, 438 U.S. at 735, 737.

47. *See supra* note 46 (discussing *Pacifica*). For a critical evaluation of the Supreme Court's holding, *see* Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1228-37, 1280-84 (1978) (noting flaws in Court's *Pacifica* argument that intrusiveness should allow broadcasting to be treated differently for First Amendment purposes). *But see* Gerald J. Thain, *The 'Seven Dirty Words' Decision: A Potential Scrub Brush for Commercials on Children's Television?*, 67 KY. L.J. 947, 957-63 (1979) (supporting *Pacifica*'s narrow holding because it poses only minimal infringements on First Amendment rights).

48. *See, e.g., In re Applications of Spanish Radio Network*, 10 F.C.C.R. 9954, 9959 (1995) (rejecting claim that radio announcers incited riot); *Anti-Defamation League of B'nai B'rith Against Station KTYM, Inglewood, California*, 4 F.C.C.2d 190 (1966), *aff'd sub. nom.*, *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169 (D.C. Cir. 1968).

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the other hand, it acknowledges the loss of protection for calculated incitement that creates a “clear and present danger” of serious injury<sup>49</sup> or is likely to produce imminent lawless action<sup>50</sup>—the meritorious cause of preventing violence.

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Many of these cases involved the application of various provisions of the FCC’s “Fairness Doctrine,” a creature of the FCC’s regulatory attempts to implement its mandate to oversee broadcasting “in the public interest.” *See, e.g.*, 47 U.S.C. § 309(a) (1994) (broadcaster licensing); Inquiry Into the General Fairness Obligations of Broadcaster Licensees, 49 Fed. Reg. 20317, 20319-22 (May 14, 1984) (Notice of Inquiry) (recounting origins and evolution of doctrine). The Fairness Doctrine imposed a two-pronged obligation upon broadcasters, requiring them both to provide coverage of “controversial issues of interest in the community served” and to “provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.” *In re* Inquiry into Section 73.1910 of the Commission’s Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees, 2 F.C.C.R. 5272 (1987). The FCC believed that content regulation in the form of a “duty to deal” in diverse ideas would best enhance the flow of diverse viewpoints to the public. *See id.*; *see also* Jerry M. Landay, *The Public Has a Right To Make “You’re on the Air” Fair Again*, CHRISTIAN SCI. MONITOR, May 30, 1995, at 19.

The 1987 Fairness Report (as had an earlier Fairness Report in 1985) concluded that the Fairness Doctrine no longer served the public interest and should be abolished. *See* 2 F.C.C.R. 5272, 5274 (1987). The Agency found that the doctrine had the effect, not of fostering a multiplicity of views, but of inducing broadcasters to censor controversial viewpoints altogether. *See In re* Inquiry into Section 73.1910 of the Comm’n’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 142, 169, 188-90 (1985). In August 1987, the FCC ruled that the doctrine violated the First Amendment on its face and contravened the public interest. *See In re* Complaint of Syracuse Peace Council, 2 F.C.C.R. 5043 (1987). The Court of Appeals for the District of Columbia upheld this order without deciding the constitutional issue, regarding it merely as an act of administrative discretion. *See* *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989).

There were far-reaching consequences. Despite the FCC’s argument that the “multiplicity of voices” now available in both the broadcast and print media obviated the need for enforcement, *see 1987 Fairness Report*, 2 F.C.C.R. at 5292, observers began to note definite trends among these voices. Since 1990, the number of talk radio stations has tripled, with nearly a thousand operating by 1995 and providing largely right-of-center views. *See* Rod Dreher, *Congress Cowers to Conservatives on the Fairness Doctrine*, WASH. TIMES, July 3, 1994, at A4; Landay, *supra*, at 19 (citing trade publication *Talker’s Magazine* estimate that 70% of “talk jocks” are right of center; citing industry contention that ideological tilt is good for business; and noting post-1987 rarity of both popular discussion programs and station editorials). Professor Landay observed that “Most gab hosts are white, male and angry. . . . [T]hey tend to take cover behind the mike, inflaming rather than informing, excluding and overwhelming rather than engaging. Most stations feel no compunction to balance them with either liberal alternatives or neutral hosts who facilitate as their guests take sides.” Landay, *supra*, at 19. Mere multiplicity of voices, then, does not at all ensure multiplicity of views, which was the interest the Fairness Doctrine was originally designed to serve.

The Fairness Doctrine has regained popularity in congressional circles. Several bills reinstating it have passed one or both Houses since 1987. *See generally* Judith Michaelson, *Effort to Revive Broadcasting’s Fairness Doctrine Raises Static*, L.A. TIMES, Feb. 17, 1993, at 5; *Morning Edition* (National Public Radio broadcast, Oct. 26, 1993), available in 1993 WL 9612285 (roundtable discussion on state of broadcasting and legislative fairness efforts). President Reagan vetoed the Fairness in Broadcasting Act of 1987. *See* President’s Message to the Senate Returning S.742 Without Approval, 23 WEEKLY COMP. PRES. DOC. 715 (June 29, 1987). Media personalities, including Rush Limbaugh and G. Gordon Liddy, have reportedly played a major role in defeating efforts under the Clinton administration to reinstitute the Fairness Doctrine by statute. *See* Dreher, *supra*, at A4; Landay, *supra*, at 19; Michaelson, *supra*, at 5; *Morning Edition*, *supra*.

49. *See Spanish Radio*, 10 F.C.C.R. 9954, 9959 (1995), (referring to test in *Dennis v. United States*, 384 U.S. 855 (1966)); *see infra* note 69 (discussing *Dennis* in context of Supreme Court’s unlawful advocacy jurisprudence).

50. *See Spanish Radio*, 10 F.C.C. 9954, 9959 (1995) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)). For a full discussion of *Brandenburg*, *see infra* Subsection I.B.1.

The FCC has decided not to choose between these two causes. Its favorite excuse has been that it should wait for a determination from local prosecutors or courts that a broadcast constitutes incitement. However, in practice, even a confirmation by local authorities has not led the agency to act. A particularly striking example involved a series of broadcasts from a station in Dodge City, Kansas,<sup>51</sup> asserting that Mexicans and Vietcongs were preparing to enter the United States from Mexico, load a boat with a huge bomb, and blow up bridges across the Mississippi River. These attacks would catch “the American Anglo-Saxon Caucasian” unaware.<sup>52</sup> Because President Reagan had allegedly ordered the Border Patrol and other agencies to do nothing about armed Mexicans crossing the border to abuse American citizens, listeners were urged to “load those weapons fellow Americans and take care of the problem . . . and after we clean up our southwestern border, let’s keep walking to the nearest state capital and Washington, D.C. and clean up the rest . . . .”<sup>53</sup> The broadcast added congratulations to the killers of an IRS agent and two bankers.<sup>54</sup>

The FCC’s response was that it might consider these statements in deciding whether to renew the station’s license if it were certain that state law had been violated, but lacked the expertise to come to any conclusion on this point. The Commission discounted a statement by the Kansas Attorney General that the programs did constitute an unlawful incitement to riot. According to the FCC, his objection to the broadcasts contained insufficient detail.<sup>55</sup>

What are the possible justifications for the agency’s self-imposed paralysis? Not the assumption that the “market” will sweep away inciters; the occasional

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51. See *In re Applications of Charles C. Babbs and Nellie L. Babbs, Cattle Country Broadcasting*, 58 Rad. Reg. 2d (P & F) 1109 (1985).

52. See *id.* at 1126.

53. News reports also described recordings of broadcast excerpts from July 9, 1982, stating: “Blacks and brown are the enemy . . . If a Jew comes near you, run a sword through him.” Csongos, *supra* note 10; see also *Anti-Jewish Radio Broadcasts Legal, FCC Rules*, *supra* note 10, at 2. The FCC made no reference to these statements in its Notice of Apparent Liability. Citizen petitions not to renew the radio station’s license were rejected, see *Cattle Country Broadcasting*, 58 Rad. Reg. 2d (P & F) at 1109, 1118. The Commission did find that the station had failed to comply with requirements to file a “programs/issues list.” See *id.* at 1120. The station was given the opportunity to produce appropriate lists to prove it had aired sufficient programming responsive to community needs. See *id.* However, the FCC found inadequate proof to support the charges that the licensees had failed to exercise proper supervision and control over their station’s operations and programming. See *id.* at 1121.

54. The programs also contained denunciations of Jewish bankers in particular and Jews in general. See *Cattle Country Broadcasting*, 58 Rad. Reg. 2d (P & F) at 1126-27.

55. In addition, the FCC characterized the broadcasts as directed towards future rather than imminent action, therefore warranting no reproof. See *id.* at 1113. But see Gloria J. Romero & Antonio H. Rodriguez, *Perspective on Immigration: A Thousand Points of Xenophobia*, L.A. TIMES, May 21, 1990, at B5 (describing vigilante attacks in late 1980s on immigrants in border areas). In California, for example, Mexicans and other immigrants—including legal farm workers—have been robbed, beaten, and killed. See *id.*

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success of self-regulation<sup>56</sup> does not offset the continuing media presentation of other inflammatory speakers.<sup>57</sup> Nor can the Commission claim that it is hobbled by its own prior precedents; it has changed its collective mind on the danger of hoaxes<sup>58</sup> and periodically reexamined its character rules for licensees.<sup>59</sup> As it has recently acknowledged,

There is no constitutional right to be granted a license when it would not be in the public interest . . . . The Communications Act does not define the term 'public interest, convenience and necessity' but instead leaves it to the Commission 'as the expert body which Congress has charged . . . ' to exercise its discretion in determining where the public interest lies.<sup>60</sup>

Judicial pronouncements have underscored this authority.<sup>61</sup>

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56. *The Aryan Nations Hour*, a West Jordan, Utah radio station broadcast hosted by an avowed racist, was cancelled after two broadcasts. The station owner cited not only threats against him but also the loss of most of his advertisers. See *The Nation*, L.A. TIMES, Feb. 7, 1988, § 1, at 2. See also *infra* note 219 (describing firing of two St. Louis disk jockeys who repeatedly used racial and ethnic slurs and wondered aloud whether Rev. Jesse Jackson could be shot); cf. *infra* note 220 (describing firing and subsequent rehiring of New York radio speaker who had said that 'ideally' police should have shot participants in gay-rights parade).

57. See *infra* Section I.B.

58. See *supra* notes 29-33, 38-39 and accompanying text.

59. In 1990, former FCC Chairman Alfred C. Sikes, writing to Rep. John D. Dingell (D-Mich.), Chairman of the House Energy and Commerce Committee, bluntly declared that he did not endorse a 1986 policy statement that had changed prior FCC standards by limiting the categories of crimes relevant to determining fitness to receive a license. See 102 F.C.C.2d 1179 (1986); see also *supra* note 22 and accompanying text (explaining FCC's power to suspend licenses of operators who cause or aid violations of any statute that FCC administers). Sikes stated, "There is no scarcity of law-abiding citizens interested in being broadcast licensees. Consequently, in my view . . . licensees should be held to a higher standard than is reflected in the current policy statement." Douglas Frantz, *FCC May Stiffen Character Rules for Licenses*, L.A. TIMES, Jan. 25, 1990, at D6.

60. See *In re* Application for Review of Stephen Paul Dunifer, Berkeley, California, 1 F.C.C.R. 718, 727 (1995) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940)). Dunifer protested a Notice of Forfeiture imposed for broadcasting without a license in violation of 47 U.S.C. § 301. In response to his constitutional claims, the FCC noted that its procedures comport with due process and the Fifth and Sixth Amendments: Its "violation of rules" statement provides adequate notice; the party is given an opportunity to respond; and the right to counsel would apply in criminal but not civil cases. See 11 F.C.C.R. 718, 729 (1995).

61. See, e.g., *CBS v. FCC*, 453 U.S. 367 (1981) (upholding prohibition against willful and repeated refusals by broadcasters to sell air time to legally qualified candidates for public office); *FCC v. ABC*, 347 U.S. 284, 289 n.4 (1954) (stating that FCC may consider violations of law, including proposed violation of criminal statute relating to conduct of broadcasters, as part of Commission's duty to act in public interest); *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (noting that Congress has empowered FCC to act in public interest and "[n]ecessarily . . . subordinate questions of . . . the scope of the inquiry . . . were explicitly and by implication left to the Commission's own devising."); cf. *CBS v. DNC*, 412 U.S. 94 (1973) (holding that FCC had authority but not obligation to compel station to accept public interest group's "editorial advertisement" protesting Vietnam War).

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) sets forth a two-part test for when an agency is interpreting its own enabling legislation: (1) Did Congress directly speak to the precise question at issue? If so, the court will give effect to this unambiguous intent. If not, the question is (2) whether the agency's action is based on a permissible construction of the statute. Among the relevant factors that a court considers in making this inquiry are the agency's past interpretations; the extent to which Congress has entrusted the agency with policy decisions; the agency's expertise and experience with respect to problems of a similar nature; and the fairness of the interpretation. See JACOB A. STEIN ET AL., ADMINISTRATIVE LAW §§ 51-17 to 51-23 (rev. ed. 1996).

The FCC's discretion to interpret statutes does not justify abdication of its duty as a steward of the public interest. Media inciters, unlike street corner orators, do not anoint themselves. The Commission licenses the broadcasters, thereby providing the means for them to influence their listeners. Nor can abdication rest on the proposition that if a speaker posed a danger, local authorities would regulate his conduct. The possibility that some offenders may ultimately be prosecuted does not necessarily validate the FCC's decision to allow a call for murder and sabotage to reach a vast and diffuse audience.

The Commission argues that the "clear and present danger" rubric<sup>62</sup> is best applied by a court, preferably one familiar with local conditions.<sup>63</sup> Advocacy—even incitement by a broadcaster against a competing station<sup>64</sup>—is political speech and therefore is favored in the First Amendment arena. This position is unduly modest, and indeed discounts the judicial deference given to agencies that promulgate regulations interpreting the law and that apply these interpretations to a myriad of fact situations.<sup>65</sup>

An FCC enforcement effort, however, would raise a critical issue: What legal standard should the agency use? Broadcasts that urge listeners to engage in specific acts of assault or murder are an abuse of the license accorded by the FCC in the public interest, and could be forbidden. Nevertheless, this Article suggests a more speech-protective test which could allay the Commission's First Amendment concerns.

*Brandenburg* is a starting point, but it must be updated. Its approach was developed from situations involving street-corner orators. It is not adequate in application to television and radio speakers, whose credibility and influence are enhanced by media appearance.<sup>66</sup> A media personality's incitement has an increased potential for reaching unstable and unidentifiable listeners, and its celebrity source may assist in giving a crime the aura of a crusade. The First Amendment analysis below supports a more contextual standard than is accorded by the Supreme Court's 1960s jurisprudence.

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In the context of the issues raised in this Article, Congress has endowed the FCC with broad authority to regulate in the public interest.

62. See *infra* Subsection I.B.1. for a full discussion.

63. See, e.g., *In re Applications of Spanish Radio Network*, 10 F.C.C.R. 9954, 9959-60 (1995) (stating that Miami police report did not include finding that anti-Castro broadcasts were inflammatory).

64. See *In re Application of Jacor Broadcasting of Tampa Bay, Inc.*, 7 F.C.C.R. 1826 (1992). A station's suggestions of harassment and violent acts against a competitor were held to be an insufficient basis for refusing a license renewal, even though the offending broadcasts had led to bomb and death threats. In a convoluted decision, the FCC found on one hand that no clear and present danger was presented, and on the other that the broadcaster's conduct could be a proper object of local law enforcement. See *id.* at 1827.

65. See cases cited *supra* note 61.

66. See, e.g., STUART OSKAMP, ATTITUDES AND OPINIONS 161-62 (1977) (stating that media by "its very mention of people, events, and issues," confers "importance upon them in the public eye").

## Policing Speech on the Airwaves

### B. *The Supreme Court's Flawed Brandenburg Test*

The FCC has chosen to overlook rather than oversee incitement to murder and maiming on radio and television. The agency has justified that choice simply by referring to the Supreme Court's First Amendment jurisprudence. It is therefore necessary to explore this jurisprudence and to unpack its underlying assumptions.

#### 1. *Revolutionizing Brandenburg*

The per curiam *Brandenburg v. Ohio*<sup>67</sup> decision has the virtue and vice of brevity. Its core lies in one sentence: “[C]onstitutional guarantees of free speech . . . do not permit a State to . . . proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>68</sup>

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67. 395 U.S. 444 (1969). *Brandenburg* overruled *Whitney v. California*, 274 U.S. 357 (1927), which had permitted a criminal syndicalism law to become a device for punishing abstract teaching of doctrine.

68. *Brandenburg*, 395 U.S. at 447.

Like its predecessors,<sup>69</sup> *Brandenburg* evolved its unlawful-advocacy formulation in response to a speaker whose vague circumlocutions fell far short of incitement. A Ku Klux Klan organizer invited a television reporter to record a “rally” to be held on a local farm.<sup>70</sup> Much of the soundtrack on one of the resultant films was inaudible when it was subsequently shown on a national network,<sup>71</sup> but derogatory references to African-Americans and Jews could be heard. Concluding, the speaker commented that “[w]e are not a revengent [sic] organization but . . . it’s possible that there might have to be some revenge taken”<sup>72</sup> if the government were to go on suppressing the white race. This statement presented a poor specimen for judicial analysis.

Expanding on the per curiam decision’s sparse reasoning, the concurring opinion of Justice Douglas (labelled as a “caveat”) celebrates the demise of the “clear and present danger” rubric developed by Justice Holmes.<sup>73</sup> Yet the opinion fails to explain why *Brandenburg* should be regarded as a new and

69. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919). Here, an Espionage Act prosecution centered on a handbill in which the defendant urged recipients to “assert [their] opposition to the draft.” *Id.* at 51. The defendant was charged with conspiring to violate the Act, interfering with recruiting, and causing insubordination. However, the handbill merely called upon citizens to resist intimidation and uphold their rights, including the right to oppose the draft. The handbill criticized Wall Street as the cause of the government’s conscription decision. Justice Oliver Wendell Holmes, speaking for a unanimous bench, concluded that Schenck’s conduct justified conviction: “The question . . . is whether the words used [in the circumstances] . . . create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” *Id.* at 52. No attention was paid to the fact that Schenck had not necessarily incited any illegality; his readers could resist the draft by writing to the appropriate Congressmen.

The failure of abstract formulas to provide sufficient First Amendment guidance was illustrated in *Dennis v. United States*, 341 U.S. 494 (1951), which concerned the prosecutions of Communist Party leaders under the Smith Act, 54 Stat. 670, §§ 2-3 (1940) (codified at 18 U.S.C. § 2385 (1994)). Justice Fred Vinson’s plurality opinion concluded that the clear and present danger rubric should not compel the government to wait until conspirators are about to execute a putsch. See *Dennis*, 341 U.S. at 509. Seeking to improve this rubric, Justice Vinson adopted an interpretation developed by Chief Judge Learned Hand in the court below. The seriousness of the evil, “discounted by its improbability,” is balanced against the invasion of free speech that would be needed to avoid the danger. See *id.* at 510. Applying this approach to the facts, the plurality opinion concluded that a conspiracy to advocate can be constitutionally restrained. See *id.* at 511. In dissenting, Justice William O. Douglas cleared away the abstractions. He argued that had the defendants taught methods of assassination, sabotage, or the use of bombs, this teaching of terror techniques would have forfeited First Amendment protection. However, no such proof had been introduced at trial. See *id.* at 581 (Douglas, J., dissenting). As Justice Hugo Black’s dissenting opinion stated, the defendants “were not even charged with saying anything or writing anything designed to overthrow the Government. The charge was that they agreed to assemble, talk and publish certain ideas at a later date.” *Id.* at 579 (Black, J., dissenting). Prosecution for the advocacy of ideas rather than action was finally interred in two subsequent Smith Act decisions. See *Noto v. United States*, 367 U.S. 290, 291 (1961); *Yates v. United States*, 354 U.S. 298, 320 (1957).

70. *Brandenburg*, 395 U.S. at 445-47. One film showed twelve hooded figures, some of whom were armed. The speaker, however, carried no weapon. See *id.*

71. It should be noted that in the *Brandenburg* era, the FCC’s former Fairness Doctrine required broadcasters to provide contrasting views on controversial questions. See *supra* note 48 (describing Fairness Doctrine in greater detail).

72. *Brandenburg*, 395 U.S. at 446.

73. Justice Douglas concludes that Justice Holmes had all but repudiated this approach, see *id.* at 452 (Douglas, J., concurring), which penalized “critical analysis” and mere “teachers of Marxism.” *Id.* at 454.

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superior vehicle for First Amendment adjudication. Is it because the phrase “directed to inciting” lawless action puts greater emphasis on the speaker’s actual intent than Justice Holmes’ stress on the effect the speaker’s words might have?<sup>74</sup> Because *Brandenburg* refers to “steeling”<sup>75</sup> a group to action and, therefore, more neatly rejects punishment of doctrinal discussion (even if such discussion could result in mischief)? Because “imminent” is a more definite word than “present”?

Whether the per curiam decision stealthily abandoned Justice Holmes’ clear and present danger test or, in the alternative, simply clarified the test’s reach,<sup>76</sup> we are still left with an unsatisfactory description of the First Amendment’s ambit. The core holding is both overinclusive and underinclusive, criminalizing some categories of acceptable speech while conversely permitting some calls for specific acts of violence.

*Brandenburg*’s salutary emphasis on intent to incite is marred by its failure to distinguish between publicly urging non-violent peaceful action and precipitating the commission of sabotage, assault, or murder. This overinclusiveness stems from the Court’s use of the term “lawless action,” as well as its grouping of the terms “use of force or law violation,”<sup>77</sup> as though these should be treated as equivalent under the First Amendment.

Punishment of those who urge civil disobedience runs counter to the Court’s sporadically-expressed desire to maintain a free marketplace of ideas as a catalyst for political growth.<sup>78</sup> Consider, for example, the “Birmingham Jail” protest led by Dr. Martin Luther King, Jr. against state-imposed racial segregation.<sup>79</sup> The political process has been enhanced by challenges to laws later found to be unconstitutional, even where such challenges emanated from organizing sit-ins rather than instituting litigation. Non-violent protest may lead to a dialogue with opponents on significant issues that inform majority decisions.

The underinclusive aspect of the *Brandenburg* test stems from its insistence on the likelihood<sup>80</sup> of imminent harm as a prerequisite for regulating

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74. Justice Holmes formulated the issue in terms of the peril that the speaker’s words, in context, could result in “substantive evils that Congress has a right to prevent.” *Schenck v. United States*, 249 U.S. 47, 52 (1919), discussed *supra* note 69.

75. See *Brandenburg*, 395 U.S. at 448.

76. See, e.g., MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 184-86 (1984) (analyzing *Brandenburg* test and concluding that it is unclear whether it implements “clear and present danger” or establishes new standard for suppression of unlawful advocacy).

77. *Brandenburg*, 395 U.S. at 447.

78. See *infra* Subsection I.B.2.

79. See MARTIN LUTHER KING, JR., *WHY WE CAN’T WAIT* 81-82 (1963) (“You may well ask: ‘Why direct action? Why sit-ins, marches and so forth? Isn’t negotiation a better path?’ You are quite right in calling for negotiation. Indeed, this is the very purpose of direct action. . . . Too long has our beloved Southland been bogged down in a tragic effort to live in monologue rather than dialogue.”).

80. WEBSTER’S NEW INTERNATIONAL DICTIONARY 1432 (2d ed. 1959) defines the word “likely” as “probably.” If a media speaker addressing a vast audience incites assault and murder, the results may

speech.<sup>81</sup> This approach may be appropriate in the context of a Hyde Park orator urging an unruly crowd to riot. If the listeners heckle the speaker, or

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only be "probable" once the Francisco Duran in that audience has already acted. Yet, depending on the celebrity aura of the speaker, the political climate, and the nature of the incitement, the occurrence of the crime may not be improbable. There is territory between "likely" and "unlikely" that should not be automatically discounted. See *infra* note 204-205 and accompanying text.

Speakers who incite or mix threats with incitement come from various parts of the political spectrum. The *New York Times* reports that a talk show host and self-described high priest of the Black Israelites, speaking on public-access television in Westchester, brandished a baseball bat and declared: "We're going to be beating the hell out of you white people. . . . We're going to take your little children and dash them against the stones . . ." Joseph Berger, *Forum For Bigotry? Fringe Groups On TV*, N.Y. TIMES, May 23, 1993, § 1, at 29; Richard Zoglin, *All You Need Is Hate: Extremist Groups Have Found a Niche on the Nation's Public-Access Cable Channels, Arousing Protests and Pitting Community Standards Against the First Amendment*, TIME, June 21, 1993, at 63. Those responding to incitement by committing bombings and murders historically have come from both left- and right-wing factions. See Nina J. Easton, *America the Enemy*, L.A. TIMES, June 18, 1995 (Magazine), at 8 (comparing right- and left-wing violent activity from 1960s to 1990s); see also FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 279 (1981) (discussing "Black Power" leader Stokely Carmichael's exhortation after murder of Martin Luther King, in which Carmichael reportedly urged executions in streets); see also Jon Nordheimer, *5 Who Died in Siege Identified as SLA Members*, N.Y. TIMES, May 19, 1974, at A1, A30 (discussing 1974 statements of Symbionese Liberation Army, terrorist group whose members kidnapped heiress Patricia Hearst and whose leader threatened to kill five policemen for every SLA casualty and urged supporters to "let the voice of their guns express the words of freedom").

Currently, there has been an increase of crimes committed by persons espousing an extreme right-wing view. See *infra* notes 84-86, 109-12 and accompanying text. As an official of the BATF has acknowledged, there are militia members who are law-abiding people exercising their constitutional rights. See *Prepared Testimony of James L. Brown, Deputy Associate Director for Criminal Enforcement Bureau of Alcohol, Tobacco and Firearms to the Senate Committee on the Judiciary, Subcommittee on Terrorism, Technology and Government Information*, FED. NEWS SERVICE, June 15, 1995. Nevertheless, fears about "new world order" governmental "plots" have led some individuals to plan and engage in devastating violence. See, e.g., *infra* note 85 (describing defense testimony at trial of Willie Ray Lampley). Militia members listen to radio, especially shortwave, which has been called the "guerilla patriot system," see Alan Snel, *Militia Speaker Rounds Out Expo*, DENVER POST, Nov. 6, 1995, at B3, and their leaders star on the talk-show circuit, see Melissa Healy, *Government, Militias Urge Calm in Standoff*, L.A. TIMES, Apr. 1, 1996, at A1. Oklahoma-bombing suspect Timothy McVeigh reportedly spent hours listening to radio shows ranting about a threat emanating from the federal government. See *CNN News* (CNN television broadcast Nov. 19, 1995); Dale Russakoff & Serge F. Kovaleski, *An Ordinary Boy's Extraordinary Rage; After a Long Search for Order, Timothy McVeigh Finally Found A World He Could Fit Into*, WASH. POST, July 2, 1995, at A1. Invasion scenarios are also given on cable television. See *Wissner, supra* note 9, at A1; Sheila Wissner, *Fear, Suspicion of Government Cause Surge in Tennessee Militias*, TENNESSEAN, Sept. 3, 1995, at A1.

Audience members are told about mysterious black helicopters that ferry foreign troops around awaiting a signal to take over the country, see Roddy, *supra* note 9 at 1A; about bar codes on the back of stop signs that are secret instructions for UN troops, see Schmidt & Kenworthy, *supra* note 35, at A5; and about computer chips that will be inserted into people's hands or foreheads so that UN police can find them, see Mike Hendricks, *Many Believe We're Conspiracy Targets; Not Even Conservative Republicans Can Be Trusted, According to Some Far-Right Thinkers*, KAN. CITY STAR, Dec. 3, 1995, at A15; see also *infra* note 103. Large numbers of people consider talk radio to be a credible source of information. See Roddy, *supra* note 9, at 1A. Indeed, some listeners have stated that they rely only on this source, diminishing the possibility of counter-speech from other quarters: "I don't read newspapers. I don't listen to television. The only thing I listen to is shortwave radio." *Id.*

When a media personality combines panic-inducing claims about governmental takeover plots with direct incitement to violence, the audience member who responds is being triggered into action rather than merely being persuaded. The First Amendment does not forbid the FCC from warning the inciter to stop or from acting to prevent continuation of such conduct on the airwaves if the warning is flouted. See *infra* Part II.

81. See *Brandenburg*, 395 U.S. at 447.

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disperse quietly, or are kept under control by watchful police officers, the potential danger subsides and the message can be combatted later by counter-speech from other sources.

The picture is more complicated when a media speaker incites adherents to specific acts of violence. Some audience members will find the message distasteful and turn it off (figuratively or literally). However, a combination of elements—the celebrity's status, descriptions of killing that reduce victims to abstract objects of hate, and assertions that conspiratorial "enemies" pose an imminent personal threat to the listener—provide action-triggering cues.<sup>82</sup>

*Brandenburg's* answer, permitting such speech unless it is likely to produce immediate criminality, discounts the effect of expression that terrorizes rather than merely persuades. In such instances, as we will see below,<sup>83</sup> the speaker's incitement may have an enduring impact. The Francisco Duran in the vast invisible audience broods, makes irate calls threatening to "take somebody

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82. See, e.g., PERSPECTIVES ON MEDIA EFFECTS 70 (Jennings Bryant & Dolf Zimmerman, eds. 1986) (noting that words can function as aggression-retrieval cues to affect our subsequent behavior). As Professor Doob has suggested, urgency is a significant propaganda weapon: "In psychological warfare, the enemy's civilian population can be made to clog the roads of his retreating armies through a rumor or threat to the effect that, if they remain where they are . . . they are likely to be killed or injured by shellfire or serial bombardment." LEONARD W. DOOB, PUBLIC OPINION AND PROPAGANDA 398-99 (2d ed. 1966); see also LAWRENCE S. WRIGHTSMAN, SOCIAL PSYCHOLOGY 222 (2d ed. 1977) (noting that frustration creates "readiness" for aggressive acts that can be triggered by external cues).

Propaganda techniques have been used by private groups, see *supra* note 80, and by governments that wish to program citizens for violent action. Common elements emerge. Scholars who have analyzed Nazi propaganda on short-wave radio during the Second World War noted that purveyors relied on appeals to human irrationality—the right formula "will remain like words received under hypnotic influence, ineradicable and impervious to every reasonable explanation." HARWOOD L. CHILDS & JOHN P. WHITTON, PROPAGANDA BY SHORT WAVE 55 n.15 (1942) (quoting Adolf Hitler). Constant repetition, with some variety in presentation, will keep the idea in general circulation until it is unthinkingly accepted. See *id.* at 58. The objects of hate must be unified: "The opposition, though it may take many forms, must appear as one and the same enemy. Having set forth one scapegoat for discontent all the others must in some way be related to it." *Id.*; see also DANIEL J. GOLDHAGEN, HITLER'S WILLING EXECUTIONERS 136-37 (1996) (concluding that anti-Semitic speeches and radio propaganda alleging that Jews threatened German state were significant factor in buttressing Germans' beliefs and preparing them for eliminationist measures).

Soviet propaganda before the Second World War similarly relied on the constant repetition of slogans and catchwords, invectives against the common enemy (bourgeois "plutocracies"), and the need for preemptive action against such an enemy. See ANTHONY RHODES, PROPAGANDA, THE ART OF PERSUASION: WORLD WAR II, at 211 (1993). The Soviet invasion of Finland was recast as "[a] rectification of frontiers to protect the pacific Soviet state against an attack" by Western imperialist warmongers. *Id.*

83. See *infra* Subsection I.B.3.

out,"<sup>84</sup> travels to the capital, and sprays his target with semi-automatic rifle fire.

Moreover, the Court ignores the difference between a crime that is simple to execute and one of greater complexity. Guns are not the only weapon of choice, and more destructive weaponry takes time to prepare. A bombing may require that large amounts of ammonium nitrate fertilizer be purchased, stored, preferably dried with nitromethane, and combined with a detonation device.<sup>85</sup> *Brandenburg's* imminence requirement would treat a speaker who urges such a bombing with more deference than one who incites an immediate trespass at an IRS office.

Suppose that a group that has many local adherents claims a common-law right to issue its own currency and to issue checks without supporting bank accounts.<sup>86</sup> The group's leader appears repeatedly on a popular radio station and asserts, "Sheriff Nottingham is planning a storm-trooper assault on all those who have aided our struggle to protect our liberties. Unless he is blown

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84. Francisco Martin Duran reportedly called Senator Ben Nighthorse Campbell's Colorado Springs office about a ban on certain assault rifles and said, "This is very bad. I will go to Washington and take someone out." Louis Sahagun, *Radio Host Quits Over Gunman*, PITTSBURGH POST GAZETTE, Nov. 21, 1994, at A7. According to defense testimony at the federal trial, Duran remained in Washington for two weeks brooding about his belief that the President was engulfed by a mist and might destroy the world and about critical ideas concerning the government that he had heard from radio talk-show host Chuck Baker and others. See Transcript at 191-92, *United States v. Duran* (Mar. 27, 1995) (CR No. 94-447). Dr. Neil Blumberg, testifying for the defense, stated that Duran listened to the repetition of messages and thought this could be "related to various plots that are going on in the world." *Id.* at 191. The prosecutor produced notes written by Duran saying, "Kill the prez," see Julia Angwin, *Doctor: Duran Shot at Evil Mist; Colorado Man Was Crazy, Defense Says*, DENVER POST, Mar. 28, 1995, at A2, as well as testimony that Duran had boasted to friends that he intended to carry out this plan. See Michael Janofsky, *Man Accused of Trying to Kill Clinton Begins Insanity Defense*, N.Y. TIMES, Mar. 21, 1995, at A15. Witnesses also testified that Duran began shooting after someone pointed at a man with curly gray hair on the White House lawn and said he looked like Clinton, see Toni Lacy, *Tourist Tells How Shooter Was Tackled*, WASH. POST, Mar. 23, 1995, at B4. The jury subsequently rejected Duran's insanity plea and convicted him of attempted murder, assault on Secret Service officers, and other charges. See Julia Angwin, *Duran Found Guilty on All Counts; Jury Rejects Insanity Plea*, STATES NEWS SERVICE, Apr. 4, 1995. See *infra* note 101 for further discussion of Francisco Duran's attempt to kill President Clinton.

85. This was the method used by Willie Ray Lampley, who testified at his Oklahoma trial about the steps he took to construct a home-made bomb. See Bill Swindell, *Bomb Building Detailed*, TULSA WORLD, Apr. 13, 1996, at A1. Lampley was terrified by the belief that an imminent takeover of his country by armies of the "New World Order" would succeed unless he destroyed various targets including the Southern Poverty Law Center, abortion clinics, and the Department of Human Services or another government office. See Bill Swindell, *Bomb-Plot Figures Found Guilty*, TULSA WORLD, Apr. 25, 1996, at A1; Bill Swindell, *3 Planned for Bomb, U.S. Says*, TULSA WORLD, Apr. 3, 1996, at A1. He was subsequently convicted of solicitation and conspiracy to build the bomb. See Swindell, *Bomb-Plot Figures Found Guilty*, *supra*, at A1; see also news articles cited *infra* note 111 and accompanying text.

86. Cf. *infra* note 109 (discussing members of Montana Freemen, who were charged under federal indictments with forgery and creating bad checks). The leader of the Montana Freemen allegedly ordered followers to kill officials who opposed him. See James Brooke, *Officials Say Montana "Freemen" Collected \$1.8 Million in Scheme*, N.Y. TIMES, Mar. 29, 1996, at A1; Carey Goldberg, *The Freemen Sought Refuge in an Ideology That Kept the Law, and Reality, at Bay*, N.Y. TIMES, June 16, 1996, at 14; David Johnston, *Turning Point in Siege: Freemen's Awareness That Allies Had Turned Away*, N.Y. TIMES, June 15, 1996, at 10.

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away, he will first disarm and then intern us.” Machine-gun fire is heard in the background.

This speech could be permitted under *Brandenburg* because it calls for action at a later and unspecified time and because response to the incitement cannot be definitively characterized as “likely” (although it is not unlikely). Yet allowing such a murder instruction is wholly antithetical to the FCC’s statutory purposes: promoting the public interest and preserving life and property. The group’s leader is engaging in political expression, but it is expression that does not embody the values sheltered by the First Amendment.

The *Brandenburg* majority did not thoroughly explain what it was protecting and how that objective would relate to its test. Were the Justices attempting to preserve free trade in ideas, the enhancement of democratic processes, the autonomy of the speaker and the listener? None of these aims, scrutinized below, support the Court’s distinction between permissible and impermissible speech.

### 2. Failure of the Judiciary’s “Marketplace” Rationale

The Supreme Court has generally relied on rather cursory invocations of the “marketplace” of ideas to justify its treatment of political speech—an unintentionally ironic term in view of the Justices’ effort to separate political from commercial expression. Considered in the abstract, an open market free of state-imposed orthodoxy is desirable because it could invigorate a search for permanent values and enhance democratic governance. This premise fails, however, when a media communication urges murder or bombing with particular targets.

References to marketplace benefits are contained in dissents emanating from earlier cases. Justice Douglas, parting from the majority in *Dennis v. United States*,<sup>87</sup> concluded that silencing opinion is “robbing the human race.”<sup>88</sup> Justices Holmes and Brandeis, dissenting in *Abrams v. United States*,<sup>89</sup> spoke of reaching “the ultimate good” by allowing “free trade in ideas.”<sup>90</sup> More recently this rationale has emerged from obscenity decisions, where the Court has emphasized that the First Amendment does not protect obscene speech because such speech makes no contribution to the marketplace of ideas.<sup>91</sup>

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87. 341 U.S. 495 (1951) (upholding criminal syndicalism law forbidding advocacy of violent means to effect political change). For further discussion of *Dennis*, see *supra* note 69.

88. 341 U.S. at 584 (Douglas, J., dissenting).

89. 250 U.S. 616 (1919) (upholding conviction of defendants who had distributed socialist leaflets during World War I).

90. *Id.* at 630 (Holmes and Brandeis, JJ., dissenting).

91. See, e.g., *Miller v. California*, 413 U.S. 15, 34-35 (1973) (reaffirming use of “community standards” to judge obscenity); *Roth v. United States*, 354 U.S. 476, 484-85 (1957) (upholding California law barring obscene mail).

These general references tell us rather little about how the marketplace functions or about how political speech fulfills the educational role apparently envisioned for it.<sup>92</sup> In John Stuart Mill's view, this marketplace—a majority of people deciding what to believe, do, and legislate—thrives on dialogue. Rather than receiving information passively, its traders sift thesis and antithesis to achieve the synthesis of truth.<sup>93</sup> Yet “marketing” of a claim can also mean manipulation of the audience. The popularity of an idea is not merely a product of its correctness. An assertion by a media speaker that is repeated, and stated with eloquence, can be more influential than its content may warrant.<sup>94</sup>

But no matter, the marketplace defender responds. Although some political notions may be distorted or specious, neither the legislature nor the judiciary can be trusted as the gatekeeper. All political claims should therefore be given an equal opportunity; government regulation must be content-neutral. This appealing proposition rests on several vulnerable assumptions: (1) Political assertions are unique and can be distinguished from other forms of speech. Thus, courts are consistent when they protect political speech regardless of its content, while denying protection to some non-political expression because of its content. (2) Speech, unlike conduct, seldom has harmful consequences. In any event, more speech is the universal panacea. (3) Regulators need not protect the marketplace against itself.

Political statements often blend into other speech categories. Fighting words can have political aspects, yet the Supreme Court has barred such words from the market because they “are no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth.”<sup>95</sup> Obscenity is also excluded on the basis of content, though it might arguably constitute a world view or

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92. Political speech may be defined as implicating an overall world view or as relating to the functions of government. *See, e.g.*, KENT GREENAWALT, *SPEECH, CRIME AND THE USES OF LANGUAGE* 261 (1989) (defining ideological motives for speech urging criminality) [hereinafter, GREENAWALT I]. Its value in particular instances could be that the thought conveyed is true, or true enough to help us sift contrary views, or false enough to invigorate actual verities.

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.

JOHN STUART MILL, *ON LIBERTY* 23 (Prometheus 1986) (1859).

93. “Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action . . .” MILL, *supra* note 92 at 26.

94. *See supra* notes 66, 82; *infra* notes 160, 208-214 and accompanying text.

95. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *Chaplinsky* was convicted for calling the City Marshall a “God damned racketeer” and “a damned Fascist.” *Id.* at 569. Note, however, that *Chaplinsky* is more distinguished than honored today. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (holding that even prescribable category of speech, like *Chaplinsky*'s “fighting words,” cannot be regulated in content-discriminatory manner). *R.A.V.* is discussed further at *infra* notes 118-20 and accompanying text.

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“social value” to some.<sup>96</sup> Commercial speech, which has been relegated to a lower tier of constitutional concern,<sup>97</sup> could be infused with ardent political rhetoric; nihilists sell copies of books (and guns).<sup>98</sup> The Supreme Court has not consistently avoided a content-based restriction on politically-charged expression, even when the market would be deprived of the message. The message’s low-value accessories permit regulation.

The second assumption seems counter-intuitive. It is because words have consequences, and can misinform, terrify, and inflame, that we have found line drawing between permissible and impermissible speech so problematic. *Brandenburg*’s attempt to do so is particularly ill-suited to incitement by media speakers because it is difficult to determine whether one or more of the countless unidentifiable listeners will be (or has already been) “stealed” to imminent lawless action.<sup>99</sup> Analysis of the content of expression is therefore insufficient; context is also critical.

Then why not maintain the less demanding conclusion that regulating calls to violence is a greater danger than permitting such expressions? Consider the following stories from media reports.<sup>100</sup> A radio speaker receiving a call from a fan who stated that President Clinton and certain other officials must be shot, reportedly replied that he advocated a cleansing of the government. Referring to the power of rebellious masses, he added: “Why are we sitting here?”<sup>101</sup>

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96. Justice Douglas has espoused this view. See *Ginzburg v. United States*, 383 U.S. 463, 489-90 (1966) (Douglas, J., dissenting); see also C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 971 (1978) (arguing that *Ginzburg* majority’s marketplace theory could lead it to protect such literature if it advocated way of life rather than just catering to entertainment needs) [hereinafter Baker I].

97. See, e.g., *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976) (“[T]he greater objectivity and hardiness of commercial speech . . . make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”); *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (stating that purely commercial advertising does not implicate same First Amendment concerns as political speech). For an extensive discussion of commercial speech, see C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (concluding that complete denial of protection for commercial speech is required by First Amendment) [hereinafter Baker II]; see also *infra* note 204.

98. *Bomb Plot May Have Been By the Book(s)*, CHI. TRIB., Aug. 22, 1995, at 10 (reporting that Oklahoma City bombing may have been encouraged by messages spread through books).

99. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969); see also *supra* note 84 (discussing Duran incident); *infra* note 101 (same).

100. These examples are presented to illustrate aspects of the doctrinal problem upon which this Article focuses. The individuals reported upon by the newspapers have not accepted the media’s characterizations of their speech, and have offered their own responses to the reports as described *infra* notes 101-103 and accompanying text.

101. See Jeff Cohen & Norman Solomon, *With Violence and “Hot Talk,” Talk Radio Becomes Hate Radio*, STAR TRIB. (Minneapolis-St. Paul), Feb. 24, 1995, at A19 (reporting statements of Colorado talk show host Chuck Baker); James A. Fussell, *Talk Radio: You May Not Believe Your Ears; These Excerpts Show That Some Hosts Aren’t Afraid To Be Extreme*, KAN. CITY STAR, May 10, 1995, at F2 (same); David Hinckley, *Nation Buffeted by Airwaves of Hate Talk*, DAILY NEWS (N.Y.), Apr. 27, 1995, at 4 (same). It was also reported that after one of Baker’s invectives against President Clinton, a caller to Baker’s “On the Carpet” afternoon show asked what could be done to effect change in Washington. Baker’s response was to make a sound like a handgun being cocked and fired. See Genevieve Anton, *Talk-Show Host Signs Off Over Duran: Baker Takes Leave After Rumored Tie to Gunman*, COLO.

Another media personality, minutely describing methods of killing agents of the Federal Bureau of Alcohol, Tobacco, and Firearms (BATF), first advised a head shot because of the agent's bullet-proof vests and then amended his statement: "You shoot twice to the body, center of mass, and if that does not work, then shoot to the groin area. They cannot use their—move their hips fast enough, and you'll probably get a femoral artery."<sup>102</sup> A short-wave radio speaker, reportedly informing his listeners that we are now in a war with the government, discussed in a related videotape the length of rope needed to hang legislators from willow trees.<sup>103</sup> And in the previously mentioned series of radio broadcasts alleging that Mexicans were crossing the border to blow up bridges across the Mississippi, a speaker urged listeners to "load those weapons . . . and take care of the problem."<sup>104</sup>

In answer to Justice Brandeis' vintage solution—"[more] discussion affords ordinarily adequate protection against dissemination of noxious doctrine"<sup>105</sup>—Professor Alexander Bickel wrote: "[W]e have lived through too much to believe it."<sup>106</sup> The danger Bickel saw was that "[t]o listen to something on

SPRINGS GAZETTE TELEGRAPH, Nov. 17, 1994, at B1. Later, he apparently acknowledged that this may have been a mistake. *See Responsibility? Just Talk*, PALM BEACH POST, Nov. 26, 1994, at A22 [hereinafter *Responsibility?*]. A few days after this broadcast, Francisco Duran, who has been described as a Baker listener, went to Washington and attempted to kill President Clinton. *See id.*; Jonathan Alter, *Toxic Speech*, NEWSWEEK, May 8, 1995, at 44-46. Duran was tackled by tourists and arrested by Secret Service agents. *See CNN News* (CNN television broadcast, Nov. 17, 1994). At Duran's trial in federal court, the defense presented testimony that he had been brooding over a mist that could cause the President to destroy the earth and over messages heard from Chuck Baker and others. *See supra* note 84. Baker commented: "If [Duran] thinks I and Rush Limbaugh are the reasons he went there, then the man needs psychiatric counseling." Cohen & Soloman, *supra*. The executive director of the National Association of Radio Talk Show Hosts has stated that "Chuck Baker is a good host and knows how to talk to people and calm them down." *Id.* Baker resigned after telling listeners that he was tired of being accused of inciting Duran. *See* Peter Jones, *KVOR's Baker Quits; White House Shooting Incident Cited*, BILLBOARD, Dec. 3, 1994, at 102. However, he returned to his show a month later. *See Responsibility?*, *supra*. The jury in the subsequent federal trial rejected Duran's insanity plea and convicted him of attempted murder. *See supra* note 84.

102. For reports of G. Gordon Liddy's comments, see Fussell, *supra* note 101; Cohen & Soloman, *supra* note 101; *Talk Radio: Is It Creating The Hate?*, SALT LAKE TRIB., Apr. 30, 1995, at D7. Liddy later emphasized that he was talking about self-defense, not unprovoked shooting of federal agents. *See Liddy: Just Kidding About Target Practice—Radio Host Defends Comments on Guns*, SEATTLE TIMES, Apr. 26, 1995, at A5; Ed Vogel, *Liddy Praises Law Officers, Says A Few Out of Control*, LAS VEGAS REV. J., May 22, 1995, at B2; *Crossfire* (CNN television broadcast, Apr. 25, 1995). Furthermore, Liddy stated that he did not believe he was fueling the lunatic fringe. *See id.*

103. *See* Roddy, *supra* note 9, at A1. *See also* Schmidt & Kenworthy, *supra* note 35, at A5. (describing statements of speaker who reportedly tells listeners that federal government is in league with U.N. to force citizens into "new world order" that is forming secret police force of National Guard troops, Los Angeles street gangs, and Nepalese Gurkhas). He has been quoted as saying that he does not espouse violence, *see* Snel, *supra* note 80, at B3, and that his statement about hanging legislators was "coffin humor." *See Prime Time Live*, *supra* note 34. Diane Sawyer noted that President George Bush had mentioned a new world order "where diverse nations are drawn together in common cause," referring to the peace-loving nations of the world joining to stop aggressors like Saddam Hussein. *Id.*

104. *See In re Applications of Charles C. Babbs and Nellie L. Babbs*, Cattle Country Broadcasting, 58 Rad. Reg. 2d (P & F) 1109 (1985); *supra* notes 51-55 and accompanying text.

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

106. ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 71 (1975).

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the assumption of the speaker's right to say it is to legitimate it . . . where nothing is unspeakable, nothing is undoable."<sup>107</sup>

This statement has increased in prescience since it was made in 1975, particularly with respect to violence against government employees. The death toll in the Oklahoma City terrorist bombing of a Federal building was 168, including many children in a day care center; in addition, 850 people were wounded.<sup>108</sup> Public officials who displeased members of militia in Montana reportedly have been threatened with hanging in the public park, have been followed to their homes, and have been advised by the police to leave the country to avoid being murdered.<sup>109</sup> President Clinton has been the object of at least one assassination attempt<sup>110</sup> (although, unfortunately, shooting at Presidents is not a new phenomenon). Four members of a Minnesota "Patriots" group were convicted in federal court for conspiracy to use ricin, a deadly toxin, to kill federal agents and law enforcement officers. The would-be assassins had sufficient ricin to kill 1400 people.<sup>111</sup> And in Oklahoma, Willie Ray Lampley and two confederates were convicted of conspiracy to build a bomb for the purpose of blowing up the offices of government agencies and civil-rights organizations. Lampley's motive was fear that the "new world order" would succeed in taking over America unless he destroyed his targets.<sup>112</sup>

Yet ominous political events should not shut down offensive political speech, one might well argue. The FCC should not be empowered to root out "wrong" thinking. This claim has important virtues if we assume that the speech at issue does no more than: (1) discuss the doctrine of governmental

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107. *Id.* at 73.

108. James Brooke, *All-American Defendant? Lawyer Works to Soften Image of Bombing Suspect*, N.Y. TIMES, June 2, 1996, at 14; Paul Gray, *Timothy McVeigh: A Gung Ho Former Soldier is Charged with the Worst Act of Home-grown Terrorism in the U.S.*, TIME, Dec. 25, 1995, at 101.

109. See Martha A. Bethel, *Terror in Montana*, N.Y. TIMES, July 20, 1995, at A23. The author, a municipal judge, testified that she was threatened with kidnapping and death for the "treasonous" act of adjudicating three routine traffic tickets issued to a man with ties to the "Freemen" movement in Montana. See *id.* Members of the Freemen are also charged pursuant to federal indictments with forgery, fraud, and bad checks. See Brooke, *supra* note 86, at A1. A Freemen leader reportedly stormed a local courthouse, and also ordered followers to "shoot to kill" county officials who oppose him. See *id.* His followers surrendered to the FBI after an 81-day standoff during which they gathered together at a ranch encircled by federal agents and reporters. See Goldberg, *supra* note 86, at 14; Johnston, *supra* note 86, at 10.

110. See *supra* notes 84, 101.

111. See Conrad de Fiebre, *Two More Men Convicted in Poison Plot*, STAR TRIB. (Minneapolis-St. Paul), Oct. 26, 1995, at B5; James Walsh, *2 More Charged in Plot to Make Poison*, STAR TRIB. (Minneapolis-St. Paul), Aug. 5, 1995, at B5; see also Alan Bavley, *Castor-Oil Plant Packs Toxic Punch; Bean's Association With Intrigue Extends to Prairie Village Case*, KAN. CITY STAR, Dec. 12, 1995, at A1 (discussing toxic power of ricin). The defendants were convicted under the Biological Weapons Anti-Terrorism Act of 1989, 18 U.S.C. §§175-78 (1994). See Conrad de Fiebre, *supra*.

112. See *supra* notes 80, 85.

overthrow, using general and theoretical revolutionary rhetoric<sup>113</sup> (“fight to establish an Aryan national republic”) or (2) demonize federal employees or members of particular racial or religious groups, without inclusion of incitement.<sup>114</sup>

By contrast, the FCC should exclude from the marketplace statements that urge political assassination with specific targets or methods.<sup>115</sup> We would probably give no First Amendment quarter to the defamatory declaration “BATF supervisor Smith is a jack-booted fascist murderer.”<sup>116</sup> Why should we grant protection to the statement, “Murder that jack-booted fascist Smith”? Is it worse to call someone a murderer than to call for his murder?

If anyone acted on this advice, she would be jailed for life or executed. Thus, the advice turns out to be neither practical nor worthy. Deterrence against murder is a centerpiece of our criminal law. Professor H.L.A. Hart, an ever-vigilant civil libertarian, noted: “[T]he free use of violence . . . would not only cause individual harm but would jeopardize the existence of a society since it would remove the main conditions which make it possible for men to live together in close proximity to each other.”<sup>117</sup>

113. Protection for such oratory is appropriate. *See, e.g.*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding that speaker’s incendiary rhetoric did not constitute incitement but rather was spontaneous, emotional appeal for unity in common cause); *Watts v. United States*, 394 U.S. 705 (1969) (holding that speaker’s threat to kill President Johnson was simply crude form of political opposition). Hyperbole unaccompanied by incitement and invocation of peril to the listener need not be regulated. There have been occasional lapses, however. *See Dennis v. United States*, 341 U.S. 494 (1951) (upholding constitutionality of convictions under Smith Act, 54 Stat. 670, §§ 2-3 (1940) (codified at 18 U.S.C. § 2385 (1994)), for espousing Communist ideology).

114. This kind of expression provides the groundwork or atmosphere for increased attacks on such groups. *See MORRIS DEES & STEVE FIFFER, A SEASON FOR JUSTICE: THE LIFE AND TIMES OF CIVIL RIGHTS LAWYER MORRIS DEES 234-37* (1991); *MARI J. MATSUDA ET AL., WORDS THAT WOUND 24-26* (1993). The expression, however, remains within the First Amendment’s ambit under the three most prominent models. *See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 7* (1970) (protecting racist speech on theory that it contributes to marketplace of ideas); Baker I, *supra* note 96 (espousing “Liberty Model,” which requires “agnosticism” regarding content); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 29 (1971) (endorsing “political speech” theory that would protect racist speech for its political message).

115. *See, e.g.*, *EMERSON, supra* note 114, at 405 (emphasizing that as communication encouraging actions “increases in specificity,” it is more likely to be regulable conduct). Regarding revolutionary rhetoric, Professor Emerson argued that as long as a message remains general, it is expression. *See id.* at 125. As soon as the message starts instructing listeners “on techniques of sabotage, street fighting, or specific methods of violence,” it becomes action. *Id.*

116. In the context of defamation, Justice Powell, speaking for the majority in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), noted that untrue factual statements do not enrich discussion of public issues and therefore have no “constitutional value.” *Id.* at 340. However, the Court concluded that in some instances, such statements are protected because they slip out in the course of robust debate. *See id.*

117. H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, 35 *U. CHI. L. REV.* 1, 8-9 (1967). Anti-terrorism statutes have been upheld precisely because of, not in spite of, the political intent of the defendant. *See, e.g.*, *People v. Mirmirani*, 171 *Cal. Rptr.* 562, 566 (Ct. App. 1981) (sustaining conviction for making terroristic threats against arresting police officer). The law under which defendant was charged defined the word “terrorize” as creating a climate of fear through threats intended to achieve political and social goals. 1977 *Cal. Stat.* 1146, at §1 (repealed 1989). Terrorism statutes are directed at coercion, while media inciters are arguably attempting to persuade and therefore entitled to

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Smith's fascistic tendencies can be revealed without including his death warrant. Only the incitement is barred; the speaker's views about Smith can be fully aired. Methods of preserving governmental viewpoint neutrality were explored in *R.A.V. v. City of St. Paul*,<sup>118</sup> where the Supreme Court observed that threats of violence are unprotected and therefore the government may choose to criminalize one subcategory of such threats—those against the President.<sup>119</sup> “But,” the opinion cautioned, “the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities.”<sup>120</sup> Applying this principle to incitement, the FCC would be infringing content neutrality if it were to target speakers urging that senators of a particular party or political bent should be killed while permitting such incitement against those in the opposite camp. The government need not, however, be neutral about murder.<sup>121</sup>

*R.A.V.* reflects judicial interest in allowing diverse viewpoints to reach the marketplace. Theorists such as Professors Alexander Meiklejohn and Cass Sunstein ask a more probing question: Does the public dialogue at issue foster the goal of insuring a politically astute electorate? Meiklejohn informs us that the First Amendment's purpose “is to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.”<sup>122</sup> Sunstein notes: “For purposes of the Constitution, the question is whether speech is a contribution to social deliberation, not whether it has political effects or sources.”<sup>123</sup> This political process analysis suggests that political expression

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greater constitutional leeway. Yet the two situations are not entirely dissimilar, especially from the standpoint of the victim. In the context of a threat, the speaker says, “I will kill local BATF agents.” In the persuasion context, the media speaker urges, “You should kill local BATF agents.” Surveillance of unseen audience members who respond to the second speaker will be more difficult than keeping tabs on the threatener.

118. 505 U.S. 377 (1992) (holding unconstitutional ordinance prohibiting display of symbols that would cause anger, alarm, or resentment on basis of race, color, creed, religion, or gender on grounds that regulation of “fighting words” cannot be predicated on content discrimination).

119. *See id.* at 388. One reason why the First Amendment does not protect threats is “the possibility that the threatened violence will occur.” *See id.*; *see also supra* note 80.

120. *R.A.V.*, 505 U.S. at 388.

121. *See infra* Subsection I.B.1 for discussion of the Supreme Court's unlawful-advocacy jurisprudence. The speech-protective test proposed in this Article would only sanction expression that uses panic-inducing incitement to precipitate specific acts of violence. Such incitement induces reflex action, as does shouting “Fire” in a crowded theater. *See infra* Part II.

122. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 75 (1960).

123. Sunstein, *supra* note 2, at 309. There is, for example, a distinction between a racial epithet and a tract in favor of white supremacy. *See id.* Sunstein concludes:

[C]onceptions of politics . . . as a kind of “marketplace,” . . . disregard the extent to which political outcomes are supposed to depend on discussion and debate. . . . The First Amendment . . . is part and parcel of the constitutional commitment to citizenship. This commitment must be understood in light of the American concept of sovereignty, placing governing authority in the people themselves.

*Id.* at 314.

is less a vehicle for arriving at truth<sup>124</sup> than it is a means for serving democratic governance.<sup>125</sup>

The marketplace must be open to such ideas as theories of revolution or speculations about history or race, regardless of their malicious or improbable predicates. This permissiveness supports the political process because dialogue on significant questions enables citizens to decide how to act at home, in public, and in voting booths (regardless of the correctness of their decisions).

Even advocacy of nonviolent protest against some laws—regulations or tax code provisions, for example—might inform majority decisions and lead to legislative changes. The tax protester urges only a challenge against the “offending” law itself.<sup>126</sup> This remains compatible with the marketplace as a rational arena where all ideas can be evaluated.

By contrast, a media speaker who urges listeners to launch murderous forays is not complaining about homicide laws. Rather, he is seeking exemption from such laws—but only for his followers—because of dissatisfaction with other statutes and policies.<sup>127</sup> This brings nothing to the marketplace except its own destruction. The coercive effect of violence undermines society’s decisionmaking capacity.

### 3. *Inapplicability of the Self-Expression or Autonomy Rationale*

#### a. *Collision with State Solicitation Prohibitions*

The high Court has sometimes proffered a self-expression rationale for the favored position of political speech,<sup>128</sup> and theorists such as C. Edwin Baker and Martin Redish have linked participation in political decisions to the broader

124. See, e.g., Willmore Kendall, *The “Open Society” and Its Fallacies*, 54 AM. POL. SCI. REV. 972, 977 (1960) (arguing that only select minority of citizens are “truth-seekers”); see also *infra* note 141.

125. For examples of the democratic-governance rationale for freedom of expression, see Alexander Bickel, *Domesticated Civil Disobedience: The First Amendment, From Sullivan to the Pentagon Papers*, in *THE MORALITY OF CONSENT*, *supra* note 106, at 62; ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATIONSHIP TO SELF-GOVERNMENT* 90 (1948); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 19 (1995).

126. Some courts, however, have been dubious about such speech. *United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979), held that defendant’s national speeches urging others to violate “unconstitutional” tax laws were not protected by the First Amendment. See *id.* at 571; see also *United States v. Buttorff*, 572 F.2d 619 (8th Cir. 1978) (holding that First Amendment does not protect speech that goes beyond mere advocacy of tax reform but explains how to perform illegal acts and actually incited several individuals to violate laws). In *Moss*, the defendant’s conduct and speech violated the *Brandenburg* test because he urged listeners to engage in specific nonpayment stratagems. See *Moss*, 604 F.2d at 571; see also *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (establishing “imminent lawless action” standard).

127. See Sheldon L. Leader, *Free Speech and the Advocacy of Illegal Action in Law and Political Theory*, 82 COLUM. L. REV. 412, 426 (1982) (arguing that advocating disobedience of law should be protected only if speaker disapproves of that law itself).

128. See, e.g., *Cohen v. California*, 403 U.S. 15, 18, 21, 26 (1971) (reversing conviction of man who wore jacket emblazoned with expletive about draft in Los Angeles courthouse).

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goal of assuring individual autonomy (in the sense of self-rule).<sup>129</sup> Application of this personal liberty model to shield a speaker who urges political assassination is problematic because it would imply that her self-fulfillment can trump state solicitation laws. Such laws, which prohibit inciting others to engage in criminal conduct,<sup>130</sup> have remained unscathed throughout the entire history of the Supreme Court's unlawful-advocacy jurisprudence.<sup>131</sup>

This peaceful co-existence has endured even though the Supreme Court's *Brandenburg* test only targets speakers whose words are likely to produce imminent lawlessness.<sup>132</sup> By contrast, solicitation statutes generally require no showing that the inciter will probably succeed. A speaker who seriously urges criminality is regarded as dangerous even if he misjudges the susceptibility of the person he is importuning.<sup>133</sup>

Exploration of this divergence in First Amendment application is useful in assessing a possible autonomy justification for the FCC's inaction. Assume that Joyce publicly urges the murder of a Senator who is sponsoring anti-terrorism legislation. Should she be shielded by the First Amendment even though Frank, a person who secretly counsels his roommate to kill their landlord, would be subject to prosecution?

Professor Kent Greenawalt, in his insightful analysis of speech usage, has attempted to resolve the apparent contradiction between the *Brandenburg* rule and solicitation provisions. He suggests a distinction between private and public incitement, concluding that private advocacy of crime stems from "self-interested" motives while public incitement is "ideological" and therefore more worthy.<sup>134</sup> Although private solicitation may constitute "an outlet for expression," it can nevertheless be prosecuted on the terms usually set by state

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129. See Baker II, *supra* note 97, at 6 (providing elegant and provocative exploration of this thesis); Martin Redish, *The First Amendment in the Marketplace, Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 443-44 (1971) (arguing that commercial speech enhances listener's self-fulfillment); see also Baker I, *supra* note 96, at 990-1009 (explaining 'liberty model' that justifies First Amendment protection for broad range of nonviolent, noncoercive activity); cf. Owen Fiss, *Why the State?*, 100 HARV. L. REV. 781, 784 (1987) (suggesting that autonomy is not protected as end in itself, but rather as way of facilitating robust debate on issues of public importance). Professor Fiss also points out that a self-expression predicate for the First Amendment does not explain why the right of free speech should extend to corporate entities or institutions that do not directly represent an individual interest in autonomy. See OWEN FISS, *THE IRONY OF FREE SPEECH* 3 (1996).

130. See, e.g., N.Y. PENAL LAW § 100.13 (McKinney 1987) ("A person is guilty of criminal solicitation in the first degree when . . . with intent that another . . . engage in conduct [constituting a] felony, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct.")

131. See, e.g., Kent Greenawalt, *Speech and Crime*, 4 AM. B. FOUND. RES. J. 645, 652, 655-57 (1980) [hereinafter Greenawalt II].

132. See *supra* Subsection I.B.1.

133. See Greenawalt II, *supra* note 131, at 655-57.

134. See *id.* at 661-63.

law.<sup>135</sup> Under this approach, Joyce's words (in our prior hypothetical) are protected but Frank's are not.

A separation between self-interest and ideology is difficult to sustain. As Professor Baker has observed, "[s]peech is rooted in 'self-interest'—whether the interest is to discover, to change or to maintain the world . . . . Self interest is, in fact, a normal and valuable aspect of speech."<sup>136</sup> But perhaps the public/private dichotomy can be vindicated if the issue of motive is removed. Should the intimacy of the setting, or perhaps the size of the audience combined with the homogeneity of its views, determine liability?

Suppose the context is one striking worker addressing others, as in the case of *State v. Schleifer*.<sup>137</sup>

You will never win the strike with soft methods. . . . Watch the scabs when they come from work, lay for them, especially on pay day. Take them in a dark alley and hit them with a lead pipe. That is the softest thing you can use. Reimburse yourselves for what we have sacrificed for five months. Don't forget to bump off a few now and then. . . .<sup>138</sup>

Ideological rhetoric aside, the setting here is not private in the sense of a one-on-one whispered conversation. Nevertheless, there is a closed audience and no present opportunity for counter-speech, both of which militate against constitutional protection.

If the public/private distinction were complete enough to guide our treatment of inciters, the inquiry could stop here. However, consider the addition of two critical factors: (1) The speaker is not in a public park, but on radio or television. (2) The words used are not intended to aid deliberation, but rather to terrify. Under these circumstances, does the autonomy justification for FCC inaction fail?

Posit a speech as virulent as Schleifer's, delivered repeatedly by a media speaker urging maiming and assassination of government employees. If, as Professor Laurence Tribe suggests, "expression has special value only in the context of 'dialogue'"<sup>139</sup> between differing views, this value is not promoted when hate speakers control the one-note format of their shows and contemptuously cut off those who call in to question prior diatribes.<sup>140</sup> Some fans will

135. Neither the speaker's failure to urge immediate action nor the listener's indifference to the proposition are relevant. See GREENAWALT I, *supra* note 92, at 261.

136. Baker II, *supra* note 97, at 9.

137. 121 A. 805 (Conn. 1923).

138. *Id.* at 805.

139. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-8, at 837 (2d ed. 1988). This general proposition is cited in the context of "fighting words" that have "no essential part of any exposition of ideas" and inflict injury by their "very utterance." See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Such expression causes harm without the opportunity for response.

140. The media watch group Fairness and Accuracy in Reporting (FAIR) has concluded that talk radio hosts are largely at the right of the political spectrum and that one such host took his program

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enjoy the heat without absorbing any message, but others may listen only to messages that “suit their temper”<sup>141</sup> without a later search for countervailing opinions.

Formerly, the FCC’s Fairness Doctrine,<sup>142</sup> which imposed a duty of even-handed programming,<sup>143</sup> made such a search unnecessary. Reestablishment of this doctrine would greatly reduce the risks posed by inflammatory speech that urges violent crime. Because this incitement is on the air, it reaches more people who are already susceptible to it, with the added credibility and glamour that media appearance affords.

The celebrity aura surrounding a media event was an important issue in *People v. Rubin*,<sup>144</sup> where the court found a speaker liable because he urged the assassination of American Nazis who were planning a march in Skokie, Illinois:

In past years free speech cases have represented two contrasting images—one, the classroom professor lecturing his students on the need to resort to terrorism to overthrow an oppressive government . . . the other, the street demonstrator in the town square urging a mob to burn down city hall and lynch the chief of police . . . But in these days of the global village and the big trumpet the line between advocacy and solicitation has become blurred; and when advocacy of crime is combined with the staging of a media event, the prototype images tend to merge. The classroom becomes a broadcasting studio, the mob in the town square becomes a myriad of unknown viewers and listeners . . .<sup>145</sup>

The media context, the court noted, made the incitement and its aims more respectable.

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further to the right when he learned that many of his fans were affiliated with the “Patriot” movement which is united by fear of the government. See Yvette Collymore, *United States: Radio Shows Told to Lower the Volume on Hate Talk*, INTER-PRESS SERVICE, Apr. 26, 1995. A media speaker in New York reportedly said to a caller who disagreed with him: “What I’d like to do is put you against the wall with the rest of them, and mow you down with them.” Jonathan Alter, *Toxic Speech*, NEWSWEEK, May 8, 1995, at 44.

141. See, e.g., JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 78-79 (R.J. White ed., Cambridge Univ. Press 1967) (1873) (stating that majority of humans believe in those ideas that enhance their own self-esteem); see also Willmore Kendall, “*The Open Society and Its Fallacies*,” 54 AM. POL. SCI. REV. 972, 977 (1960) (rejecting Mills’ view that “society is, so to speak, a *debating club* devoted above all to the pursuit of truth, and capable therefore of subordinating . . . all other considerations, goods, and goals—to that pursuit”); see also *supra* note 124.

142. See *supra* note 48.

143. This Doctrine did not mandate that opposing views necessarily be aired on the same program. However, as former Rep. Andrew Jacobs (D-Ind.) has observed, an opportunity for counterargument “on the same media to the same audience” is particularly effective. See *Americans Debate Whether Hate Talk Sooner or Later Leads to Hateful Acts*, CHARLESTON GAZETTE, Apr. 26, 1995, at 8A.

144. 96 Cal. App. 3d 968 (Cal. Ct. App. 1979).

145. *Id.* at 975. Note that although the defendant made a poignant political speech about the cruelty of a march planned in the heart of an area populated by Holocaust survivors, he also offered money to potential assassins. The commercial speech aspect of the case is discussed *infra* notes 206-207 and accompanying text.

Critics such as Professor Franklyn Haiman argue that the publicity involved in Rubin would have made an attack on the marchers less likely.<sup>146</sup> (Certainly it would have produced a larger police contingent at the event.) Yet he wavers when he discusses “Black Power” leader Stokely Carmichael’s public statement after Martin Luther King’s assassination, in which Carmichael reportedly urged executions in the streets that would make prior riots “just light stuff.”<sup>147</sup> Haiman continues, “If Carmichael or any other speaker in that mode had direct access to time on television in a community where emotions were running high and anger was directed at a particular target, we can be sure that inciting communication under those circumstances would have to be a strong candidate for punishment. Conceivably, the *Brandenburg* criteria could all be met.”<sup>148</sup> Nevertheless, he concludes that simply holding listeners responsible for their own behavior is a better course.<sup>149</sup>

I disagree. The televised speech posited by Haiman combines tinderbox political events with a medium that reaches a huge invisible audience. The power of the criminal solicitation increases while the power of police officials to identify potential Durans decreases. Unlike the proverbial firebrand Hyde Park speaker under the wary eye of the cop on the beat, there is no crowd to watch. Unlike a Klan march where the police can keep the demonstrators and hecklers apart, there is no single event to monitor. The listeners are hidden; the BATF and other public employees all have continuing tasks to perform.

Haiman’s response would be that the listener has the capacity to reject the incitement.<sup>150</sup> A liberty rationale enters here to describe not only the speaker’s autonomous conduct but also that of the audience member.

b. *Collision With the Autonomy of the Listener and of the Potential Target of the Violence*

The assumption that every speech simply elicits autonomous responses (or non-responses) from audience members overlooks the fact that the listener’s autonomy can be invaded by words. Consider expression that induces reflex action. There is general agreement that (falsely) shouting fire in a crowded theater is not shielded by the First Amendment.<sup>151</sup> By contrast, words that inspire sustained thought and analysis contribute to the autonomous hearer’s range of choices.

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146. See HAIMAN, *supra* note 80, at 28.

147. *Id.* at 279 (citing CHI. DAILY NEWS, Apr. 5, 1968).

148. *Id.*

149. See *id.* at 279-80.

150. See *id.* at 279. This would depend upon whether the speaker relied on persuasion or terror in urging violence. See *infra* Part II.

151. Justice Douglas concluded that this expression can be criminalized because it is “brigaded with action.” *Brandenburg v. Ohio*, 395 U.S. 444, 456 (1969) (Douglas, J., concurring).

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Building on this contrast, Professor David Strauss has presented a “persuasion principle”: Restrictions on speech may not be justified by invoking the harmful consequences resulting from the words.<sup>152</sup> The persuasiveness of a speech—regardless of its content—is not a proper basis for prohibiting it. However, he defines “persuasion” as a rational process. Lying, for example, would not be protected because no appeal to the listener’s rationality is made.<sup>153</sup> Strauss devotes relatively little discussion to speech advocating unlawful conduct, although he approves the “clear and present danger” test because it stresses the imminence of the harm.<sup>154</sup> He relates such imminence to situations where speakers are “bypassing the rational processes of deliberation.”<sup>155</sup>

Application of the persuasion principle to media speakers that urge assassination (an issue that Strauss does not reach) opens the door to recognition of factors beyond imminence.<sup>156</sup> The persuasion postulate guides us in determining when and why counterspeech fails. It can fail when speakers make “false statements of fact or statements that seek to precipitate ill-considered action.”<sup>157</sup> While attempts to manipulate the audience do not alone justify governmental intervention,<sup>158</sup> lies and efforts to create panic could be regulated because the listener’s autonomy is invaded rather than augmented.

Counterarguments emerge when this postulate is applied. Does the assertion that the Federal Emergency Management Agency (FEMA) is establishing secret concentration camps for citizens<sup>159</sup> qualify as a lie or panic-inducing device? Those who answer in the negative can point out that conspiracy theories are not as simple to disprove as a typical libel (“Smith has embezzled money from his employer”). Would the speaker’s reckless disregard of facts be sufficient to qualify as manipulation, or must it be shown that he is certain that his claims are false? And if Duran listens to many inflammatory broadcasts before he tries to kill the President, has his action been “precipitated?” When a listener to such broadcasts also has access to a Quaker publication advising pacifism under all circumstances, doesn’t the availability of counterspeech make governmental

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152. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 338-39 (1991).

153. See *id.*

154. See *id.* He assumes, however, that “garden variety” criminal solicitation can be prohibited, citing Greenawalt’s public/private distinction. See *id.* at 339, 346, 369.

155. *Id.* at 338-39.

156. For full discussion of defects in the *Brandenburg* political speech test, see *infra* Subsection I.B.1.

157. Strauss, *supra* note 152, at 365-66.

158. See *id.* at 363. Purveying false mythologies about race is an example of offensive, damaging, and yet protected speech. See *id.*; *supra* note 114 and accompanying text.

159. A media personality has reportedly made this claim in speeches about FEMA’s role in the “new world order” takeover of the United States, asserting that only about 29% of the agency’s employees are engaged in helping victims of storms and disasters. See ANTI-DEFAMATION LEAGUE, BEYOND THE BOMBING: THE MILITIA MENACE GROWS, *supra* note 9; Van Biema, *supra* note 9, at 61.

regulation unnecessary (or too undesirable to countenance)? Can't he just turn off the radio?

It is a combination of factors, rather than a single element, that would militate in favor of FCC control over such incitement of criminality. The celebrity aura of the media speaker,<sup>160</sup> public descriptions of killing methods which lend legitimacy to acts of murder and maiming, and repeated fear-inducing misinformation and falsehoods, are effects that enhance each other and make no appeal to rationality. The prediction that impending danger will be overwhelming unless it is stopped now reaches a disparate audience. Some members may be listening in isolation, reacting in rage as well as panic. This result is hardly surprising. The speaker is not trying to elicit philosophical contemplation or the rationality needed to ignore or turn off the message. The objective is action: "[L]oad those weapons . . . and take care of the problem."<sup>161</sup>

The Supreme Court's recent First Amendment decisions have tended to transform action into speech, reflexively striking down government regulation as impermissible. These pronouncements have not protected the right to debate; rather, they have sheltered a specious right to exercise raw political power. *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,<sup>162</sup> for example, involved a ceiling on campaign spending by political parties, a measure designed to prevent corruption of politicians who might promise political favors in return for large contributions. The majority ruled that the First Amendment precluded the imposition of such spending limits when political parties made contributions independently, without prior coordination with a candidate.<sup>163</sup>

The electronic media are engaged in entrepreneurial activities that involve speech, with licensees increasing revenue by employing popular personalities.

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160. See *supra* note 66, *infra* notes 208-214, and accompanying text; see, e.g., DAVID L. PULETZ & ALEX P. SCHMID, TERRORISM AND THE MEDIA 54 (1992) (detailing influence of media in creating sympathy for terrorists); RICHARD W. SCHAFFERT, MEDIA COVERAGE AND POLITICAL TERRORISTS: A QUANTITATIVE ANALYSIS 64-65, 69-72 (1992) (discussing power of media commentators to persuade and to legitimate terrorism); cf. Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231 (1992) (describing media glamorization of crimes in televised dramas that are then copied in real life by viewers). Explicit incitement could have more impact than a play.

161. See *In re Applications of Charles C. Babbs and Nellie L. Babbs*, Cattle Country Broadcasting, 58 Rad. Reg. 2d (P & F) 1109 (1985); *supra* note 1 and accompanying text.

162. 116 S. Ct. 2309 (1996).

163. See *id.* at 2315-17. Payment for advertisements that were devised without prior consultation with a candidate would be permitted. See *id.* As the dissent noted, "[a]lthough the Democratic and Republican nominees for the 1996 Presidential race will not be selected until this summer, current advertising expenditures by the two national parties are no less contributions to the campaigns of the respective front-runners than those that will be made in the fall." *Id.* at 2332 (Stevens, J., dissenting). The majority's absolutist First Amendment interpretation treats money as the equivalent of speech, thereby undermining campaign finance reform. See also *Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding Rhode Island's ban on advertising liquor prices, an enactment meant to promote temperance, violated commercial free speech).

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This choice of speakers is generally protected both under traditional capitalist deference to business decisions<sup>164</sup> and under First Amendment deference to expressive conduct.

However, application of an absolutist First Amendment approach to incitement would protect the communications industry while suppressing the competing First Amendment rights of those targeted by the inciter—for example, people singled out because they have chosen a particular religion<sup>165</sup> or a particular public sector job.<sup>166</sup> Incitement can instill fear that chills expression, impeding full participation in public activities and debate.

The *Brandenburg* approach to political speech, now precariously perched on a marketplace rationale,<sup>167</sup> teeters even more when the self-expression model surfaces. Words can permeate the listener's autonomy, as well as threaten the interests of potential victims of the killing and maiming. This hazard is too readily discounted in the Supreme Court's imminent-consequences requirement, which fails to recognize that an individual's autonomy can be undermined over time by repeated inflammatory instruction.<sup>168</sup>

A revised *Brandenburg* standard to guide the FCC in regulating speech on the airwaves should accomplish three goals: 1) permit incitement of non-violent illegality; 2) permit public statements urging any illegal conduct when these statements are based solely on a persuasion principle; and 3) bar incitement to violence that falls outside the persuasion principle even when this violence would not occur immediately. Part II provides such a test.

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164. See, e.g., Sunstein, *supra* note 2, at 264-66. See generally Anthony S. McCaskey, Comment, *Thesis and Antithesis of Liberty of Contract, Excess in Lochner and Johnson Controls*, 3 SETON HALL CONST. L.J. 409 (1993) (explaining historical development of liberty of contract).

165. See, e.g., *supra* note 10 (describing broadcast that urged, "If a Jew comes near you, run a sword through him."); see also FISS, *supra* note 129, at 16-18 (arguing that hate speech silences its targets). See generally MATSUDA, *supra* note 114, at 24-26 (discussing chilling effect experienced by victims of hate speech).

166. See Tom Wharton & Christopher Smith, *West's Rebels Take Fight to the Feds, Government Officers Told to Back Off*, SALT LAKE TRIB., Apr. 23, 1995, at A1 (describing federal rangers and wildlife officers reluctant to enforce law because of incitement, threats, and bombings). An employee of the Federal Bureau of Land Management in Reno, Nevada noted: "It seems all the rhetoric being raised sends a small fringe over the edge, inciting them to believe violence is the way to resolve a public policy debate. What's worse, the media tend to romanticize these people and paint our employees as the big, bad faceless bureaucrats." *Id.* at A1.

167. See *supra* Subsection I.B.2.

168. See *supra* Subsection I.B.1.

## II. TEST FOR MEDIA SPEECH: EXPLICATIONS, OBJECTIONS, AND IMPLEMENTATION

### TEST:

MEDIA STATEMENTS URGING ILLEGAL CONDUCT ARE PROTECTED BY THE FIRST AMENDMENT UNLESS THE SPEAKER INTENDS TO INCITE VIOLENT ACTS OF PROPERTY DESTRUCTION, ASSAULT OR MURDER BY INVOKING AN IMMINENT AND SUBSTANTIAL PERIL TO THE LISTENER THAT COULD BE REDUCED BY EXPEDITIOUS COMMISSION OF THESE VIOLENT ACTS. IN CASES OF SUCH INCITEMENT, THE SPEAKER MAY OVERCOME THE PRESUMPTION THAT FIRST AMENDMENT PROTECTION HAS BEEN FORFEITED BY DEMONSTRATING THAT THE STATEMENTS: (a) EXPRESSED MERE HUMOR, IN THE CONTEXT GIVEN; OR (b) EXPRESSED GENERAL REVOLUTIONARY RHETORIC RATHER THAN URGING SPECIFIC ACTS AGAINST PARTICULAR TARGETS.

### A. *Application of the Media Test*

Taking each component of the proposed test separately, we first address the packaging of the prohibited incitement.<sup>169</sup> The speaker's words must explicitly urge illegality; it is not enough that the statements might have a tendency to cause unlawful conduct.<sup>170</sup> This approach would allow camouflaged appeals to violence but not direct solicitations.

As applied to private solicitations, such a standard would be underinclusive because a speaker addressing his own henchmen could use code words that are readily understood as orders to kill or assault.<sup>171</sup> However, a radio speaker exhorting unseen strangers is unlikely to communicate in code. An objective standard focusing on the words themselves is therefore appropriate, and more protective of speech than the amorphous "directed to inciting" rubric of *Brandenburg*.<sup>172</sup>

Clarity is one aspect of the incitement's packaging; the motivational device used is another. Has the speaker appealed to reflex rather than reflection? In

169. "Packaging" refers to the terminology and claims used by the media personality to achieve her goal.

170. The "bad tendency" test would presume the speaker's intent to cause the foreseeable consequences of her words. See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

171. For a thoughtful exploration of this possibility, see David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1 (1994). Professor Crump, however, would extend the prohibition against camouflaged incitement to public as well as private statements, an extension which is too restrictive of speech. See *id.* at 1-5.

172. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). A speaker could, of course, attempt to inflame the audience against a particular target without explicitly urging that the targeted person or group be injured. A popular example is Marc Anthony's speech after Julius Caesar's death. See Crump, *supra* note 171, at 1 (citing WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 3, sc. 2.). The government should not try to suppress this type of public speech; to do so would, *inter alia*, chill mere criticism of political figures—an effect that would clash with the purposes of the First Amendment.

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some instances, this question is unimportant. A media personality hits on a current controversy and exploits it to increase ratings; audience members enjoy the “hot talk” and dismiss the issue after a release of expletives. But where a speaker intends to trigger violent action, the images he invokes matter.

Scenario One: “The appointment of Jones as School Chancellor is an outrage! Round up your friends, go to his office, and use force if necessary to achieve his resignation!”

Scenario Two: “Federal troops under United Nations command are taking control. They have already set up secret concentration camps in certain states. Jackbooted BATF fascists are now invading homes like yours, beating and interning families like yours. Attack on ATF agents at their East Street headquarters can turn the tide and reclaim the true America.”

The first example, while highly offensive, is merely an effort to persuade. Audience members, who are not under threat, are capable of rejecting bad advice. Even if a listener has a child in the school system, no particular or immediate effect on the pupil’s education has been described. Moreover, the parent has nonviolent alternatives and counterspeech is available to list the Chancellor’s prior educational and fiscal achievements.

The second scenario undermines the listener’s rationality by invoking an apocalyptic and imminent peril that threatens him personally.<sup>173</sup> It trades on a few facts (United Nations troops, composed of many nationals including Americans are in the former Yugoslavia), adds dramatic conspiratorial elements, creates panic about the listener’s physical security, and asserts that violence can alleviate the threat. Given the claims made by the inciter, self-help is essential to combat ubiquitous and savage government agents.<sup>174</sup>

Those with opposing views may be hesitant to dignify the story by replying, or fearful of drawing attention to themselves by speaking out. Because the “concentration camps” have been described as secret, any denial of their existence only suggests to an obsessed listener that the conspiracy is succeeding. This internment-and-invasion scenario becomes the trigger for ill-considered action.

The proposed test is not aimed at (or limited to) expression that could be characterized as political. Assume, for example, that two television stations (A

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173. Terror about internment surfaced during the Gulf War in 1991. Arab-American leaders were fearful that members of their community would be placed in camps similar to those used in World War II to confine Japanese-Americans. See Kenneth Reich & Richard A. Serrano, *FBI Downplays Its Arab-American Contacts*, L.A. TIMES, Feb. 2, 1991, at A11. A spokesman for the U.S. Immigration and Naturalization Service, referring to a rumor that Arabs would be sent to a detention camp in Oakdale, La., said that the service had “never seriously considered it,” although “a couple of low-level staffers” had suggested sending Arab immigrants (not U.S. citizens) to the Oakdale facility. See Don Hayner & Frank Burgos, *Arabs Here Denounce War, Fear Reprisals*, CHI. SUN-TIMES, Jan. 17, 1991, available in 1991 WL 8667240.

174. Attacks on federal agents can affect government policy. See, e.g., *supra* note 166 (discussing reluctance of federal rangers to enforce law because of incitement, threats and bombings).

and B) are competing for audience ratings and advertisers. A popular speaker on Station A tells the audience that Station B's unusually constructed transmitter produces a carcinogenic electrical power field, and that these emissions pose a life-threatening risk to children living within a certain radius. Repeatedly stating that "pusillanimous" scientific studies to the contrary must be ignored, she urges listeners to storm the site and destroy the transmitter. Broadcasting such incitement is an abuse of her station's license and should be regulated.

Thus far, we have considered the phrasing and motivational device used by the media speaker to facilitate incitement. On both fronts, this Article suggests more speech protection than *Brandenburg* would require.

We turn now to the content of the solicitation—what the listener is told to do—and the time frame in which the illegal acts would occur. The proposed test diverges radically from *Brandenburg* on the core question of whether the government may punish incitement of any "law violation"<sup>175</sup> regardless of its nature. The Supreme Court's failure to distinguish between types of illegalities is somewhat antithetical to both the marketplace and liberty models discussed above. The undifferentiated approach adopted by the Justices overlooks the possibility that in some instances, even encouragement of law-breaking could contribute to the marketplace of ideas.<sup>176</sup> This approach also binds too tightly the spontaneity of expression that is an integral aspect of autonomy.

The scope of any incursion on advocacy should therefore be limited to incitement of violent acts of property destruction (e.g., arson or sabotage) or violence against persons. Prior Supreme Court decisions have made no effort to provide such limitations, preferring a "content neutral" formulation<sup>177</sup> that equates advocacy of civil disobedience that is non-violent (and productive of dialogue) with advocacy of terrorist bombings. Every jurisdiction grades acts on the basis of the risks or damage they impose. Words that trigger acts should only be regulated when they incite specific, highly dangerous conduct.<sup>178</sup>

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175. *Brandenburg*, 395 U.S. at 447.

176. See *supra* notes 78-79 and accompanying text.

177. See FISS, *supra* note 129, at 21 (concluding that content neutrality should not be applied to situations such as hate speech, where "private parties are skewing debate and the state regulation promotes free and open debate"). For an argument that the distinction between content-neutral regulations versus content-based regulations is a misleading one, see Redish, *supra* note 76, at 105-14 (suggesting both can inhibit speech to same extent); see also *supra* notes 118-121 and accompanying text (reassessing content-neutrality doctrine in context of incitement to murder).

178. Note, however, that self-defense and destruction of property to ward off immediate attack or calamity have been permitted under both criminal and civil law. See, e.g., N.Y. PENAL LAW § 35.15 (McKinney 1992) (justifying physical force when actor reasonably believes it necessary to defend himself against imminent and unlawful physical force); *United States v. Schoon*, 971 F.2d 193 (1992) (discussing necessity defense, and differentiating it from indirect protests against policy); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 24, at 146 (5th ed. 1984) (setting out Restatement of Torts position that there is complete privilege to damage property when such conduct is reasonably necessary to avoid imminent public disaster, such as spread of fire).

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With respect to the time frame within which the acts of murder or sabotage would commence, we have noted above the shortcomings of *Brandenburg's* requirement that the incitement must be likely to result in "imminent" lawless action. In the context of a speaker with the prestige of a media podium addressing a vast invisible audience, this aspect of *Brandenburg* should be modified.<sup>179</sup> Under the proposed test, the speaker must intend to galvanize the audience—indeed, invocation of an imminent peril to the listener is particularly geared to do that. However, the listener's speed in carrying out the crime will depend on its complexity. Acquiring a gun and going to a particular location may be done fairly quickly, while acquiring and storing large amounts of fertilizer and other components to build a bomb may take weeks. The proposed test uses the more flexible phrase "expeditious commission of these violent acts" to signify that the actor proceeds as quickly as the task permits.

If the FCC finds that the criteria set out in the test (intent, packaging, category of crime) have been met, the statements at issue are presumptively unprotected. The Commission would advise the licensee and the speaker that repetition of such incitement would lead to sanctions.<sup>180</sup>

The media personality must now rebut this presumption by demonstrating that one of the exceptions provided in the test should apply. Invoking the first exception, a speaker explains that she was doing a comedy routine on a show where running gags are expected. Applying the second exception, a talk show host who had urged his listeners to rebel against government efforts to enslave them, proves that he did not tell them what their particular role in the revolution should be. The comedian wins because the incitement, in the context given, was not serious. The talk show host wins because the incitement, designating no particular acts or targets, was not specific.

The specificity requirement addresses the concerns of commentators who forge a crisp distinction between speech and conduct.<sup>181</sup> While Professor Stanley Fish concludes that all speech has an effect and is therefore "action,"<sup>182</sup> Professor Thomas Emerson argues that we should penalize only those who carry out (rather than merely purvey) an incendiary idea.<sup>183</sup>

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179. See *supra* Subsection I.B.3.b.

180. See *infra* notes 224-233 and accompanying text for details of the procedures that could be used.

181. See *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (holding that First Amendment was not violated where statute regulated non-communicative aspect of conduct).

182. STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING TOO* 106 (1994) (arguing that all speech is "action" because it has effect on world; otherwise there would be no reason to say anything). *But see* Michael Kent Curtis, *Critics of "Free Speech" and the Uses of the Past*, 12 CONST. COMMENTARY 29, 49-57 (1995) (critiquing Fish's perspective as one which will cause "persuasive power of free speech doctrine" to shrivel and die).

183. See EMERSON, *supra* note 114, at 125 (opining that advocacy of general use of violence is expression, while advocacy that becomes incidental part of overt act is action). *But see* Redish, *supra* note 76, at 189 (suggesting that seriousness of crime advocated can justify greater suppression).

Nevertheless, Emerson appears to acknowledge that the bright line, speech/action dichotomy breaks down when the incitement galvanizes the hearer into acting in a specified way towards a particular group or individual.<sup>184</sup> Any such bright line would lead to too many fluctuations. The proposed test, however, insures a high level of speech protection by allowing general revolutionary rhetoric.

#### B. *Some Objections to the Media Test*

Objection #1: Instead of balancing competing interests, the test creates an unprotected category of speech. This infringes unnecessarily on freedom of speech, and permits the government to suppress expression without showing a compelling interest in doing so in each instance.

Answer: The test categorizes, but like any definitional category, it reflects a prior balancing of competing interests.<sup>185</sup> It represents an implicit determination that the governmental purposes at stake justify limiting words that incite certain kinds of violence. As Professor Tribe has suggested, regulation of expression without a separate, compelling-interest balancing test may be appropriate if the speech at issue falls outside the dialogue of persuasion,<sup>186</sup> and instead triggers action with slight social value.<sup>187</sup>

Section I.B above argues that there is relatively little social value in speech that precipitates specific acts of terrorism and sabotage. This argument does implicate content, just as regulation of fighting words, obscenity, and commercial speech necessarily creates a hierarchy based on content. Maintaining a content-neutral approach, however, becomes less significant where a speaker is urging violent crime.<sup>188</sup> Such incitement, as Professor Greenawalt

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184. See EMERSON, *supra* note 114, at 328-29, 333.

185. See TRIBE, *supra* note 139, at 792; Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942-48 (1968) (discussing merits of definitional categories).

186. See TRIBE, *supra* note 139, at 836-37. Causing panic by a false shout of "Fire!" in a theater, or providing instruction on how to "build . . . bombs out of old Volkswagen parts" are given as examples of unprotected speech. The theater hypothetical involves the immediate reflex action of the listener. However, a media speaker's invocation of threatening conspiracies and ways of combatting them also aims to trigger fearful action rather than to inspire autonomous, independent thought and decision. See *supra* Subsection I.B.3.b.

187. See TRIBE, *supra* note 139, at 838-39. A direction to kill is not an argument, but merely a call to action. Any criticism or idea can be disseminated without inclusion of a death warrant. See *supra* notes 118-121 and accompanying text.

188. See Redish, *supra* note 76, at 117 (stating that invalidating content-neutral distinction in regard to advocacy of unlawful conduct would not significantly diminish protection for such advocacy). But see Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 100-03 (1978) (suggesting that content-based regulations present special dangers to First Amendment principles).

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has aptly observed, “floats uncomfortably between speech and action.”<sup>189</sup> Groundbreaking analysis by Professor Owen Fiss indicates that state regulation may in some instances serve rather than undercut the First Amendment.<sup>190</sup> Such regulation can facilitate the public’s receipt of complete information in an atmosphere of reflection rather than reflex.<sup>191</sup>

The Supreme Court’s standard “clear and present danger” category is based on the paradigm of the soapbox orator exhorting a crowd, and therefore focuses on the imminence of harm. The proposed test refurbishes *Brandenburg* for the media context. The celebrity aura enhanced by appearances on radio or television can lend credence to apocalyptic claims about “enemies” posing a personal threat to the listener, and the necessity for preemptive violent acts to reduce this peril. The messages reaching a vast, unseen audience—buttressed by descriptions of killing methods that lend legitimacy to murder and maiming—undermine the hearer’s rationality and provide cues that can trigger immediate action or gain in urgency as a plan takes shape.<sup>192</sup>

The media test can be described as creating a category because it fixes on a few factors and is based on the speaker’s message.<sup>193</sup> The fact-finder is limited to a relatively narrow field: She must decide whether the speaker intended to precipitate specific violent acts through invoking a terrorizing threat to the listener that could be reduced by expeditious obedience to the speaker’s direction.<sup>194</sup> Scenario Two in Section II.A above provides an example. The advantage to this more categorical approach is that it yields greater predictability and therefore more consistent results in similar situations. And although consistency may carry the risk that the test is too speech-restrictive, that risk is alleviated by the protection accorded to general revolutionary rhetoric and advocacy of non-violent illegal conduct. Even calls for violence are protected if such calls seek to persuade rather than to terrorize the listener into ill-considered action.<sup>195</sup>

**Objection #2:** The test does not fulfill its purported mission of identifying and forbidding dangerous speech. For example, it would permit the “corn

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189. Greenawalt I, *supra* note 92, at 229.

190. See FISS, *supra* note 129, at 2-4 (arguing that state may regulate those who seek to stifle and dehumanize others).

191. See *id.* at 22-23. Receipt of information on both sides of a question, enhanced by the Fairness Doctrine, see *supra* note 48, would reduce a listener’s unwarranted panic. In addition, regulation of incendiary speech that could otherwise silence its targets can ultimately encourage more balanced debate.

192. Cf. *supra* notes 84 and 101 and accompanying text.

193. See Frederick Schauer, *Categories and the First Amendment: A Play In Three Acts*, 34 VAND. L. REV. 265, 300-02 (1981); see also TRIBE, *supra* note 139, at 793.

194. In deciding these questions affirmatively, the FCC fact finder must dispose of the possible defenses: the words were not serious, or they suggested nothing specific. See discussion of the hearing procedures *infra* notes 224-233.

195. See Strauss, *supra* note 152, at 335-37.

dealer” hypotheticals that most commentators would prohibit. A speaker addresses a furious mob outside a corn dealer’s house, shouting to them that such leeches should be killed and their houses destroyed.

Answer: The proposed test is designed to regulate incitement by media personalities rather than town square speakers, and therefore both subtracts from and adds to *Brandenburg’s* requirements. The *Brandenburg* approach<sup>196</sup> remains to govern situations outside the FCC’s purview.

Objection #3: The test is too vague, because the phrase “substantial peril” is subject to myriad subjective interpretations. It is an imprecise tool that puts us on a slippery slope leading to restriction of colorful rather than harmful utterances. Moreover, it could muzzle a speaker warning of an actual danger (what if the Martians are really coming?).

Answer: The proposed test requires an intent to incite specific violent acts. The word “peril” indicates a high degree of danger, which the speaker is invoking in the service of this intention. The modifiers, “substantial”<sup>197</sup> and “imminent,” buttress this point; they are no more subjective than other terms in constant interpretive use (e.g., “reasonable”).<sup>198</sup>

The slippery-slope claimant has, in effect, concluded that confusion and unwarranted speech restrictions are less likely to occur under the linguistic status quo than under a change in terminology.<sup>199</sup> Yet the term “imminent” has a more concrete meaning when applied to an existing peril described by the speaker, as here, than to some future danger predicted by the courts, as in *Brandenburg* and its predecessors. And because the test proposed in this Article would apply only to extreme incitement freighted with apocalyptic claims, it avoids the danger of over-regulation.

The word “imminent” also supplies some measure of protection against penalizing a speaker who warns of an actual danger. The proposed test precludes any prior restraint, and FCC action (based on incitement that has already occurred) allows for response and is subject to judicial review.<sup>200</sup> If the Martians arrive as promised, the speaker will have a window of opportunity to vindicate himself with an “I told you so.”

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196. *But see supra* Subsection I.B.1 (suggesting that even in stump-speaker situations, advocacy of non-violent civil disobedience—in contrast to the corn dealer hypothetical—should be permissible).

197. The word “substantial” appears frequently as a modifier of risk in the homicide context. *See, e.g.,* N.Y. PENAL LAW § 15.05(3) (McKinney 1987) (incorporated in § 125.25, second-degree murder provision).

198. *See, e.g.,* N.Y. PENAL LAW § 35.15 (governing use of physical force in defense of person).

199. *See* Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 370-71 (1985).

200. *See* discussion *infra* notes 224-233 and accompanying text.

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Objection #4: The test makes a distinction between public and private speech, protecting the former to a far greater extent. Yet it implicitly draws on the legitimacy of anti-solicitation state laws (which have been left in peace by the Supreme Court) to supply an analogy for permissible restrictions on public expression. Any such analogy is flawed because solicitation involves direct personal contact between the one suggesting the crime and the listener, thereby increasing the speaker's influence and control.<sup>201</sup> One cannot be penalized for suggesting a crime to the world at large.

Answer: As Herbert Wechsler, William Kenneth Jones, and Harold L. Korn note in explaining the Model Penal Code's treatment of solicitation, the intent to induce another to commit a crime is prohibited even if the solicitation reaches no one.<sup>202</sup> Thus, personal contact is not a necessary ingredient of the crime.

Nor has an intent to achieve one-on-one communication been required under most decisions discussing the issue. The size of the audience being exhorted does not operate as a defense to solicitation. In a frequently cited analysis, the British Chief Justice, Lord Coleridge, stated:

The argument has been well put that an orator who makes a speech to 2000 people does not address it to any one individual amongst those 2000; it is addressed to the whole number. It is endeavoring to persuade . . . large portions of that number, and if a particular individual amongst [them] . . . is persuaded, or listens to it and is encouraged, it is plain that . . . [the law punishing solicitation to murder has been violated].<sup>203</sup>

Soliciting members of a vast audience to join in a criminal endeavor has had an unfortunate success rate in the context of "gun for hire" advertisements. Michael Savage's ad in *Soldier of Fortune* magazine, assuring readers of his discretion, special skills, and willingness to consider all jobs, resulted in many responses directed at procuring assistance in various violent crimes. Eventually, Savage, one of his readers, and another hit man committed a murder togeth-

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201. An objector may note also that the private context decreases the possibility of counter-speech.

202. Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 627-28 (1961).

203. *State v. Schleifer*, 121 A. 805, 808 (1923) (citing *Reg. v. Most*, 14 Cox's Criminal Law Cases, 583, 588). In *Schleifer*, the defendant advised a group of strikers to assault scabs and sabotage the New Haven Railroad. See *id.* at 805. For other commentary on the irrelevance of audience size as a defense to solicitation, see James B. Blackburn, *Solicitation to Crimes*, 40 W. VA. L.Q. 135, 145-46 (1934); W.H. Hitchler, Note, *Solicitations*, 41 DICK. L. REV. 225, 227-28 (1937); *Criminal Law—Orator Urging Acts of Violence Guilty of Solicitations*, 33 YALE L.J. 98 (1923). But see *People v. Quentin*, 58 Misc. 2d 601 (N.Y. Crim. Ct. 1968) (holding that brochure giving formula for making illegal drugs but not appending any specific request concerning drugs was addressed to indefinable group and was too general to constitute solicitation).

er.<sup>204</sup> We cite this example of non-political speech<sup>205</sup> only to indicate that the frustrations of an unseen audience can be tapped effectively (an audience member formulated the scheme and paid Savage, not vice versa).

Use of the media as a technique to reach listeners enhances rather than diminishes the impact of solicitation. In *People v. Rubin*,<sup>206</sup> defendant's motive was wholly political, though he offered a monetary reward to anyone who would kill, maim, or severely injure an American Nazi taking part in a scheduled Skokie, Illinois, march. The appellate court emphasized that defendant's statements were made at a press conference, which "tends . . . to give respectability to what otherwise would remain an underground solicitation of limited credibility addressed to a limited audience, and thereby tends to increase the risk and likelihood of violence."<sup>207</sup>

Although mass communication does not generally change opinions,<sup>208</sup> studies have indicated that it can reinforce existing attitudes or create views on new issues.<sup>209</sup> Because much of what we "know" comes from outside sources rather than first-hand experience, the media also create a kind of "second-hand reality" that purports to define what is happening in the world—a "reality" that is highly selective.<sup>210</sup> Visual media "pretends to actuality, to immedia-

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204. See *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1113 (11th Cir. 1992). The decision found *Soldier of Fortune (SOF)* liable in damages to the victim's children because publication of Savage's advertisement presented an identifiable and unreasonable risk. See *id.* at 1121. Plaintiffs offered evidence of magazine and newspaper articles indicating a strong link between *SOF* ads and a number of convictions for murder, assault, and extortion. See *id.* at 1113 n.1.

205. See *supra* note 97 (discussing disparate treatment given to commercial and political expression by courts and commentators). The fact that *Braun* was a civil suit rather than a criminal prosecution is not significant for First Amendment purposes. See, e.g., *S&W Seafoods v. Jacor Broad.*, 390 S.E.2d 228 (Ga. 1990) (applying *Brandenburg* identically to civil lawsuit); *McCollum v. CBS, Inc.*, 249 Cal. Rptr. 187 (Cal. Ct. App. 1988) (same).

206. 158 Cal. Rptr. 488 (Cal. Ct. App. 1979). For prior discussion of *Rubin*, see *supra* notes 144-145 and accompanying text.

207. See 158 Cal. Rptr. at 493. The lower court had dismissed the charges on the grounds that defendant had no serious intent to solicit commission of the crime; the Court of Appeals reversed.

208. See, e.g., OSKAMP, *supra* note 66, at 149-50 (1977). However, repeated exposure to a certain view may change individual beliefs. See ROBERT ZAJONC, *Attitudinal Effects of Mere Exposure*, 9 J. PERSONALITY & SOC. PSYCHOL. 1 (1968 & Supp.) (using example of controversial military decision where hearing repeated commentary in favor of one side could play significant role in changing listener's position on issue).

209. See OSKAMP, *supra* note 66, at 149 (citing pioneering work of Lazarsfeld, Berelson, and Goudet on minor changes in political attitudes as result of mass communication); see also P. Schaffner & A. Wandersman, *Familiarity Breeds Success*, PERSONALITY & SOC. PSYCHOL. BULL. 1, 88-90 (1974) (demonstrating that number of campaign posters in campus election is highly correlated with election's outcome). But see OSKAMP, *supra* note 66, at 124 (noting that "if the voice of a particular politician always grates on your ears, or you dislike his insincere manner, you are very likely to become less fond of him with repeated exposure").

210. See, e.g., OSKAMP, *supra* note 66, at 159-60. Audio-visual communication has been characterized as more influential than literary speech. See STEPHEN WORCHEL & JOEL COOPER, UNDERSTANDING SOCIAL PSYCHOLOGY 12 (rev. ed. 1979), although written material is more suited to conveying complex messages. See George Comstock, *Television and Human Behavior*, in UNDERSTANDING TELEVISION: ESSAYS ON TELEVISION AS A SOCIAL AND CULTURAL FORCE 35, 42-43 (Richard P. Adler ed., 1981).

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cy.”<sup>211</sup> Radio can also convey this sense of authenticity, and has been trusted as a source of information about danger.<sup>212</sup> Regulation is therefore appropriate if radio personalities abuse this trust by basing incitement on unsupported or false messages of peril.

Media appearance extends the speaker’s prestige and influence. As Oskamp notes, “Some media celebrities, such as . . . Johnny Carson, have become so famous that they have been widely credited with personal persuasive power in selling products or ideas.”<sup>213</sup> Even more obscure people benefit from the belief that anyone who is the focus of mass attention “must really matter.”<sup>214</sup>

Objection #5: Adoption of the media test would result in two related but distinct disadvantages. First, licensees will err on the side of suppression if a speaker’s message nears the borderline of the test elements. Second, even a station’s voluntary dismissal of a speaker (who is offensive but has not violated the media test) would be vulnerable to court challenge. The rejected speaker could argue that the station was influenced by fear of FCC sanctions, and therefore the dismissal constituted state action in violation of the First Amendment rather than unfettered private conduct.

Answer: Concern about a possible *in terrorem* effect flowing from the FCC’s licensing power is not new. David Bazelon, then Chief Judge of the United States Court of Appeals for the District of Columbia, raised the issue in 1975, citing as examples instances where presidential pressure was exerted

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211. ROBERT C. ALLEN, CHANNELS OF DISCOURSE: TELEVISION AND CONTEMPORARY CRITICISM 189 (1987).

212. Radio has been found to have more authority than print. See SHEARON A. LOWERY & MELVIN L. DEFLEUR, MILESTONES IN MASS COMMUNICATION RESEARCH 108 (1983). In a famous incident in the 1930s, widespread panic was created by an Orson Welles broadcast announcing that Martians were invading the earth spreading poison gas. Although the broadcast was described at the outset as fictional, many people who tuned in later fled in panic or hid in cellars. In later interviews, they explained that they were motivated by confidence in radio as a source of information, in the announcer, and in the (fictitious but realistically described) scientists and officials who urged defensive action. See HADLEY CANTRIL, THE INVASION FROM MARS: A STUDY IN THE PSYCHOLOGY OF PANIC 47-54, 70-71 (1940). The mention of towns and highways familiar to the listener increased alarm. Some audience members were too frightened to check the broadcast. Others attempted to do so but were unsuccessful. See *id.* at 92-95. Cantril noted that the listeners’ fear, worry, and excitement undermined their rationality. See *id.* at 105.

213. See OSKAMP, *supra* note 66, at 161-62 (1977) (observing that media confer prestige on speakers and their views.) Even the solitary listener may feel like part of a group of insiders who understand the message. For a discussion of how the media determine the public agenda, see *id.* at 161. One author has noted that David Duke, the far-right 1991 Louisiana gubernatorial candidate, benefitted from his appearance on *60 Minutes*, the CBS news program, despite the rudeness of the interviewer. See Fish, *supra* note 182, at 118. The television appearance legitimized his message and elevated his views to national stature.

214. OSKAMP, *supra* note 66, at 162 (quoting P.F. Lazarsfeld & R.K. Merton, *Mass Communication, Popular Taste and Organized Social Action*, in THE COMMUNICATION OF IDEAS (L. Bryson ed., 1948) (describing how formerly unknown individuals acquire celebrity status merely through being subject of television or newspaper publicity).

to reduce unfriendly network news coverage.<sup>215</sup> The Ninth Circuit found state action where FCC efforts to protect children from obscenity and excessive violence in programming caused a change in network policy.<sup>216</sup>

However, the FCC has not been accused of hyperactivity in the area of incitement. The objection assumes that adoption of the media test would transform the agency from one that has refused to act in the face of patent incitement to riot<sup>217</sup> into one that would overzealously penalize advocacy of illegality (or be perceived as doing so). It may also be noted that the FCC's vigorous anti-indecency campaign has apparently not produced an undue chill on such speech.<sup>218</sup>

This concern about a possible impact on permissible expression can be rebutted by the test's own terms and application. The presumption of protection is lost only in the egregious case where a media speaker explicitly urges violence against specified targets, and invokes an imminent and substantial danger to the listener that could be alleviated by expeditious obedience to the speaker's instruction. As will be shown in detail below, penalties could only be imposed if FCC warnings to the licensee and speaker are flouted and the incitement thereafter continues.

Stations who fire offensive speakers generally do so because of advertiser or community objections,<sup>219</sup> sometimes reversing their decisions for those very reasons.<sup>220</sup> This private, market-driven process will not be affected by the narrowly focused test suggested here.

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215. See David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 214-15, 244-51.

216. See *Writer's Guild of America v. FCC*, 609 F.2d 355, 365 (9th Cir. 1979). Often, however, *in terrorem* claims have been rejected. See, e.g., *Sofer v. United States*, No. 2:94cv1182, 1995 WL 576833, (E.D. Va. June 7, 1995) (FCC's concurrence with station's rejection of advertisement did not transform private conduct into governmental action).

217. See *supra* notes 51-55 and accompanying text.

218. For an example, see Howard Stern's indifference to the FCC warnings, *infra* note 228 and accompanying text.

219. Two St. Louis disc jockeys were fired after repeatedly using racial and ethnic slurs, and wondering aloud whether Rev. Jesse Jackson could be shot on a hotel balcony. See Tim O'Neil & Lori Teresa Yearwood, *WKDQ Apologizes for Racial Slur*, ST. LOUIS POST-DISPATCH, May 12, 1993, at A11; Lori Teresa Yearwood & Tim O'Neil, *Station Fires, Sues DJs; 'Steve and D.C.' Say They Now Are Sorry*, ST. LOUIS POST-DISPATCH, May 20, 1993, at A1. The station sued the DJs for violating the terms of their contract, and causing advertisers to withdraw their commercials. The two men thereafter joined a Denver, Colorado station but were fired nine days later because of the earlier St. Louis broadcasts. See Leroy Williams Jr., *Station in Denver Fires DJs Over Incident in St. Louis*, ST. LOUIS POST-DISPATCH, July 22, 1993, at A2.

220. See also *supra* note 56 (describing rejection of Aryan Nations program in West Jordan, Utah). A New York radio speaker was quoted as saying that "ideally" police officers should have shot participants in a gay-rights parade. See Fussell, *supra* note 101, at F2; Renee Graham, *Talk Radio's Tough Talkers; The Oklahoma City Bombing*, BOSTON GLOBE, Apr. 29, 1995, at 10. This speaker, who also reportedly made racist statements, was dismissed by one station but hired within two weeks by another. See James Barron, *Bob Grant Is Back on the Air, Picking Up Where He Left Off*, N.Y. TIMES, Apr. 30, 1996, at B3. The new station cited the speaker's large number of listeners. See *id.*

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Objection #6: The FCC has established no procedural mechanisms that could, in a manner consistent with due process, be adapted to the task of acting upon broadcasts that solicit murder, assault and violent destruction of property.

Answer: The Commission has, at an earlier point in its history, noted that the public interest can be imperiled when a broadcaster makes a citizen the target of harassing phone calls.<sup>221</sup> Incidents of harassment triggered FCC letters informing the offending station that “your conduct raises serious questions regarding your responsibility as a licensee,” and requesting within ten days “a statement of your future policies and procedures for preventing the use of your facilities to cause the harassment of members of the public. This letter and your response will be associated with the appropriate file with respect to your station where it will be available for future reference.”<sup>222</sup> Although the agency later dropped its anti-harassment policy,<sup>223</sup> the procedure that was invoked is still available.

More recently, warning mechanisms have been utilized in the area of indecent material, where First Amendment problems are generally less troublesome than in the political speech arena and where FCC regulations abound.<sup>224</sup> Nonetheless, the processes marshalled against Howard Stern broadcasts could be adapted to control speakers that urge murder and sabotage.

The FCC could begin with a notice of violations under 47 C.F.R. § 1.89 (1995), which operates as a warning to the licensees that more serious methods such as forfeitures, cease and desist proceedings, or suspension of license may be undertaken if these violations are repeated. Infinity Broadcasting received such an initial notice concerning Howard Stern’s description of “sexual and excretory activities and organs in patently offensive terms.”<sup>225</sup> The recipient

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221. See *supra* notes 40-45 and accompanying text.

222. *In re* Complaint by Dewey M. Duckett, Jr. Concerning Fairness Doctrine by Station WQXL, 23 F.C.C.2d 872, 873 (1970). The complainant raised an issue under the now-defunct Fairness Doctrine, see *supra* note 48, and argued that the station broadcast his telephone number after urging listeners to call him about a disputed issue, which resulted in his receiving threats. See 23 F.C.C.2d at 873. The FCC dismissed the fairness issue, but sustained the harassment aspect of the complaint. See also *In re* Complaint by Port of New York Auth. Concerning Station WXTV, 33 F.C.C.2d 840, 842 (1972) (indicating television station failed to take reasonable steps to protect members of public from harassment, but instead urged viewers to call Mr. Austin Tobin of the Port Authority, therefore acting in a manner “calculated to cause harassment . . . rather than merely to present [its] version of the facts to [its] viewers.”).

223. See *supra* note 44 and accompanying text.

224. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978) (“[I]f there were any reason to believe that the Commission’s characterization of the Carlin monologue as offensive could be traced to its political content, . . . First Amendment protection might be required,” but because that was not the case, the FCC was able to regulate the speech under 18 U.S.C. § 1464 (1994)); *In the Matter of Infinity Broadcasting Corporation of Pennsylvania*, 2 F.C.C.R. 2705, 2705 (1987) (“[I]t is well settled that the Commission is empowered to take action with regard to programming proscribed by 18 U.S.C. § 1464.”).

225. Letter to Mr. Mel Karmazin, President, Sagittarius Broadcasting Corporation, Licensee of Radio Station WXRK (FM) New York, New York, 8 F.C.C.R. 2688, 2689 (1992).

of the warning is given an opportunity to file a written answer, which is expected to contain a statement of the action taken to preclude recurrence of the targeted conduct.<sup>226</sup>

If this conduct nevertheless continues, the Commission is authorized to issue a Notice of Apparent Liability<sup>227</sup> for a monetary forfeiture. Acting on its concern about Infinity Broadcasting's apparent "indifference to the requirements of federal law," the agency gave the licensee a thirty-day period to show in writing why a penalty should not be imposed.<sup>228</sup> As the Howard Stern controversy illustrates, such a proceeding does not necessarily involve live testimony by witnesses. The FCC has considerable discretion as to whether a determination on papers alone can fairly present the issues.<sup>229</sup>

By contrast, license revocations require that the FCC issue an order to show cause (accompanied by an explanation of the matters being examined by the agency), which calls upon the licensee to appear before the Commission for a hearing.<sup>230</sup> The Commission has the burden of proof,<sup>231</sup> its subsequent

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226. 47 C.F.R. § 1.89(b) (1995).

227. 47 C.F.R. § 1.80(f) (1995). The question of whether FCC procedures comport with due process under the Fourteenth Amendment, *see Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), and the Administrative Procedure Act (APA), 5 U.S.C. § 558 (1994), is not free from difficulty with respect to the Notice of Apparent Liability. If the FCC rejects the licensee's defenses and imposes a forfeiture (fine), judicial review is effectively possible only if the licensee refuses to pay, and the Commission seeks judicial enforcement under the Communications Act. *See* 47 U.S.C. § 503(a) (1994); *see also* *Illinois Citizens Comm. for Broad. v. FCC*, 515 F.2d 397, 414-15 (D.C. Cir. 1975) (Bazelon, C. J., dissenting from denial of suggestion for rehearing *en banc*). Should the agency opt to proceed under 47 U.S.C. § 503(b)(3)(A) (1994) (providing for administrative hearing in forfeiture proceedings at FCC's discretion), the licensee may seek judicial review of an unfavorable determination under § 402(a). In practice, however, the Commission has chosen the Notice of Apparent Liability as its sole means of enforcement, requiring an aggrieved licensee to await FCC enforcement action in order to raise his or her claims before a court. *See Action for Children's Television v. FCC*, 59 F.3d 1249, 1253 (D.C. Cir. 1995). Nevertheless, courts have overcome some qualms to uphold the forfeiture scheme's constitutionality. *Action for Children's Television v. FCC* called the enforcement scheme "potentially troubling in some respects," but concluded that appellants had not demonstrated that the agency was currently applying the statutes in an unconstitutional fashion. *See id.*

228. Letter to Mel Karmazin, President, Sagittarius Broadcasting Corporation, Licensee of Radio Station WXRK (FM) New York, New York, 8 F.C.C.R. 2688, 2689 (1992). Any such showing must include a detailed factual statement accompanied by pertinent documentation. *See* 47 U.S.C. § 1.80(f)(3) (1994). In the case of *Infinity Broadcasting*, the Notice of Apparent Liability for a \$600,000 forfeiture that the FCC levied in 8 F.C.C.R. 2688 was one of several, all of which Infinity contested. Infinity eventually agreed to a settlement in which it "contributed" \$1,706,000 to the U.S. Treasury. *See* In the Matter of Sagittarius Broad. Corp., 10 F.C.C.R. 12245 (1995).

229. *See* 47 U.S.C. § 309(d) (1994) (regarding license applications, as interpreted in *United States v. Storer Broadcasting*, 351 U.S. 192, 202-03 (1956)); *see also* *United States v. American Tel. & Tel.*, 498 F. Supp. 353, 365 (D.C. Cir. 1980) (showing paper proceedings that permitted argument and rebuttal were sufficiently reliable for ruling on antitrust matter to rest on documents alone); *accord* *Gencom, Inc. v. FCC*, 832 F.2d 171, 180-82 (D.C. Cir. 1987) (granting applicant right to establish new cellular radio communications system, rejecting competing application, ruling that § 309 requires FCC to determine whether hearing is necessary to promote public interest and whether there is significant issue of material fact).

230. 47 U.S.C. § 312a(c) (1994). This procedure also is mandated for cease-and-desist orders. Although broadcast licenses are essentially a government-bestowed privilege, procedural safeguards must be provided in licensing proceedings. *See, e.g.,* 47 U.S.C. § 309 (1994) (providing for licensing of broadcasters according to public interest, convenience, and necessity, as well as for hearing procedure

findings are appealable to the federal courts,<sup>232</sup> and Administrative Procedure Act requirements govern the appeal.<sup>233</sup> Essential due process elements are therefore present, and the judiciary has the final word.

It should be noted that one of the grounds for revocation of a short-wave radio license is the licensee's intent to program solely for an audience in the United States.<sup>234</sup> Congress designated short-wave as international broadcasting for which licenses issue only when the public interest is served.<sup>235</sup> Moreover, such broadcasts must "reflect the culture of this country" and "promote international good will."<sup>236</sup> This description is a rather poor fit for short-wave stations that describe domestic "enemies" in league with Nepalese Gurkhas to force Americans into secret Federal Emergency Management Agency concentration camps.<sup>237</sup> However, FCC investigation of allegations that short-wave licenses are being misused<sup>238</sup> has apparently not led to regulatory action.

How would this bundle of FCC mechanisms apply to a case under the test proposed in this Article? Assume that a media speaker tells the audience that United Nations police are about to implant computer chips into people's foreheads and hands as a tracking device<sup>239</sup> unless certain officials are killed. Complainants who object to the repeated broadcast of this incitement would send a transcript and audio (or visual) tape to the FCC. The agency could

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which FCC must follow in awarding or renewing licenses); Administrative Procedure Act (APA), 5 U.S.C. § 558 (1994) (requiring notice to licensees of facts or conduct warranting withdrawal, suspension, or annulment of license, and opportunity to demonstrate or achieve compliance with applicable regulations, absent licensee's willful acts or imperatives of health, safety or interest); STEIN, *supra* note 61, at § 41.01.

*The Communications Act*, 47 U.S.C. § 312a(c) (1994), provides for an agency hearing and federal court review when a license is at stake in a disciplinary proceeding. Moreover, the doctrine of unconstitutional conditions ("whatever an express constitutional provision forbids the government to do directly it equally forbids the government to do indirectly") has eroded the right-privilege distinction. See William W. VanAlstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445 (1968). *But see* Rust v. Sullivan, 500 U.S. 173 (1991). In *Rust*, the Court held that Congress could condition the receipt of federal funds by family planning clinics on their agreement not to speak as to abortion advice; a family planning provider could still give such advice under a privately-funded program, and therefore was not being forced to choose between receiving the money and exercising a First Amendment right. *See id.* at 193-96.

231. *See* The Communications Act, 47 U.S.C. § 312(d) (1994); 47 C.F.R. § 1.91(d) (1994).

232. *See* 47 U.S.C. § 402(b) (1994).

233. *See* 47 U.S.C. § 402(g) (1994) (specifying that APA § 706 controls).

234. *See* 47 C.F.R. § 73.788 (1996).

235. *See id.*

236. 47 C.F.R. § 73.788 (1995).

237. *See supra* notes 103, 159.

238. *See* John Commins, *Radio Station Under FCC Review*, NASHVILLE BANNER, July 14, 1995, at A1; Steve McCellan & Harry A. Jessell, *Right-wing Shortwave Comes Under FCC Scrutiny; Oklahoma City Backlash Hits Airwaves*, BROADCASTING & CABLE, May 1, 1995, at 6; ANTI-DEFAMATION LEAGUE, POISONING THE AIRWAVES: THE EXTREMIST MESSAGE OF HATE ON SHORTWAVE RADIO, U.S. NEWSWIRE, Feb. 1, 1996, at 1, available in LEXIS, News Library, Curnws File.

239. *Cf.* Hendricks, *supra* note 80, at A15 (reporting radio host's claim that such chips will be inserted into people's bodies so that UN police can find them).

conclude that the elements of the test had been satisfied—a public statement urging murder as a solution to a substantial peril facing the listener. More than general revolutionary rhetoric has been purveyed. The targeted officials risk far more than harassment. The issue of whether the speaker was merely being humorous (and therefore intended no incitement) may involve more subjective factors than the other prongs of the inquiry. In some instances, the seriousness of the media personality's accusations and urgings will be unmistakable (particularly when a tape aids the inquiry). However, where this point is in doubt, the FCC could take further testimony as contemplated by § 309 of the Communications Act.

It is appropriate that the Commission's sanctions are not directed against the offending speaker,<sup>240</sup> but rather against the licensee which has acquired a significant pecuniary interest in operating a station subject to the demands of federal law. The multistage procedure described here protects the licensee from unexpected penalties. Such protection is particularly warranted in the political speech context because of the FCC's prior statements describing its own content-neutrality (albeit diluted by other pronouncements and actions).<sup>241</sup> The process is launched by a warning that imposes no penalty, and escalates to a possible sanction only after repeated broadcasts urging particular acts of sabotage, assault, or killing.

### C. *Implementation and the Executive Branch*

Implementation of the media test could be based on a general announcement of policy.<sup>242</sup> A sounder course, however, would be the commencement of a notice-and-comment rule-making procedure permitting members of the public

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240. As *Infinity Broadcasting* illustrates, the FCC does not deal with the speaker; it merely exercises its jurisdiction over the licensee. See 2 F.C.C.R. 2705, 2705 (1987); see also *supra* note 224 (explaining FCC's empowerment to regulate indecent material). See Letter to Mr. Mel Karmazin, President; Sagittarius Broadcasting Corporation, Licensee of Radio Station WXRK (FM) New York, New York, 8 F.C.C.R. 2688 (1992). The FCC did not take any direct action against Howard Stern. The licensee will determine how to comply with FCC regulations.

241. See *supra* Section I.A.

242. A policy presented in an interpretative rule gives the agency's view as to the meaning of duties implicit in its enabling statute. See Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 349. The FCC could, for example, announce in the context of an adjudication that broadcasting of incitement would be considered a substantial failure to comply with the terms and conditions of the broadcaster's license, which the FCC grants in the public interest, convenience and necessity. See 47 U.S.C. §§ 303, 309(a) (1994). The Commission has reluctantly acknowledged that if programming "constitutes a violation of law," action against the licensee could be taken. See *In re Applications of Charles C. Babbs and Nellie L. Babbs, Cattle Country Broadcasting*, 58 Rad. Reg. 2d (P & F) 1109, 1113 (1985). Unfortunately, this acknowledgement was tied to a "clear and present danger" standard, and the Commission declared that it could not apply that standard unaided by some law enforcement authority. See *id.* Moreover, a policy presented only as an interpretative rule without procedures involving public participation does not in itself have the force of law. See Saunders, *supra*, at 346, 350.

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to submit relevant material and then publishing a new rule after discussion of suggestions and objections.<sup>243</sup>

Pursuit of an anti-incitement policy may also be affected by the views of the Chief Executive. As indicated in Section I.A, congressional direction in this area neither precludes nor explicitly mandates implementation of such a policy. The President, however, has expressed strong concern about “reckless speech that can push fragile people over the edge, beyond the boundaries of civilized conduct to take this country into a dark place.”<sup>244</sup> To what extent should such presidential concern spur FCC action?

Speaking after the Oklahoma City bombing of a federal building, President Clinton condemned “loud and angry voices . . . [which] leave the impression, by their very words, that violence is acceptable,” including “some things that are regularly said over the airwaves.”<sup>245</sup>

This stance was anticipated<sup>246</sup> and vehemently criticized by broadcasters and editors on several different grounds. Some commentators emphasized that mainstream government critics should not be linked by innuendo with “the nuts and lunatics who blew up this building,”<sup>247</sup> and argued that “national” talk show hosts do not advocate terrorism.<sup>248</sup> Others reportedly suggested that such terrorism could have been the result of anger at the government’s handling of Waco, and was not connected to talk on the airwaves.<sup>249</sup> One national host pointed out that “there is a huge difference between dissent and hatred,”<sup>250</sup> indicating the importance of making this distinction.

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243. This procedure creating a “legislative rule” establishes duties beyond those embodied in the enabling statute and can have the force of law. Saunders, *supra* note 242, at 346. See APA, 5 U.S.C. § 553(c) (1994) (providing that such rule must be accompanied by “concise general statement of [its] basis and purpose”). The FCC’s present rule prohibiting dangerous hoaxes could, with some amendments, serve as a general model. See *supra* notes 29-39 and accompanying text.

244. J. Jennings Moss, *Clinton Cools Rhetoric Aimed at Talk Radio*, WASH. TIMES, Apr. 26, 1995, at A1.

245. Doyle McManus, *Clinton Denounces Reckless Speech on the Airwaves; Violence*, L.A. TIMES, Apr. 25, 1995, at A1.

246. Even before President Clinton’s speech, a prominent conservative broadcaster reportedly predicted that “[l]iberals intend to use this tragedy for their own gain,” and said that it would be irresponsible to suggest that conservative rhetoric had helped to create a climate for extremism. See *id.*

247. *Id.*

248. The chairman of a media research group challenged Clinton to name a “national” talk show host who advocated terrorism. See Robert Hearn, *Rightwing Talk Radio Swings Back at Clinton*, REUTERS, Apr. 25, 1995, available in LEXIS, Nexis Library, Reuna File. A similar distinction was reportedly made on *Crossfire* (CNN television broadcast, Apr. 25, 1995), when host John Sununu mentioned this challenge. Michael Kinsley replied, “That’s an easy one. Give him Chuck Baker.” Sununu responded, “It’s a local station,” and later again emphasized, “That’s not national.” Kinsley commented, “So what if it’s not national. Hundreds of thousands of people hear it.” *Id.*

249. See Moss, *supra* note 244, at A1. The Oklahoma City bombing occurred on the second anniversary of the BATF’s raid on the Branch Davidian compound in Waco, Texas, in which more than 70 people were killed. See Howard Kurtz, *Gordon Liddy on Shooting From the Lip; Radio Host Denies ‘Fueling the Lunatic Fringe’*, WASH. POST, Apr. 26, 1995, at C1.

250. For an example, see Hearn, *supra* note 248 (statement of Rush Limbaugh).

The President issued an immediate clarification of his words. Acknowledging that most militias and dissenters were not law-breakers, he stated: "You have every right—indeed you have the responsibility—to question our government when you disagree with its policies."<sup>251</sup> He added, however, that citizens' grievances could not justify the threats and incitement of violence by paramilitary groups,<sup>252</sup> and that such groups use short-wave radio to purvey their messages.<sup>253</sup> Clinton did not offer a First Amendment analysis, nor a basis for distinguishing between legally permissible and impermissible expression.<sup>254</sup> Nevertheless, his addresses represent the Chief Executive's deep concern with the possible consequences of reckless speech and incitement.

The Federal Communications Commission is formally part of the Executive Branch. However, the FCC is an independent agency<sup>255</sup> and its five members are "Officers of the United States"<sup>256</sup> protected from removal under most circumstances.<sup>257</sup> The purpose of the independent-agency designation is to allow for policymaking by experts who are insulated from political pressure.<sup>258</sup> Such agencies combine aspects of executive, legislative and judicial

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251. *Clinton Assails 'Paranoid' Violence*, BALTIMORE SUN, May 6, 1995, at 1A.

252. *See id.* The President also discussed his anti-terrorism legislation, which would give federal investigators new wire-tapping authority and require that explosives be "tagged" with particles that would facilitate tracing. *See id.*

253. *See* Lanny Larson, *Fresno Programmers Defend Shows*, FRESNO BEE, Apr. 26, 1995, at A6. Supporting the President's views, Rep. Andrew Jacobs (D.-Ind.), noted a link between talk on the airwaves and three attacks on the White House that had occurred in close succession. He proposed restoring the Fairness Doctrine, *see supra* note 48, which required stations to air opposing views on controversial issues. "If there's an opportunity for response on the same media to the same audience, it makes a big difference," he added. *Americans Debate Whether Hate Talk Sooner Or Later Leads To Hateful Acts*, CHARLESTON GAZETTE, Apr. 26, 1995, at 48.

254. The President's emphasis was on the harmfulness and inaccuracy of some speech from the left and the right that characterized violence as "a legitimate extension of politics." *Clinton Assails 'Paranoid' Violence*, *supra* note 251, at 1A.

255. *See* U.S.G.M., *supra* note 3, at 22. This status has annoyed some officials. *See, e.g.*, BERNARD SCHWARTZ, *ADMINISTRATIVE LAW: A CASEBOOK* 5 (4th ed. 1994) (quoting speech of then-Attorney General Edwin Meese to Federal Bar Association in 1985: "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that.").

256. *Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976) (defining "Officers of the United States" who must be designated under the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, which provides that: "[The President] shall have power, by and with the Advice and Consent of the Senate . . . [to] appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law invest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."). The Communications Act of 1934, as amended, provides for presidential appointments with congressional advice and consent, 47 U.S.C. § 154(a) (1994) and terms of five years, 47 U.S.C. § 154(c) (1994).

257. Officers of the United States may be removed only by impeachment. *See* *Bowsher v. Synar*, 478 U.S. 714, 726 (1986), or in certain cases by the President for cause only, as specified in the enabling statute. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 623-24 (1935) (Communications Act of 1934 does not provide for any specific removal grounds that President could invoke.)

258. *See* *Humphrey's Ex'r*, 295 U.S. at 624. There were originally seven major independent agencies. *See* SCHWARTZ, *supra* note 255, at 17. Two of these, the Civil Aeronautics Board and the Interstate Commerce Commission, have been abolished. The remaining five are the Federal Power

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functions so that they can effectively regulate concentrated business entities.<sup>259</sup> This arrangement does not leave the President without power over the Commission. He appoints members with the advice and consent of the Senate<sup>260</sup> and can decline to reappoint those whose five-year terms have expired.<sup>261</sup> He also designates the Commission's Chairman.<sup>262</sup> These powers have occasionally been misused for partisan purposes.<sup>263</sup>

Some channels of influence are guaranteed by statute. Under the Administrative Procedure Act,<sup>264</sup> any member of the public may ask the Commission to adopt or amend a rule.<sup>265</sup> While the Chief Executive cannot order the FCC to act, he can request that the agency give his policy views serious consideration. In a recent example, President Clinton prepared a request that the FCC investigate whether liquor advertisements on television should be restricted because such ads might induce more young people to drink.<sup>266</sup> FCC Chairman Reed Hundt welcomed the President's plan: "It's exactly what I think we should do, and with presidential backing we can get it done."<sup>267</sup>

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Commission, the Federal Trade Commission, the National Labor Relations Board, the Securities and Exchange Commission and the Federal Communications Commission.

259. SCHWARTZ, *supra* note 255, at 17.

260. *See supra* note 256; *see also* U.S.G.M., *supra* note 3, at 538.

261. 47 U.S.C. § 154(c) (1991) (providing for five-year terms).

262. *See* SCHWARTZ, *supra* note 255, at 43.

263. *See supra* note 215. It may be noted that broadcasters are also players in the pressure game. They can influence the members of Congress who write communications laws because (outside of minimal equal-time requirements during campaigns) stations can control news coverage of such members in their viewing areas. *See* BARRY COLE & MAL OETTINGER, *RELUCTANT REGULATORS* 41 (1978). They may also lobby FCC commissioners in proper or improper ways. An FCC commissioner once told Professor Barry Cole of Indiana University that "Any Commissioner who pays for his own lunch is a fool." *Id.* at 35. *See also* Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 223-24 (D.C. Cir. 1959) (describing various attempts to influence FCC commissioners through lunches, conversations and gifts).

Perhaps the greatest restraint on public and private pressure on agencies is a moral one. Improperly exercised influence breeds cynicism and undermines the rule of law. The American preference for open and "above-board" governmental processes in general is clear from the enactment of such legislation as the APA, 5 U.S.C. §§ 551-59, 701-06 (1994); the Ethics in Government Act, 28 U.S.C. §§ 591-99 (1994); the Freedom of Information Act, 5 U.S.C. § 552 (1967) (amending the APA); and a further APA amendment, the Government in the Sunshine Act, 5 U.S.C. § 552b (1976).

264. 5 U.S.C. §§ 551-59 and 701-06 (1994).

265. *See* 5 U.S.C. § 553(e) (1994) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."); *see also* 47 C.F.R. § 1.41 (1995) (providing for informal requests for FCC action). *But see* 47 C.F.R. §§ 1.1200-1.1216 (1995) (prohibiting ex parte communications when parties of interest are involved in adjudicative process).

266. *See* John M. Broder, *Clinton to Ask F. C. C. to Consider Restricting Liquor Commercials*, N.Y. TIMES, Apr. 1, 1997, at A12 (discussing letter expressing concern about liquor industry's decision to end voluntary policy against advertising on television).

267. *Id.*

## III. CONCLUSION

Speech on the airwaves can teach as well as entertain. It was originally envisioned as a medium that would banish ignorance and bigotry.<sup>268</sup> Interactive programs such as call-in television shows and talk radio can give the powerless and less affluent a voice,<sup>269</sup> overcoming the fear of some commentators that broadcasting would be the province of the rich, who could afford to buy time and therefore influence listeners to revere the status quo.<sup>270</sup>

Yet, even those who embrace the broadest concept of free speech acknowledge that some words are unprotected.<sup>271</sup> Radio or television speakers who solicit a crime should be free in many instances to do so; the challenge is to encapsulate the narrow category of cases that cross the line.

This Article proposes a test for the media that would bar a speaker from urging specific acts of murder, assault or sabotage when he repeatedly goes beyond the persuasion principle<sup>272</sup> by invoking a terrorizing danger to listeners that could be reduced by expeditious commission of these prohibited acts. The celebrity aura of the media personality, descriptions of killing methods that lend legitimacy to murder and maiming, and repeated fear-inducing misinformation, are triggering effects that enhance each other.

Such instances of media prestige marshalled to precipitate ill-considered action have not yet been addressed in the Supreme Court's unlawful-advocacy jurisprudence. The *Brandenburg* formulation arose out of a stump speaker's vague musings.<sup>273</sup> In an era of increasing domestic sabotage, *Brandenburg* is ill-suited to limiting expression that instructs countless hearers to embark on complex acts of destruction.

The proposed test distinguishes government critics from purveyors of terror. The former are serving the marketplace by supplying new viewpoints and exercising the vital function of dissent, while the latter are undermining the republic<sup>274</sup> by their methods.

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268. See *supra* note 8 and accompanying text.

269. Commentators such as Peter Laufer, a disaffected former talk show host, have criticized talk radio as a "carnival" where "[g]roundless innuendo gets the same respect as investigative journalism." See *Talk Radio: Is It Creating The Hate?*, SALT LAKE TRIB., Apr. 30, 1995, at D7. Others, however, have pointed out that "it's good that we're on the air two and three hours a night. At least people have an opportunity to vent their frustration . . ." Cal Thomas (CNBC television broadcast, Apr. 21, 1996) (1996 WL 7484510).

270. See, e.g., JOHN DEWEY, *The Future of Liberalism* (1922), in 2 JOHN DEWEY: THE LATER WORKS 289 (Southern Illinois, 1987) (1981).

271. See *supra* notes 115, 152-57 and accompanying text.

272. See *supra* notes 151-157 and accompanying text.

273. It should also be noted that at the time *Brandenburg* was issued, the FCC's now-defunct Fairness Doctrine required broadcasters to provide contrasting viewpoints on controversial issues. See *supra* note 48.

274. The republic is described in the Pledge of Allegiance as one indivisible nation.

## Policing Speech on the Airwaves

The FCC has the authority and procedural mechanisms to regulate this category of incitement. Obstacles to implementation would not emanate from the three branches of government. Congress gives the agency authority in several content-based areas, including regulation of dangerous hoaxes.<sup>275</sup> The President has vividly expressed his concern about speakers who “try to keep some people as paranoid as possible . . . .”<sup>276</sup> The judiciary has given respectful deference to the Commission’s expertise in defining the scope of its endeavors.<sup>277</sup>

Under classical liberalism, the media speaker may be viewed as a citizen in need of protection from state-imposed orthodoxy. Under traditional capitalism, the media personality could be characterized as an entrepreneur engaged in business activities that should be shielded from governmental interference.<sup>278</sup> Both approaches, when applied to an inciter whose instructions are laced with terrorizing claims, fail to capture the First Amendment values that are at risk. The state acts here not only to exercise its police power, but also to insure that the public is free to make choices “with full information and under suitable conditions of reflection.”<sup>279</sup>

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275. See *supra* notes 30-33 and accompanying text. Congress does not preclude the FCC, as steward of the public trust, from dealing with unlawful speech. See *supra* Section I.A.

276. See Hearn, *supra* note 248.

277. See cases cited *supra* note 61.

278. See FISS, *supra* note 129, at 51; *supra* note 164 and accompanying text.

279. FISS, *supra* note 129, at 23.

