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# BOMB-MAKING MANUALS ON THE INTERNET: MANEUVERING A SOLUTION THROUGH FIRST AMENDMENT JURISPRUDENCE

BRYAN J. YEAZEL\*

## I. BACKGROUND OF REGULATION ON THE INTERNET

As early as 1995, the United States Congress moved to implement legislation regulating the dissemination of explosives information on the Internet. In June of 1995, Senator Feinstein (D-CA) proposed legislation "to address the problem of increasingly widespread 'distribution of bomb-making information for criminal purposes.'"<sup>1</sup> The proposed legislation would have made it unlawful to disseminate or instruct others in the means of constructing incendiary devices.<sup>2</sup>

Senator Feinstein's legislation portended to be one of the government's first attempts at regulating conduct in "cyberspace."<sup>3</sup> However, the amendment slipped into legislative obliv-

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1. DEP'T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION 5 (1997), *available at* <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html> (last visited Nov. 26, 2001); *see also* Appendix A for text of Feinstein amendment.

2. DEP'T OF JUSTICE, *supra* note 1. The amendment specifically provided: It shall be unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person intends or knows, that such explosive materials or information will likely be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal offense of a criminal purpose affecting interstate commerce.

*Id.* at BACKGROUND.

3. The author William Gibson is credited with coining the term "cyberspace" in his science fiction novel NEUROMANCER. Gibson conceptualized cyberspace as a "shared hallucination" that served as a "medium through which people could interact and where computer constructs provided sensory richness and intellectual challenge." *See* VRML WORKS, *Cyberspace*, *available at* <http://home.hiwaay.net/~crispen/vrmlworks/> (last visited Nov. 27, 2001) (quoting William Gibson) (Web page on file with the NOTRE DAME J.L. ETHICS & PUB.

ion. The Senate approved the legislation on two separate occasions by unanimous vote. In both instances, the amendment suffocated in conference committee.<sup>4</sup>

At nearly the same time, the U.S. Supreme Court heard arguments in *Reno v. ACLU*,<sup>5</sup> and eventually struck down the Communications Decency Act (CDA), one of the government's first attempts at regulating content on the Internet. After the Court squarely rejected regulation of indecent speech on the Internet, Congress backed away from attempts to regulate the Internet.<sup>6</sup> In lieu of Senator Feinstein's legislation, the Senate requested that the Department of Justice (DOJ) conduct a study on the extent to which bomb-making information was electronically available and the scope of First Amendment protection for such information.<sup>7</sup>

The DOJ report suggested alterations to the proposed Feinstein amendment<sup>8</sup> in 1997.<sup>9</sup> In counseling a cautious approach to any legislation, the DOJ relied heavily on the district court's decision in *Rice v. Paladin Enters., Inc.*<sup>10</sup> The *Rice* decision held that the First Amendment precluded a finding that the publisher of an "how to" manual for assassinations was civilly liable for a death in which the victim's killer allegedly relied on the manual. At the time, *Rice* was the only decision on-point. However, the DOJ's assessment was premature as the Fourth Circuit Court of

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POL'Y) The term "cyberspace" has come to mean a litany of things in contemporary society. Whereas commercial interests may be more interested in the effect of cyberspace on commerce, other visions of cyberspace were often more romantic and mystical in detailing how it could affect communication. One author noted:

But what is cyberspace? Where had it come from? Cyberspace had oozed out of the world's computers like stage-magic fog. Cyberspace was an alternate reality, it was the huge interconnected computation that was being collectively run by planet Earth's computers around the clock. Cyberspace was the information Net, but more than the Net, cyberspace was a shared vision of the Net as a physical space.

*Id.* (quoting Rudy Rucker in *THE HACKER AND THE ANTS*).

4. *Id.* at 5.

5. 521 U.S. 844 (1997).

6. See generally Mark S. Kende, *Lost in Cyberspace: The Judiciary's Distracted Application of Free Speech and Personal Jurisdiction Doctrines to the Internet*, 77 OR. L. REV. 1125 (1998).

7. DEP'T OF JUSTICE, *supra* note 1, at 3, available at <http://www.usdoj.gov/criminal/cybercrime.bombmakinginfo.html> (last visited Nov. 26, 2001) (citing § 709 of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1297 (1996)).

8. See Appendix B for the DOJ's proposed alterations to the Feinstein amendment.

9. *Id.* at 30.

10. 940 F. Supp. 836 (D. Md. 1996).

Appeals later reversed the *Rice* decision, holding that a publisher of a "how to" guide on assassination received no protection under the First Amendment from aiding and abetting laws.<sup>11</sup> The proliferation of technology in the past five years has opened the door to some of the greatest gains in corporate efficiency and communication ever. However, it has also ushered in an era where wide-spread dissemination of lethal information requires only a few clicks. Because the law regulating conduct on the Internet has developed substantially on this issue since 1997, the legal climate is primed to reconsider legislation curtailing the dissemination of explosives information on the Internet.

A. *Availability of Bomb-Making Information on the Internet*

5 g Mercury	glass stirring rod	blue litmus paper
35 ml nitric acid	distilled water	small funnel
100 ml beaker(2)	paper	acid resistant glove
90 ml ethyl alcohol	heat source <sup>12</sup>	

The availability of bomb-making information on the Internet should be a palpable concern for any lawmaker. Content that provides an "ingredient list" and instructions on how to make incendiary devices is presumptively more dangerous than other forms of violent content on the Internet. There is a substantial debate (at least in some circles) about the connection between exposure to violent content and the use of violent force. The debate largely short-circuits reasoned attempts to make constructive policy changes in the area of violence. Because it is difficult to demonstrate the causal connection between one observing violent content and one behaving violently at some later date, reasonable people differ on whether a solution is needed at all. With bomb-making instructions, this otherwise sharp debate is dramatically dulled.

11. 128 F.3d 233 (4th Cir. 1997), *cert. den'd*, 523 U.S. 1074 (1998).

12. THE BIG BOOK OF MISCHIEF 12 (2000), *available at* <http://www.ripco.com/download/text/e-texts/tbbom/> (last visited Oct. 29, 2000) (on file with NOTRE DAME J.L. ETHICS & PUB. POL'Y). The information is an ingredient list for constructing a mercury fulminate bomb and is readily available on the Internet with three or four clicks of a mouse and five minutes of time. The recipe is one of many the author provides and follows an introduction where he solicits additional information from the reader. The author notes that "[a] couple of case studies are still needed—please make suggestions! World Trade Center Bombing[,] The Unabomb Case[,] Major Professional pyrotechnical mishaps." *Id.* at 1. Although this information is readily available to anyone with an Internet connection, I have taken the liberty to change one of the ingredients. I do not mean to misquote the author but rather feel the reader is best left not knowing how to construct a mercury fulminate bomb.

Reasonable people more easily accept the "but for" causation between an adolescent child reading a blueprint for constructing a bomb and the child constructing a bomb. Without access to design information, children are usually beyond their educational league and cannot construct explosive devices. If not legally, people understand intellectually that information about bomb construction is generally not available on the average family's bookshelf.

Information about constructing bombs is currently available in print.<sup>13</sup> However, dissemination of bomb-making information in print comes with built-in barriers to access. Purchasing a bomb-making instruction manual requires many steps. First, those who search for information must locate a bookstore or publishing house willing to sell the information. Second, they must provide some form of payment for the materials. Third, they must be willing to bear the social consequences (whatever they may be) of purchasing a title that others frown upon. More importantly, each individual purchaser must incur all of these costs. The Internet substantially diminishes those barriers to information access. Notwithstanding intellectual property restrictions, dissemination of bomb-making information on the Internet requires only one purchaser to bear these costs and to incur the minimal cost of space on the Internet. Therefore, the publication of bomb-making instructions is not unique to the Internet, but the potential scope of dissemination and available audiences is markedly greater on the Internet.

Recent acts of terror in the United States have heightened the concern over dissemination of bomb-making instructions on the Internet.<sup>14</sup> It seems a foregone conclusion that probabilities favor the chance someone will use this information in the commission of a violent act. Even while cautioning against heavy Internet regulation, Professor Cass Sunstein noted that "[i]t is likely, perhaps inevitable, that hateful and violent messages carried over the airwaves and the Internet will someday be responsi-

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13. DEP'T OF JUSTICE, *supra* note 1, at 5. Publishing houses have produced titles such as *THE ANARCHIST'S HANDBOOK* (J. Flores, 1995), *GUERRILLA'S ARSENAL: ADVANCED TECHNIQUES FOR MAKING EXPLOSIVES AND TIME-DELAY BOMBS* (Paladin Press, 1994), *RAGNAR'S GUIDE TO HOME AND RECREATIONAL USE OF HIGH EXPLOSIVES* (Paladin Press, 1988), and *IMPROVISED EXPLOSIVES: HOW TO MAKE YOUR OWN* (Paladin Press, 1985). *Id.* In considering whether mention of these titles in their report would bolster accessibility to them, the DOJ concluded that such information is "so readily available . . . that [their] publication in a Report to Congress will create no additional risk." *Id.* at 32.

14. See generally Lawrence Tribe, *The Internet vs. the First Amendment*, N.Y. TIMES, Apr. 28, 1999, at A29; Caitlin Locinger, *The Nation: After the Madness; Violence, Even Before the Internet*, N.Y. TIMES, Apr. 25, 1999, at § 4-18.

ble for acts of violence. This is simply a statement of probability.”<sup>15</sup> The concern over the availability of this information stems from experience. In countless criminal actions, people with no formal explosives training have relied on bomb-making manuals to perpetrate their crimes.

The DOJ reported that “law enforcement experience demonstrates that persons who attempt or plan acts of terrorism often possess literature that describes the construction of explosive devices and other weapons of mass destruction.”<sup>16</sup> The use of bomb-making instructions in the planning of criminal offenses has been observed in both attempts prevented by law enforcement and in judicial findings of fact. For example, a schoolboy in New York was foiled in his attempt to bomb his middle school. Authorities noted that “the boy used a home computer to fetch a bomb-making recipe from the Internet, then persuaded two classmates to gather diesel fuel, fertilizer and other materials to fashion a crude explosive device reminiscent of the one used to destroy the Federal Building in Oklahoma City.”<sup>17</sup>

The use of “how to” manuals for making bombs is not limited to isolated anecdotes. Federal courts observed the discovery of bomb-making manuals during investigations of several bomb-related crimes.<sup>18</sup> Although possession of a bomb-making manual

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15. Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 366 (1996).

16. DEP'T OF JUSTICE, *supra* note 1, at 8.

17. Raymond Hernandez, *The Outsider: Bomb Plot Suspect was Shy but Volatile Loner*, N.Y. TIMES, Feb. 5, 1996, at B1.

18. DEP'T OF JUSTICE, *supra* note 1, at 9 (citing *United States v. Prevatte*, 66 F.3d 840, 841 (7th Cir. 1995) (“Prevatte later read a book Williams had suggested, the *Anarchists Cookbook*, and the two discussed, when Williams was home from the academy on weekends, how to manufacture pipe bombs and how to use them near gas meters as a diversionary tactic for burglaries.”); *United States v. Johnson*, 9 F.3d 506, 507 (6th Cir. 1993) (“While doing so, the officers observed, in plain view, ammunition, gun clips, a dynamite wick or fuse, two pipes with end caps, books on how to make explosive devices, and a piece of white PVC pipe with tape on the end.”); *United States v. Talbott*, 902 F.2d 1129, 1131 (4th Cir. 1990) (“The search of his residence uncovered guns and two pipebombs as well as extensive identity-changing material. Also seized were various books on bomb-making and a handwritten ‘hit list’ containing the names of various public officials related in some way to Talbott’s prior legal troubles.”); *United States v. Michael*, 894 F.2d 1457, 1459 (5th Cir. 1990) (“Michael later experimented with making bombs in his garage and attended gun shows and bought books to determine how to make bombs or silencers or booby traps.”); *United States v. Levasseur*, 816 F.2d 37, 41 (2nd Cir. 1987) (“Among the items recovered and introduced at trial were weapons, ammunition, bomb-preparation instructions and materials, copies of UFF communiqués, and notebooks containing coded information about the planning, execution, and review of the bombings charged in the indictment.”); *United*

does not alone prove that a reader intends to commit an act of violence, both the Federal Bureau of Investigation (FBI) and the Bureau of Alcohol, Tobacco, and Firearms (ATF) "expect that because the availability of such information is becoming increasingly widespread, such bomb-making instructions will continue to play a significant role in aiding those intent upon committing future acts of terrorism and violence."<sup>19</sup>

Precise instructions for constructing bombs are readily available with a few short minutes of web navigation. Testifying before the Senate Committee on Science, Commerce, and Transportation, Special Agent Mark James, the ATF Deputy Chief of Intelligence, recounted several stark realities about the ubiquitous nature of bomb-making instructions on the Internet. James observed that researchers at the ATF "ran a simple query of the phrase 'pipe bomb' . . . [and] produced nearly 3 million 'hits' of web-sites containing information on pipe bombs."<sup>20</sup> James significantly noted the longtime recognition that availability of bomb-making instructions on the Internet is in causal connection with violent incidents. He observed that the use of computer "bulletin boards to obtain bomb-making instructions first came to ATF's attention in 1985, when five separate bombing incidents were attributed to knowledge gained from the internet."<sup>21</sup> Unfortunately, those five incidents served as foreshadowing for the next fifteen years. The frequency of actual bombing incidents has increased substantially since 1995. "From 1985 to 1995, 35 bombing incidents were known to have occurred as a result of bomb-making instructions obtained from computer bulletin boards" and in 1996, the number of incidents was a "600 percent increase in the average number of incidents annually."<sup>22</sup>

Instructions for the production of bombs have been available in print form for decades. Congress has made no formal attempt to restrict the supply of these publications and their sale has remained constant. So what explains the statistically substantial increase in the number of bombing incidents related to use of bomb-making manuals? Many explanations have been dis-

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States v. Arocena, 778 F.2d 943, 947 (2nd Cir. 1985) ("The FBI also found bomb components, including thirteen timing mechanisms used in the making of time-bombs, tools, and a bomb-making manual.")).

19. *Id.* at 10.

20. *Internet Filters: Hearings on S. 97 Before the Comm. On Commerce, Science, and Transp.* (statement of Special Agent Mark James, ATF Deputy Chief of Intelligence Division on May 20, 1999) (on record with the NOTRE DAME J.L. ETHICS & PUB. POL'Y).

21. *Id.*

22. *Id.*

cussed, but one variable in the dissemination process remains in constant flux—the expansion of availability of these instruction manuals on the Internet.

## II. INTERNET IS DISTINCT FROM OTHER MEDIA

*"It's a pipe, a plain old plumbing pipe, threaded ends with caps screwed to both ends."*<sup>23</sup>

The mechanics of building a pipe bomb (or any bomb, really) have not changed significantly in the past twenty years. The ingredients are readily available in most well-stocked kitchens and a persistent individual could easily procure instructions for building a bomb through mail order or a less than reputable bookstore. However, the distribution channels for bomb-making instruction manuals have changed dramatically since the advent of the Internet. Although most information on the Internet is available in hard copy, would-be bombers can now procure the required recipes with relative ease. Although one may contend that the Internet is no different from conventional communication mediums, the Internet is a unique environment that demands unique analysis.

### A. *Distinct Communications Medium*

As a technology, the Internet's potential appears unlimited. Although society has not approached full realization of that potential, we know that the Internet can revolutionize the way we communicate, learn, research, and do business with each other. As one commentator put it, "[M]ost mass technologies have not been used as tools to improve communication in meaningful ways, but the Internet has the potential to . . . reshape 'our common culture.'"<sup>24</sup> Internet technology alters far more than the way we communicate in the office. The avenues for political speech are nearly infinite. "Anyone can send email to thousands of like-minded (or un-like-minded . . .) people, or create a Web site . . . to promulgate messages on any subject one wishes—from aardvarks to Zoroastrianism."<sup>25</sup> From Wall Street to Main Street,

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23. Steven Levy, *The Senate's Bomb Scare*, NEWSWEEK, Aug. 8, 1996, at 48. Levy noted this introduction to a portion of the Cable News Network website discussing pipe bombs. He observed that "a diagram is helpfully supplied, and we see where to put the powder, the fuse and even the tissue paper, which seems to be a handy filter at the bottom of the pipe." *Id.*

24. JEREMY H. LIPSHULTZ, *FREE EXPRESSION IN THE AGE OF THE INTERNET: SOCIAL AND LEGAL BOUNDARIES* 2 (2000).

25. JOHN F. WIRENIUS, *FIRST AMENDMENT, FIRST PRINCIPLES: VERBAL ACTS AND FREEDOM OF SPEECH* 195 (2000).



society is rapidly understanding the financial potential of the Internet. One commentator observed that "[t]his revolution has already transformed our economy . . . . [J]ust the development of the Internet . . . has been responsible for an average of 35% of the real growth of the U.S. economy from 1995 to 1998."<sup>26</sup> As a communications medium, the Internet has the potential to turbo-charge many of the educational, political, and financial benefits that other technologies have reaped. However, the scope of the Internet's effects is not limited to positive social change.

With the unbridled power of the Internet come some formidable concerns. As the Internet can enhance the way we communicate with each other, it can also magnify the influence of socially undesirable elements in society. This magnification of deleterious effects on the Internet is especially acute in the area of violence. The debate over whether exposure to violent content through media causes violent behavior is far from resolved.<sup>27</sup> However, many commentators have suggested that media outlets remain the only parties unconvinced of the connection between exposure to violence and violent tendencies.<sup>28</sup> Due to the graphic portrayals of violent content on the Internet, the illusion that gratuitous violence is real eclipses the under-

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26. Ira Magaziner, *At the Crossroads of Law and Technology: Keynote Address*, 33 LOY. L.A. L. REV. 1165, 1166 (1999).

27. AM. PSYCHOLOGICAL ASS'N, VIOLENCE ON TELEVISION: WHAT DO CHILDREN LEARN? WHAT CAN PARENTS DO?, *available at* <http://www.apa.org/pubinfo/violence.html> (last visited Oct. 29, 2001) ("In spite of the accumulated evidence, broadcasters and scientists continue to debate the link between viewing TV violence and children's aggressive behavior. Some broadcasters believe that there is not enough evidence to prove that TV violence is harmful. But scientists who have studied this issue say there is a link between TV Violence and aggression . . . .").

28. CTR. FOR MEDIA LITERACY, VIOLENCE IN THE MEDIA, *available at* <http://www.medialit.org/Violence/indexviol.htm> (last visited Oct. 29, 2001):

For decades, media writers, directors and producers have been trying to tell us that the violent content of the media they create also doesn't hurt—that is, that despite its glamour and impact, it plays no role in making this a more violent society. They may have had a case earlier in this century, when portrayals of media violence were less believable, but today the proliferation of realistic-looking mayhem, assault and death makes for a totally different situation. One expert believes that of the 25,000 murders committed in the United States every year (the greatest number of any industrialized country) at least half are due to the influence and desensitizing effects of media violence. At minimum, media violence may be most influential in modeling the use of deadly force as the primary, if not the only way to solve problems and resolve interpersonal conflict.

*Id.*

standing of television or the Internet as staged.<sup>29</sup> As this revelation crystallizes, the Internet comes under greater scrutiny. For example, recent school shootings have caused parents to reassess their beliefs about allowing their children to access the Internet.<sup>30</sup> "[E]ven though a growing number of parents consider the Internet an essential tool to which they must expose their children, they feel distinctly uncomfortable with the prospect."<sup>31</sup> As one parent explained it, "[t]wenty years ago . . . you didn't have access to millions of people to mess with your head . . . . What is on TV is sort of controlled. What is in the movie theatres is sort of controlled. The influences you can be exposed to on the Internet are just a lot more widespread."<sup>32</sup>

The components of the causation debate regarding media violence will continue to be parsed indefinitely.<sup>33</sup> This Note leaves the resolution of that debate to those more skilled in statistical analysis. Assuming some threshold level of causation, the Internet poses unique problems for social scientists researching the connection between exposure to violence and real violence. The Internet is a distinct organism and society must understand the unique challenges it presents. "The development of the

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29. See generally Elizabeth Thoman, *TV Violence: It's Time to Break the Circle of Blame*, available at <http://www.medialit.org/Violence/articles/senate.htm> (last visited Oct. 29, 2001); see also AM. PSYCHOLOGICAL ASS'N, *IS YOUTH VIOLENCE JUST ANOTHER FACT OF LIFE*, available at <http://www.apa.org/pi/pii/is/youthviolence.html> (last visited Nov. 27, 2001) (on record with NOTRE DAME J.L. ETHICS & PUB. POL'Y); CENTER FOR MEDIA LITERACY, *VIOLENCE IN THE MEDIA*, available at <http://www.medialit.org/Violence/indexviol.htm> (last visited Oct. 29, 2001).

30. See generally Amy Harmon, *Parents Fear that Children Are One Click Ahead*, N.Y. TIMES, May 3, 1999, at A24.

31. *Id.*

32. *Id.* (quoting uncredited parent Marti Seidel of Greensboro, N.C.).

33. Despite the mounting scientific evidence establishing a connection between media portrayals of violence and actual violence, many observers have continued to deny a connection between the two. See, e.g., Jacob Sullum, *Phantom Studies*, REASON, Dec. 2000, at 15 ("The majority of studies do not find evidence that supports the notion that television violence causes aggression."); see also Richard Rhodes, *The Media-Violence Myth*, ROLLING STONE, Nov. 23, 2000, at 55 ("The presumption that gory movies, television and games make kids violent is based on shoddy science and shadowy motives."). However, even media industry executives have begun recognizing the media-violence connection. Recently, the President of Walt Disney Corporation, Robert Iger, acknowledged the simplicity of the connection, noting that "[w]hen the finger is pointed at [media executives], they say their media has no influence; but they turn around and say just the opposite to advertisers. We should all admit that our media has an influence." See John P. McCarthy, *A Modest Step Toward Cleaning Up Television*, AMERICA, July 31, 1999, available at [http://findarticles.com/m1321/3\\_181/55285945/pl/article.jhtml](http://findarticles.com/m1321/3_181/55285945/pl/article.jhtml) (last visited Oct. 29, 2001).

Internet as a means of communication marks a dramatic change in the manner in which information is exchanged and disseminated in our culture. Quickly fading are the days in which a person's main venue for expressing her revolutionary views include standing on a soapbox or distributing leaflets."<sup>34</sup> Although the social changes harbored by the Internet foster an indescribable feeling of imminence, there are specific reasons for people to be cautious about Internet content.

### B. *Violent Content on the Internet More Dangerous*

The Internet alters the way people receive information. In many regards, the reasons that the Internet boosts productivity in commerce are the same reasons that raise the danger level for bomb-making instruction manuals. First, the "cost of entry" on the Internet is extremely low. Whereas actors might have previously found dissemination of the bomb information cost prohibitive, the Internet allows them to distribute their information with minute entry costs. Second, the speed of communication on the Internet is literally as fast as light. Previous to the technological revolution, actors were required to purchase their instruction manuals through the mail or at a book store. This process forced at least some time for reflection before would-be bombers had access to recipes. Third, the Internet lowers organizational barriers, allowing people to coordinate violent actions. Fourth, the Internet is anonymous and obliterates the significant impact that social norms may have on preventing socially undesirable behavior.

#### 1. Low Cost of Entry

The Internet has lower financial barriers to entry than other communication media. With lower cost of entry, organizations or individuals bent on supplying information about bomb construction can afford to communicate. In discussing a different type of violence, racial violence, one commentator observed that "racists have discovered that the Net is a marvelous way to get their message out to a huge audience at low cost."<sup>35</sup> For people wishing to communicate any message, the Internet is perhaps the most affordable communication vehicle in history. Any organization choosing to communicate through conventional mediums

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34. Bruce Braun et al., *www.commercial\_terrorism.com: A Proposed Federal Criminal Statute Addressing the Solicitation of Commercial Terrorism Through the Internet*, 37 HARV. J. ON LEGIS. 159 (2000).

35. Joshua Quitner & Chris Stamper, *Home Pages for Hate*, TIME, Jan. 22, 1996, at 69.

(television, movies, video and mail) must incur substantial cost burdens. Those cost burdens virtually vanish on the Internet. Any organization opting to communicate with a broad audience needs only an Internet connection and a list of addresses.

The reduced cost per communication on the Internet is a cause of significant concern with violent content. In real space, it costs money to communicate. As such, those communicating to a large audience have the hurdle of "testing" their ideas with a large enough audience such that people will be willing to financially support the communication. However, the cost of communicating an idea in cyberspace is negligible and many ideas are communicated that would normally be obliterated in the free market due to "lack of viewer interest."

This quality of the Internet is beneficial in many regards. Ideas considered counter-majoritarian are floated like never before. This fact secures our ability to delve into ideas that are sound, but not popular. However, this lessened barrier of entry often fuels promoters of violence and hatred. One pundit noted:

Although hatred-inspired violence is hardly a new development (ask Cain), there is a dangerous new ingredient: the Internet. In October, a homosexual group, in the course of investigating an America Online (AOL) policy about 'objectionable' speech, discovered scores of postings on AOL advocating violence against homosexuals. Other messages called for blacks to be lynched, Christians killed, and Jews burned. The Internet, it appears, gives hatemongers just what they want: a cheap device to reach millions of new recruits.<sup>36</sup>

## 2. Faster Speed of Communication

The Internet's speed allows speakers of violent content to communicate faster than ever before and with a substantially larger audience. "It is now possible to send the entire contents of the Library of Congress across the United States in under fourteen seconds on a single optical fiber as thin as a human hair."<sup>37</sup> The Internet's speed fosters the potential for unprecedented development for corporations, education institutions and government. Conversely, it speeds the rate of transmission for extremists communicating a message of hatred. As one commentator noted:

The Internet generation, unfortunately, is seriously at risk of infection by this virus of hate. Not only is this virus present on the Internet today; it is being spread around the

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36. *Downloading Hate*, THE ECONOMIST, Nov. 13, 1999, at 1.

37. Magaziner, *supra* note 26, at 1166.

globe, in the wink of an eye—or more accurately, in the click of a mouse. This exciting new medium allows extremists easier access than they have ever had before to a potential audience of millions, a high percentage of whom are young and gullible. It allows haters to find and communicate cheaply and easily with like minded bigots across the borders and oceans, to promote and recruit for their cause while preserving their anonymity, and even to share instructions for those seeking to act out their intolerance in violent ways.<sup>38</sup>

It is a given in the Internet age that anyone can communicate with another person anywhere on the globe. This fact is encouraging for business leaders, but should be concerning for lawmakers. The hypothetical extremist once had to use the mail or telephone to disseminate information, but the world is very different now. Blueprints for constructing an incendiary device are now merely a few clicks away. The Internet's speed closes the valuable time window between a person wanting information on bomb construction and the time they actually get the information. The result is that there is less time for reflection in the process. People who seek bomb-making information in a fit of outrage can now procure that information while they are still outraged.

### 3. Lower Organizational Barriers

The Internet's enhanced speed of communication lowers organizational barriers in the free market of ideas. If a person hypothetically wanted to organize a violent protest in the pre-Internet era, he would have to communicate by mail, call people on the phone, or be close enough in geographic proximity to others to speak to them directly. Financial resources, location, speed of mail, etc., limited the size of audience. With the Internet, that same violent mob organizer can communicate with a large audience simultaneously.<sup>39</sup> The size of any reachable audience increases exponentially on the Internet. The financial and geographic limitations on his speech disappear, and he can speak to  $n^*$  people at the same time. The only limitations on the

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38. ANTI-DEFAMATION LEAGUE, COMBATting EXTREMISM IN CYBERSPACE: THE LEGAL ISSUES AFFECTING INTERNET HATE SPEECH 1 (2000).

39. See generally Alexander MacLeod, *British Police Eye "www.sportshooligan.com,"* CHRISTIAN SCIENCE MONITOR, Aug. 12, 1999, at 7 ("British police say they are facing a new threat to law and order: mob violence orchestrated over the Internet. Twice in the past two months demonstrators have used Web sites to organize and provoke serious confrontations with law enforcement officers.").

size of the audience are the procurement of an online account and the preparation of an address list.

#### 4. Lack of Social Norms

Fourth, violent content on the Internet is not encumbered by typical social norms. As Lawrence Lessig noted, "The right to free speech is not the right to speak for free."<sup>40</sup> In our society, one generally has the right to speak without fear of reprisal. However, no one is ever promised that his or her idea will be well received. In fact, most people censor their own comments daily based on the audience with whom they are speaking. One of the reasons people do this is for fear of an immediate response. For example, a typical racist is unlikely to make racist remarks in a business meeting because he fears the reprimand of his superior, the loss of a business deal, or even the loss of his job. This concern is immediate for the average racist because the universe of people we speak to on a daily basis is generally limited to people we know or interact with in some way. On the Internet, however, people are known only by their web addresses or email addresses. Even then, people hide behind pseudonyms and organizational names. The Internet allows people to communicate with others they might never meet or who cannot authenticate their identity. As such, the fear of being verbally reprimanded or socially ostracized for offensive speech disappears. The result is that many people who previously espoused hatred within their tight circle of colleagues can do so on the Internet without fear of any immediate or significant response. "Before the Internet, . . . many extremists worked in relative isolation, forced to make a great effort to connect with others who shared their ideology. Today, on the Internet, bigots communicate easily . . . . Extremists have found a secure forum in which to exchange ideas and plans."<sup>41</sup> In this manner, the Internet poses a challenge previously unseen: how to deal with people that can preach hatred without fear of even a social consequence. With bomb-making instruction manuals, the social norms deterring their publication are even stronger. In the wake of the Oklahoma City bombing, few would dare encourage or make light of the bomber's actions. On the Internet, however, sensitivities are weakened, and the specter increases for discussions about otherwise taboo topics.

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40. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 164 (1999).

41. *Downloading Hate*, *supra* note 36, at A1 (citing unspecified Anti-Defamation League Publication).

### III. REGULATION

This Note argues that the best manner to ameliorate the problem of available bomb-making instructions on the Internet is to enforce existing aiding and abetting laws and to pass the Feinstein amendment. The enforcement of existing laws and the passage of the Feinstein amendment are not *per se* regulations on speech. Rather, they would only be enforced to the extent that a publisher's bomb-making instructions were used in the commission of a crime. Mere publication is not sufficient to warrant a felony charge.

However, many critics argue that even legislating the "effects" of Internet content is impermissible or at best impractical. Therefore, it is important to briefly acknowledge the arguments in opposition to Internet regulation, and explain the principles that counter those arguments.

#### A. Case Against Regulation

The primary argument against content regulation on the Internet is feasibility. The Internet is growing exponentially on a yearly basis and law enforcement simply moves at a slower pace. Proponents of this argument note that Internet regulation is inherently difficult without any central governance structure.<sup>42</sup> Many commentators have observed that regulation of the Internet is difficult due to the international scope of the technology. International legal structures are often incompatible. Law differs by locality within the United States. Internationally, the variance is even greater. This variance can cause severe enforcement problems because the transfer of information via the web transcends those regional variations in law.

National speech restrictions can be enforced directly only within the territory to which they apply. But the net is global, and so is the flow of information. People who disseminate information through the Net that is illegal in one country can easily transfer their operations to another country without similar prohibitions and effectively reorganize their disseminating action in matters of hours.<sup>43</sup>

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42. Elizabeth M. Shea, Note, *The Children's Internet Protection Act of 1999: Is Internet Filtering Software the Answer?*, 24 SETON HALL LEGIS. J. 167, 178 (1999) ("Because there is no 'single point at which the Internet is administered,' it is not technically feasible for any single entity to control the immense amount of information being transmitted via the Internet.").

43. Viktor Mayer-Schonberger & Teree E. Foster, *A Regulatory Web: Free Speech and the Global Information Infrastructure*, 3 MICH. TELECOMM. TECH. L. REV. 45 (1997), available at <http://www.mtlr.org/volthree/foster.pdf> ("In the world

The feasibility argument is unpersuasive for several reasons. First, regulation of the Internet appears virtually inevitable. As the economy becomes increasingly dependent on digital communications, rules governing every topic from intellectual property to electronic signatures have and will continue to evolve. Second, the possibility that an operation can move internationally does not seem to justify why laws should not be enforced in the United States. There are multiple forms of analogous crimes that the United States continues to enforce. One example is money laundering. Savvy criminals can easily transfer their operations off-shore to avoid the sanction of U.S. law. However, these laws continue to exist on the books and people continue to be prosecuted under them. Third, a diminished rate of successful prosecution does not challenge the legitimacy of the law. Even though the Internet forum may be more difficult to regulate than other media, regulation will invariably eviscerate some amount of criminal activity. The success rate of prosecutions may be lessened by the Internet structure, but the slightest modicum of success at all furthers the goal of the statutory framework.<sup>44</sup>

The second argument employed by opponents to Internet regulation is the possibility that domestic regulation will spillover to foreign countries and vice versa.<sup>45</sup> These advocates suggest, for example, that Chinese regulation of Internet content does not only implicate Chinese citizens. Rather, Chinese regulations may affect the course of business for a U.S. citizen operating a website within the United States. The spillover scenario contemplates a situation where the U.S. citizen's website has material that is objectionable by Chinese standards. In this scenario, the U.S. citizen could be subjected to Chinese regulations even though he never operated in China, and he may have never conceived of Chinese citizens as his primary audience.

A different variation of the spillover argument presumes that sovereign entities may be forced to massively restrict the total flow of information to its citizenry in order to curtail offensive material.

Because controlling the flow of electrons across physical boundaries is so difficult, a local jurisdiction that seeks to prevent

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of a global information infrastructure, an escalating national de jure regulation of speech meets a similarly pervasive de facto futility of enforcement."'). See also David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1371–73 (1996).

44. Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEG. STUD. 475, 481–83 (1998).

45. See Johnson & Post, *supra* note 43, at 1394.



its citizens from accessing specific materials must either outlaw all access to the Net—thereby cutting itself off from the new global trade—or seek to impose its will on the Net as a whole.<sup>46</sup>

If the spillover scenario becomes fully manifested, legal maneuvering on the Internet would be untenable. One commentator referred to this scenario as the “modern equivalent of a local lord in medieval times either trying to prevent the silk trade from passing through his boundaries . . . or purporting to assert jurisdiction over the entire known world.”<sup>47</sup>

The spillover argument is of greater concern than the feasibility argument. In fact, the argument has played out in reality with regard to Internet content. Last year, a French court ruled that Yahoo, a California-based corporation, must remove Nazi paraphernalia from its website or at a minimum block access to French citizens.<sup>48</sup> The Yahoo website hosted an auction that offered “more than 1,000 Nazi objects for sale . . . available to anyone in the world—including the French—with a credit card and a click of the mouse.”<sup>49</sup> The imposition of French law on a U.S.-based corporation is not negligible. If Yahoo was unable to block access to the Nazi paraphernalia, they may have been forced to pay “\$14,000 for each day” it maintained the Nazi paraphernalia on the site.<sup>50</sup> This spillover forced Yahoo to make a very difficult strategic choice. Hypothetically, were a technological fix to take a year, Yahoo had to choose between shutting down French access to the site thereby forgoing countless dollars of revenue or ignore the French court and pay nearly \$5,000,000 (annualized) in fines. Ultimately, Yahoo developed “software to scan entries submitted for auction” allowing the company to comply with the French order.<sup>51</sup> The Yahoo example is an isolated demonstration of the spillover argument. However, spillover has occurred in other places as well.<sup>52</sup> The real question is how significant the

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46. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1394 (1996).

47. *Id.*

48. See Jenny Oh, *French Court Gives Yahoo More Time*, THE STANDARD, July 25, 2000, available at <http://www.thestandard.com/article/0,1902,17082,00.html> (last visited Apr. 24, 2001).

49. Angela Doland, *French Oppose Yahoo! on Nazi Items*, ASSOCIATED PRESS WIRE, July 24, 2000, available at <http://www.nd.edu/~phellia/yahoozedit.htm>.

50. See George A. Chidi, *Nazi Ban Goes into Effect on Yahoo Auctions*, INFOWORLD DAILY NEWS, Jan. 10, 2001.

51. *Id.*

52. See Doland, *supra* note 49, at 2 (“A German court also heard one of the Internet’s first major test cases, in which the former head of the CompuServe online service in that country was prosecuted for failing to block access

impact will be and whether the spillover is genuinely unique to the Internet.

Despite its empirical occurrence, the effects of the spillover argument may be overstated. One commentator notes, "[T]his quagmire [the spillover scenario] is much less significant than it appears."<sup>53</sup> The reason the spillover argument is exaggerated is that nations still must prove jurisdiction in order to hear a case. With traditional norms of legal sovereignty, "a nation cannot enforce its laws against an individual content provider from another country unless the content provider has a local presence."<sup>54</sup> Therefore, should a U.S. citizen never establish any connection to China (either by location or targeted commerce), it appears difficult to understand how this hypothetical person would fall under the ambit of Chinese law. "The vast majority of individuals who transact on the Internet have no presence or assets in the jurisdictions that wish to regulate their information flows."<sup>55</sup>

Spillover is a real concern for Internet regulation. However, policy makers must be cognizant of the fact that legal spillover occurs in many areas of the law beyond Internet regulation. Citing the inevitability of attempts to regulate content on the Internet, one observer noted:

Even assuming the worst about the feasibility of geographic content control of Internet information flows, spillover effects caused by territorial regulation of the Internet do not undermine the legitimacy of such regulation. As the traditional territorialists realized, spillover effects are an inevitable consequence of unilateral territorial regulation. For example: When a security sold legally in Japan violates U.S. securities laws, the application of the anti-fraud provisions of the U.S. securities regulations produce spillover effects by making this extraterritorial activity more costly, and by diminishing the force of Japanese law on Japanese soil. If instead Japanese law governed the situation, persons in the United States would have been harmed and U.S. regulations undermined. The same point applies to the unilateral regulation of the Internet. Spillovers are present when activity deemed legal in one country causes

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to child pornography sites. Found guilty in 1998 of distributing illegal pornography, Felix Somm's conviction was overturned last November.").

53. Jack L. Goldsmith, *The Internet and the Abiding Significance of Territorial Sovereignty*, 5 IND. J. GLOBAL LEG. STUD. 475, 485 (1998).

54. *Id.*

55. *Id.*

harm deemed illegal in another, regardless of which nation's law applies.<sup>56</sup>

Given that regulation of the Internet appears inevitable, minor restrictions on content such as the proposed Feinstein amendment, will do little to cause the cascading of regulation that some fear.

The third argument against regulation on the Internet is that there is no prime justification for it. Commentators have observed that regulation of other media had a technical justification for regulation: limited bandwidth. "[G]overnments initially regulated broadcast media because there was a similar problem with respect to competition due to the limited amount of spectrum available. The government became involved in the allocation of the broadcast spectrum and therefore it regulated it because it was conferring an economic value."<sup>57</sup> In the absence of any constraint on the capacity of the media, the argument goes, the government should not attempt to regulate activity on the Internet.

The justification argument has substantial merit when it comes to economic regulation of the Internet. Social interests in curtailing socially undesirable expression are the impetus for most proposals for content restriction on the Internet. To that extent, there are few economic justifications for the vast majority of contemplated regulation on the Internet. In fact, many content restrictions might have economically deleterious consequences for content providers. The justification argument is, however, of limited assistance in the context of bomb-making instruction manuals. Whereas the government has limited or even no interest in regulating who has access to the Internet, the government does have an interest in prosecuting those who violate federal aiding and abetting laws.

#### IV. FIRST AMENDMENT IMPLICATIONS OF INTERNET REGULATION

*"Only an idiot would deny that 'The Terrorist's Handbook' is a frightening document. But if we are to embrace the Internet's gifts—a bounty of information delivered instantly—we must also accept that not all forms of electronic speech will be constructive. We must also remember that the issue is not weapons, but speech. If someone is sufficiently motivated to kill, does it really make a*

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56. See Goldsmith, *supra* note 44, at 488.

57. Magaziner, *supra* note 26, at 1174.

*difference if the fatal blueprints are acquired by mail order, in a library or on the Web.*<sup>58</sup>

"[T]hese bombs [sic] are there for one reason and one reason only, and that is a criminal purpose . . . . None of this is for use in any constructive civilian or military project."<sup>59</sup>

First Amendment jurisprudence is constantly in flux. Since as recently as 1942, the U.S. Supreme Court has identified five categories of speech that do not qualify as protected speech. Working within this framework, the Court has rarely dealt with First Amendment issues in the new Internet medium. Because much content on the Internet is pure, unadulterated speech, the Court and the Congress now have an opportunity to test the boundaries of speech protection. Bomb-making manuals on the Internet are a prime battle ground for such a test because the issue shepherds a critical public policy debate—how much speech protection is the country willing to give up in order to prevent large-scale bombing massacres?

#### A. *First Amendment Jurisprudence Ambiguous*

First Amendment jurisprudence has been likened to a patchwork.<sup>60</sup> Although most people recognize the significance of the First Amendment, few seem to comprehend the existing body of law created by the Supreme Court. "The Supreme Court has established not one test, or even several related tests to measure the degree of protection accorded to speech, but rather a series of pigeonholes into which various forms of expressive conduct are slotted."<sup>61</sup> Although many are satisfied with the workable exceptions to free speech created by the court, the protections themselves are fragile when society ventures into a new media. As one commentator observed, "The appropriate degree of protection to be extended to the conduct depends upon into which pigeonhole the speech at issue is fitted."<sup>62</sup> Needless to say, any proposal to regulate speech on the Internet must appropriately navigate the Court's current First Amendment regime.

As is commonly understood, the First Amendment does not secure the right of free speech absolutely.<sup>63</sup> The Supreme Court

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58. See Levy, *supra* note 23.

59. Debra Gersh Hernandez, *Bomb-making on the Internet*, EDITOR & PUBLISHER, June 24, 1995, at 38 (quoting Senator Dianne Feinstein).

60. WIRENIUS, *supra* note 25, at 72-73.

61. *Id.*

62. *Id.* at 73.

63. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942):

has carved out five major exceptions to the First Amendment. Any regulation that prohibits the specific content of certain forms of speech must fall into one of these categories. First, the Supreme Court has permitted content regulations on obscenity. In *Miller v. California*, the Supreme Court held that governments were permitted to regulate obscenity that, "taken as a whole, appeal[s] to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which . . . do[es] not have serious literary, artistic, political, or scientific value."<sup>64</sup> Second, the Court deemed "fighting words" to be unprotected speech. In *Chaplinsky v. New Hampshire*, the Court permitted content restrictions on speech that "by [its] very utterance inflict injury or tend to incite an immediate breach of the peace."<sup>65</sup> Third, the Court found restrictions on libel to be constitutionally permissible. In *New York Times v. Sullivan*, the Court held that libelous statements "can claim no talismanic immunity from constitutional limitations."<sup>66</sup> Fourth, the Court held that commercial speech does not receive the full measure of First Amendment protection. In *Ohralik v. Ohio*, the Court held that commercial speech only holds "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."<sup>67</sup> And most germane to the argument of this Note, the Court has afforded no protection to words that are likely to incite imminent lawless action.

Those attempting to regulate violent content have necessarily positioned themselves under the incitement test from *United States v. Brandenburg*.<sup>68</sup> In *Brandenburg*, the Court held that a State is not permitted to "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>69</sup> The *Brandenburg* test is rarely applicable where a speaker discusses the use of violence because most speakers merely advocate the use of violence alone

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There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those by which their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.*

64. 413 U.S. 15, 24 (1973).

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

66. 376 U.S. 254, 269 (1964).

67. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

68. 395 U.S. 444 (1969).

69. *Id.* at 447.

rather than advocating the use of violence in conjunction with a plan to act violently. However, this standard is not readily applicable to bomb-making instructions on the Internet. Bomb-making manuals on the Internet focus on instructing others in the means to resort to violence and rarely contain any significant words of advocacy.

In *Brandenburg*, the Court dealt with a criminal syndicalism statute that tried to punish mere advocacy.<sup>70</sup> In confronting the issue the Court held the statute unconstitutional on the grounds that it “purport[ed] to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action.”<sup>71</sup> The *Brandenburg* Court continued by making an often over-looked distinction between advocating the use of force and preparing others for violent action.<sup>72</sup> The imminence and incitement tests of *Brandenburg* are not necessary hurdles to overcome for the lawmaker wanting to regulate mere preparation for an act of violence. As such, the courts have evaluated a series of “instruction” or “how-to” cases differently than they have mere advocacy cases.<sup>73</sup> The series of instruction manual cases are crucial to understanding how bomb-making instructions on the Internet can be regulated. However, the series is often ignored when discussing the exceptions to First Amendment protection.

B. *Internet Is an Excellent Test Vehicle for Limits and Constraints on First Amendment*

The First Amendment is the greatest bastion of individual freedom. With few exceptions, people in the United States are secure in their political advocacy; free from fear of governmental repression. The distinctly American tradition of free speech will undoubtedly survive whatever challenges the digital age places in its way. However, the tradition of free expression comes with a commensurate responsibility to use discretion in the content of speech. Often, new technologies upset the equilibrium of what is considered acceptable and unacceptable. One commentator noted that “[t]echnology always moves ahead of society’s moral

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70. *Id.* at 449.

71. *Id.*

72. DEPARTMENT OF JUSTICE, *supra* note 1, at 23. (“The Court drew a sharp distinction between ‘the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence’ and ‘preparing a group for violent action and steeling it to such action.’”) (quoting *Brandenburg v. Ohio*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961))).

73. See *infra*, PART V.B.1.

and ethical judgments, giving rise to a cultural lag.”<sup>74</sup> As the technology changes, people become unsettled as the moral judgment of the community and the law attempt to catch up with the changes wrought by new technology. In the American tradition, the free speech implications of technology are being debated with a vigor not previously seen with other technologies. “The TV wars are over. The new wars are going to be brutal.”<sup>75</sup>

The brutality of the First Amendment debate over the Internet stems from the fact that the Internet is “a vehicle for core, ‘raw’ political speech.”<sup>76</sup> At first blush, the fact that technology automatically preserves a “record” of speech betrays the difficulty in deciphering which types of speech are outside constitutionally permissible boundaries. The courts have not provided a great deal of guidance on this issue either. The dearth of direction from the judiciary exists even with legal issues that have well-developed non-Internet analogues (*e.g.* hate speech). “Although the intersection of law and the Internet promises to be one of the more fascinating legal developments in the early part of the 21st century, to date relatively few court cases have addressed hate speech on the Internet.”<sup>77</sup>

Because the Internet has the ability to fundamentally alter the way we interact with one another, “free expression is at an important crossroads.”<sup>78</sup> As expected, positions are nearly polarized with some parties advocating zero restriction on Internet speech and others arguing for heavy regulation. As in most situations, the real debate will occur somewhere in the middle of these positions. The Internet is uniquely different from any other previous media. However, nothing in the structure of the Internet justifies an abandonment of the basic principles of First Amendment jurisprudence. “The point to remember is that basic constitutional principles do not arise and disappear as each new technology comes on the scene.”<sup>79</sup> In fact, part of the value

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74. Gloria Goodale, *Battles Over Media Violence Move to a New Frontier: The Internet*, CHRISTIAN SCIENCE MONITOR, Nov. 18, 1996, at 10 (quoting Richard Gelles, director of the Family Violence Research Program at the University of Rhode Island).

75. *Id.*

76. LIPSHULTZ, *supra* note 24, at 11.

77. ANTI-DEFAMTION LEAGUE, *supra* note 38, at 6.

78. LIPSHULTZ, *supra* note 24, at 2.

79. Tribe, *supra* note 14, at A29. Professor Tribe humorously notes that the Supreme Court has learned from experience not to conjure up a new category of jurisprudence for every technology. He observed that “[e]arly in the 20th century, the Supreme Court expressed doubt that free-speech principles had any application at all to motion pictures, and in 1981, Justice Byron White

of our First Amendment is that its protection transcends the target forum and quality of speech.<sup>80</sup>

While preserving our most fundamental principles, we must be mindful that First Amendment jurisprudence is less clear than we like to pretend.

There has not actually yet evolved a juridical consensus as to how the First Amendment immunizes (or fails to immunize) speech on this new and somewhat intimidating medium . . . . [T]he issues are still so new that no distinct 'majority' view has had time for its views to set in the public imagination.<sup>81</sup>

A portion of this ambiguity in First Amendment jurisprudence and the Internet is caused by the fact that the technology is simply too new for any real consensus to emerge. Supreme Court Justice David Souter went so far as to say, "In my ignorance, I have to accept the possibility that if we had to decide today just what the First Amendment should mean in cyberspace, we would get it fundamentally wrong."<sup>82</sup>

However confusing the First Amendment's application to cyberspace, we must note that the judiciary is used to dealing with this type of confusion. "New media have repeatedly presented challenges to the First Amendment . . . that have clouded the jurisprudence and diminished only as society . . . has grown familiar and more accepting of them."<sup>83</sup> For this very reason, regulation of violent content on the Internet provides a brilliant test case for First Amendment law. "In terms of legal issues, the Internet provides unique opportunities to better unveil the limitations of and constraints on free expression."<sup>84</sup>

## V. AIDING AND ABETTING

The primary mechanism for aiding and abetting prosecutions is 18 U.S.C. § 2,<sup>85</sup> which contains general provisions for aiding and abetting. "That statute in its essence provides that 'those

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introduced his analysis of a law regulating outdoor billboard advertising by saying, 'We deal here with the law of billboards.'" *Id.*

80. *Id.* ("The same First Amendment that safeguards the right of Nazis to march through Skokie protects the right of an adult to put virtual machine guns aimed at lifelike human targets on his or her computer screen.")

81. WIRENIUS, *supra* note 25, at 196.

82. LIPSHULTZ, *supra* note 24, at 2 (quoting Justice David Souter of the United States Supreme Court in 1997).

83. WIRENIUS, *supra* note 25, at 182.

84. *Id.* at 9.

85. Specific analysis of the proposed Feinstein amendment under 18 U.S.C. § 2 is discussed *infra*, Part V.B.2.



who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing the crime.’”<sup>86</sup> Although courts have found people guilty of aiding and abetting in analogous situations,<sup>87</sup> “there is some question whether aiding and abetting culpability can ever rest solely on the basis of general publication of instructions on how to commit a crime.”<sup>88</sup> Although somewhat unconventional in analysis, the best vehicle for effectively combating the dissemination of bomb manuals on the Internet is through enhancements to current aiding and abetting laws.

### A. *Aiding and Abetting Statutes*

The distribution of bomb-making manuals over the Internet poses a very different First Amendment question than other forms of violent content. With bomb-making manuals, more than advocacy is conveyed. Rather, the manuals provide a precise set of directions for creating and detonating devices in contravention of innumerable federal, state and local laws. One critic observed that distributing bomb-making guides is “not quite like yelling ‘Fire’ in a theatre; they do not cause harm in a purely reflexive or automatic manner. Instead, they change the mix of ideas and information in the heads of the speaker’s audience.”<sup>89</sup> To this end, bomb-making instructions are unlikely by themselves to meet the imminence and incitement tests of *Brandenburg*. But, despite the fact that they are entitled to some protection, they are:

not entitled to the same level of protection to which speech advocating ideas is entitled because it is rarely part of any dialogue about what is true or what ought to be done. Distributing such materials doesn’t try to persuade anyone to take a course of action, but instead provides the means for committing a crime.<sup>90</sup>

Therefore, policy makers can employ traditional avenues of prosecution for offenders enabling others to commit crimes with instruction manuals.

To prosecute under a conspiracy charge, the government must prove that the actor did more than simply provide bomb-

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86. See DEP’T OF JUSTICE, *supra* note 1, at 12 (quoting the U.S. Supreme Court holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 181 (1994)).

87. See *infra* Part V.B.2.

88. *Id.*

89. Tribe, *supra* note 14, at A29.

90. *Id.*

making information.<sup>91</sup> The DOJ has observed the improbability of successfully prosecuting a disseminator under existing conspiracy statutes.<sup>92</sup> To that extent, this Note argues that the best alternative for regulating this content is through existing aiding and abetting statutes and the proposed Feinstein amendment.

### B. *Development of Instructional Advocacy Jurisprudence*

The courts have substantially developed instructional advocacy jurisprudence over the previous fifty years. It is important to understand the evolution of jurisprudence on the general topic of "instruction manuals" in order to extrapolate holdings to the Internet context. In a series of holdings, the judicial system affirmed that speech is not protected if it is the vehicle of the crime. In this regard, the aiding and abetting statutes provide the most feasible means of prosecuting people who provide the means, and in some cases justification, for others to build and utilize explosive devices.

#### 1. Speech Unprotected Where Vehicle of the Crime

In *Giboney v. Empire Storage & Ice Co.*, the Court held that the right to free speech does not extend to the commission of illegal ends.<sup>93</sup> In *Giboney*, a union attempted to build support for a picket by inducing ice distributors to stop selling ice to nonunion ice retailers.<sup>94</sup> The Court awarded the *Giboney* plaintiffs an injunction that prohibited union members from picketing around a particular building. The defendants claimed that the pickets were a constitutionally permissible form of free speech in that they were attempting "peacefully to publicize truthful facts about a labor dispute."<sup>95</sup> However, the Court found that the speech could not be isolated in a vacuum. Although the union actions involved speech, they were part of a concerted effort to "compel Empire to agree to stop selling ice to nonunion peddlers,"<sup>96</sup> an offense under Missouri law at the time. Noting that the injunction did little more than prevent the defendants from breaking a state law, the Court observed that "[i]t has rarely been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part

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91. DEP'T OF JUSTICE, *supra* note 1, at 11.

92. *Id.*

93. *Giboney v. Empire Ice & Storage Co.*, 336 U.S. 490 (1949).

94. *Id.* at 494.

95. *Id.* at 498.

96. *Id.*

of conduct in violation of a valid criminal statute."<sup>97</sup> The Court's holding in *Giboney* set the course for regulating speech that effectively breaks the law or aids others in so doing. Other courts have used the rhetoric of the *Giboney* decision in similar cases.

In *Ohralik v. Ohio*, the Court affirmed the previous holding in *Giboney* and noted that criminal conduct is no less criminal simply because it takes the form of words.<sup>98</sup> In *Ohralik*, the defendant was an attorney who made an in-person solicitation for legal services to the victim of a car accident in the hospital.<sup>99</sup> The rules of the Ohio Bar prohibited such in-person solicitations, and the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio found that the defendant was guilty of violating the rules and sanctioned him with a public reprimand. The defendant contended that the First Amendment protected his speech. The Court recited its rhetoric from *Giboney* that speech "used as an integral part of conduct in violation of a criminal statute" does not fall within the ambit of constitutional protection.<sup>100</sup> The Court's decision in *Ohralik* is significant because it appears to be one of the first occasions after *Giboney* where the notion of criminal "speech acts" was affirmed.

The Court continued to maintain the distinction between advocacy speech and speech as an instrument in the facilitation of a criminal offense. In *Brown v. Hartlage*, the Court held that although an agreement to commit an illegal offense may contain associational elements, the use of words alone does not secure First Amendment protection.<sup>101</sup> In *Brown*, a local political candidate made a promise to raise the salaries of certain government officials if he was elected.<sup>102</sup> A state law prohibited the practice of promising material benefits to electors in exchange for votes. Although the candidate retracted the promise, he was later sued for violation of the state law. At trial, the candidate maintained that his promise was protected by the First Amendment. The Supreme Court disagreed and held that whatever advocacy value his speech had was severely trumped by the criminal elements involved in it. The Court noted that "[a]lthough agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without

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97. *Id.*

98. 436 U.S. 447.

99. *Id.* at 449.

100. *Id.* at 456 (quoting *Giboney v. Empire Ice & Storage Co.*, 336 U.S. 490, 502 (1949)).

101. 456 U.S. 45 (1982).

102. *Id.* at 47.

trenching on any right of association protected by the First Amendment.”<sup>103</sup> The Court went on to note that “[t]he fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech.”<sup>104</sup> After *Brown*, the Court’s opinion on the unprotected nature of speech used in the facilitation of a criminal offense was clear. Successive cases upheld and proverbially codified the Court’s position.<sup>105</sup>

### C. Bomb-Making Manuals as Aiding and Abetting

#### 1. Instruction Manuals as Proof

The most notable decisions finding publishers of instruction manuals guilty of aiding and abetting dealt with tax evasion and drug manufacturing. These decisions were handed down in the late 1970’s and early 1980’s. It took until 1997 for the analytical reasoning to be applied to fact patterns similar to the publication of bomb-making instructions.

In 1978, the Eighth Circuit Court of Appeals handed down its decision in *United States v. Buttorff*.<sup>106</sup> In *Buttorff*, the defendants held several public and private meetings with employees of a tractor plant in Iowa. At the meetings, the defendants challenged the constitutionality of the graduated income tax and recommended the filing of false income tax returns.<sup>107</sup> As a consequence of the meetings, several attendees testified that “they submitted false or fraudulent forms because of the defendants’ recommendations, advice or suggestions.”<sup>108</sup> The defendants were charged and convicted of criminal aiding and abetting under 18 U.S.C. § 2, and asserted a First Amendment defense on appeal. In affirming the conviction, the *Buttorff* court noted that explanations of how to avoid withholding of taxes went “beyond mere advocacy of tax reform.”<sup>109</sup> The language in the decision is subtle, but started a demonstrable break from the traditional

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103. *Id.* at 55.

104. *Id.*

105. See *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (quoting *Giboney v. Empire Ice & Storage, Co.*, 336 U.S. 490, 498 (1949)); *New York v. Ferber*, 458 U.S. 747, 762 (1982) (quoting *Giboney*, 336 U.S. at 498); *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) (“Contrary to the apparent logic of appellant’s contention, speech is not protected by the First Amendment when it is the very vehicle of the crime itself.”).

106. 572 F.2d 619 (8th Cir. 1978).

107. *Id.* at 622.

108. *Id.*

109. *Id.* at 624.

analysis that the Supreme Court established in *Brandenburg*. The *Buttorff* court noted that the Supreme Court "has distinguished between speech which merely advocates law violation and speech which incites imminent lawless activity . . . . The former is protected; the latter is not."<sup>110</sup> Given the citation to the *Brandenburg* distinction, it would appear that the inquiry should have stopped. However, the *Buttorff* court went further. It noted that "[a]lthough the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform."<sup>111</sup> The significance of the dichotomy should not be overlooked. The *Buttorff* court suggested that the threshold for constitutionally unprotected lawless advocacy may be lower than that mandated in *Brandenburg*. In essence, the *Buttorff* court intimated the notion of some middle ground of activity that is more than mere advocacy and less than that which would incite imminent lawless activity. Although a subtle distinction in the context of the *Buttorff* decision, courts in later years have embraced the concept.

Less than two years after the *Buttorff* decision, the Eighth Circuit heard a case with strikingly similar factual circumstances. In *United States v. Moss*,<sup>112</sup> the defendant was convicted of criminal aiding and abetting after he gave speeches challenging the constitutionality of federal income tax laws. As in *Buttorff*, the principals in the case asserted that the defendant's speeches motivated them to file fraudulent income tax returns.<sup>113</sup> The defendant claimed that he was merely "espous[ing] a political cause aimed at changing the tax law in the United States."<sup>114</sup> Again, however, the First Amendment defense to this type of activity did not persuade the Eighth Circuit. Rather than parsing the individual tenets of the defendant's defense, the court merely quoted in block from *Buttorff* and affirmed the conviction.<sup>115</sup>

These two tax evasion cases could have been isolated uses of criminal aiding and abetting laws against publishers of instructions on how to violate the law. Both cases originated and were resolved within the Eighth Circuit. Both cases dealt with tax fraud and involved personal contact with the primary criminal actors. However, the use of aiding and abetting laws to combat criminal "how-to" manuals spread to the Ninth Circuit only two years later.

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110. *Id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

111. *Id.*

112. *United States v. Moss*, 604 F.2d 569 (8th Cir. 1979).

113. *Id.* at 570.

114. *Id.* at 571.

115. *Id.*

In *United States v. Barnett*,<sup>116</sup> the Ninth Circuit heard the appeal of a defendant charged under aiding and abetting laws with disseminating an instruction manual for making phencyclidine (PCP). In *Barnett*, the police arrested the suspect for possession of PCP and related paraphernalia, including an instruction manual entitled *Synthesis of PCP—Preparation of Angel Dust*.<sup>117</sup> After interrogating the suspect, the police discovered that he had ordered the manual through the mail from a periodical. The suspect provided the police with the name and address of the defendant, who supplied him with the manual. After investigating the periodical, the police identified the defendant as the author of the material and charged him with violating 18 U.S.C. § 2. In his defense, the defendant maintained that he had a First Amendment “right to disseminate and exchange this information through the mails even if the recipients use the same for unlawful purposes.”<sup>118</sup> The First Amendment defense did not move the court. Rather, it challenged the syllogism on which the argument was based. The Court noted that:

Barnett appears to argue as follows: (1) The [F]irst [A]mendment protects speech including the printed word. (2) Barnett sells printed instructions for the manufacture of phencyclidine. (3) Therefore, the First Amendment protects Barnett’s sale of printed instructions for the manufacture of phencyclidine. This specious syllogism finds no support in the law.<sup>119</sup>

The court went on to note that “[t]he [F]irst [A]mendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.”<sup>120</sup> Most significantly, the Ninth Circuit cited the decision in *United States v. Buttorff* as the guiding precedent for the decision.<sup>121</sup>

In applying this series of decisions, many commentators have remained skeptical about the application of aiding and abetting laws to those who distribute to the public at large, with limited knowledge of the actual recipients/principal criminal offenders. The *Barnett* court dealt with this issue by referring to the *Buttorff* decision. The court noted that in *Buttorff* “the defendants had virtually no personal contact with the persons who filed the false income tax returns.”<sup>122</sup> Rather, the inquiry

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116. *United States v. Barnett*, 667 F.2d 835 (9th Cir. 1982).

117. *Id.* at 837.

118. *Id.* at 842.

119. *Id.*

120. *Id.*

121. *Id.* at 842–43.

122. *Id.* at 843.

turns on traditional notions of aiding and abetting; whether or not the publisher shared in some way with the intent to commit a crime.

## 2. *Rice v. Paladin*

When the DOJ produced its 1997 report, it relied heavily on a district court opinion in *Rice v. Paladin*.<sup>123</sup> In *Rice*, the district court granted summary judgment for a publisher of a book entitled "Hit Man" which gave systematic instructions on how to assassinate persons without detection. The plaintiff in *Rice* filed a wrongful death action against the publisher of the book, Paladin, after a reader of the book committed a triple murder.<sup>124</sup> In its decision, the district court applied the *Brandenburg* incitement standard and held that the instruction manual was constitutionally protected under the First Amendment.<sup>125</sup> When the DOJ published its advisory opinion on the constitutionality of regulating bomb-making instructions on the Internet, it noted that in light of *Rice v. Paladin*, "it is necessary to consider carefully the First Amendment questions that a statute like the Feinstein Amendment would raise."<sup>126</sup> The DOJ unfortunately did not have the luxury of waiting for the appeals process to run its course. Within seven months of the publication of the DOJ report, the Fourth Circuit reversed the district court's decision in *Rice v. Paladin*.<sup>127</sup> This new decision veritably rolled out the red carpet for adoption of the Feinstein Amendment.

In an extensive opinion, the Fourth Circuit Court of Appeals reversed the district court's decision in *Rice*. The court began its opinion with an abridged reprint of the "Hit Man" publication.<sup>128</sup> After incredulously reviewing the findings of fact in the lower court,<sup>129</sup> the court held:

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123. 940 F. Supp. 836 (D. Md. 1996).

124. *Id.* at 838.

125. *Id.* at 846.

126. DEP'T OF JUSTICE, *supra* note 1, at 18.

127. 128 F.3d 233 (4th Cir. 1997).

128. *Id.* at 235-39. The court's recitation of the content of the "Hit Man" publication is significant. As a student reading the constitutional issues involved in this area of the law, it is easy to forget about the content itself. Although First Amendment jurisprudence appears to be predicated on the assumption that one's particular opinion of certain content is irrelevant to the constitutional decision calculus, reading the content is important to understand the advocacy value of any form of speech.

129. *Id.* at 242.

Notwithstanding Paladin's extraordinary stipulations that it not only knew that its instructions might be used by murderers, but that it actually *intended* to provide assistance to murderers and would-be murder-

Because long-established caselaw provides that speech—even speech by the press—that constitutes criminal aiding and abetting does not enjoy the protection of the First Amendment, and because we are convinced that such caselaw is both correct and equally applicable to speech that constitutes civil aiding and abetting of criminal conduct . . . we hold . . . that the First Amendment does not pose a bar to a finding that Paladin is civilly liable as an aider and abettor.<sup>130</sup>

The *Rice* court based its decision largely on the series of decisions holding that words can be used to aid or abet the commission of a criminal offense.<sup>131</sup> The court observed that “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”<sup>132</sup>

### 3. Prosecution Under *Rice v. Paladin* Theory

#### a. *Prosecution Under Existing Laws*

Although federal prosecutors are gun-shy in the wake of *Reno v. ACLU*, they should feel comfortable if prosecuting publishers of these manuals today. The *Rice* decision opened the door for prosecution of these perpetrators. Until *Rice*, prosecutors had difficulty overcoming First Amendment challenges and proving the requisite intent for aiding and abetting. Fortunately for them, authors that publish this type of information on the Internet often brandish their intentions on their web page. Although intent is still difficult to prove, federal prosecutors have much fodder with which to work.

Under the *Rice* decision, prosecutors can successfully prosecute a publisher of aiding and abetting under 18 U.S.C. § 2(a).<sup>133</sup> Section 2(a) provides that “[w]hoever commits an offense against the United States or aids, abets, counsels, com-

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ers which would be used by them ‘upon receipt,’ and that it in fact assisted Perry in particular in the commission of the murders . . . the district court granted Paladin’s motion for summary judgment.

*Id.*

130. *Id.* at 242–43.

131. *Id.* at 244 (“Indeed, every court that has addressed the issue, including this court, has held that the First Amendment does not necessarily pose a bar to liability for aiding and abetting a crime, even when such aiding and abetting takes the form of the spoken or written word.”).

132. *Id.* at 243 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

133. 18 U.S.C. § 2(a) (2000).



mands, induces, or procures its commission, is punishable as a principal."<sup>134</sup> To prove the case for aiding and abetting, the government must prove that the defendant had a 'purposeful attitude' and participated in the unlawful action in some manner.<sup>135</sup> After the *Rice* decision, prosecutors can build this case in an incremental fashion. First, citing the *Giboney-Ohrlik-Brown* trilogy, prosecutors can defeat any First Amendment challenges. Because speech used as the vehicle of a crime is not protected speech, prosecutors need only demonstrate that providing an instruction manual is deemed to be participation in the criminal act. Second, prosecutors can employ the *Buttorff-Moss-Barnett* trilogy as precedent for convicting criminals of aiding and abetting under 18 U.S.C. § 2 for providing instructions on how to commit a crime. Once prosecutors demonstrate that instruction manuals are unprotected speech and can satisfy an aiding and abetting charge, prosecutors have a more difficult hurdle to leap. "A harder question is whether aiding and abetting can be established with even less direct connection between the aider and the principals."<sup>136</sup> However, prosecutors are strongly positioned on this argument for two reasons. First, the government successfully prosecuted the *Barnett* and *Buttorff* defendants although the aider had limited or no personal contact with the principals. No cyberspace case has yet suggested that aiding and abetting principals are different on the Internet than in real space. Second, Internet publishers have a tendency to wear their intentions on their sleeves. Perhaps the anonymity of the Internet provides false security to web publishers, but this Note has argued that web publishers feel few constraints about voicing their true motivations. For example, one instruction manual site opened with the phrase, "This site was designed for everyone who have [sic] been victimized or wronged in any way. Here you will find revenge schemes, tactics, ideas, tips and guidance that would scare or pester most offenders [sic] into surrender."<sup>137</sup> This type of boldness is not uncommon on the Internet.<sup>138</sup> As the courts

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134. *Id.*

135. See, e.g., *United States v. Baumgarten*, 517 F.2d 1020, 1027 (8th Cir. 1975), cert. denied 423 U.S. 878 (1975).

136. See DEP'T OF JUSTICE, *supra* note 1, at 33 n. 24.

137. AVENGER'S FRONT PAGE 1, available at <http://www.ekran.no/html/revenge/> (last visited Nov. 27, 2001)

138. The sociology behind the boldness is curious. Some web publishers appear to feel they are a voice for the silent masses. By publishing instruction manuals on the Internet, they somehow participate in a grander scheme of justice. One site prefaced the manual with a quote from Genghis Kahn saying, "Oh people, know that you have committed great sins. If you ask me what proof I have for these words, I say it is because I am the punishment of God. If

have eased the magnitude of specific intent required for aiding and abetting, similar statements will undoubtedly help build successful cases of intent.

*b. Adoption of the Modified Feinstein Amendment*

The DOJ proposed the adoption of the Feinstein Amendment with modifications.<sup>139</sup> The DOJ's formulation was different in two significant regards. First, it narrowed the intent requirement such that a defendant must have a specific purpose of "facilitating criminal conduct" or they must know that a "*particular* recipient intends to make improper use of the material."<sup>140</sup> Second, the modified proposal broadened the scope of illegal offenses by including information on the "use" of explosives as distinct from information on the mere "creation" of explosives.<sup>141</sup> These proposed revisions are modest, but substantially lessen the possibility of a First Amendment challenge while increasing the number of perpetrators that can be charged under the statute.

The DOJ proposed its revisions over three years ago. Nothing in the legislative history of the Feinstein Amendment suggests that Congress has even looked at the legislation since it was killed in committee. However weary Congress may be with regulating the Internet, action is needed to plug this hole in our aiding and abetting jurisprudence. Congress should adopt the revised Feinstein Amendment in whole.

## VI. CONCLUSION

World Trade Center, New York City. Murrah Federal Building, Oklahoma City. Columbine High School, Littleton. Three very public massacres should remind us of the dangers of publicly disseminating bomb-making information. In two of those situations, there was strong evidence that perpetrators procured explosives information from the Internet. Congress and federal prosecutors should stand idly by no longer.

Recent concerns about the First Amendment implications of certain types of Internet regulation are no longer warranted. Although the Supreme Court sent a clear message regarding the constitutionality of obscenity regulations, the case is very different for bomb-making instruction manuals. The courts have

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you had not committed great sins, God would not have sent a punishment like me upon you." *See id.*

139. *See* Appendix B; *See also* DEP'T OF JUSTICE, *supra* note 1, at 29.

140. *Id.* at 29-30.

141. *Id.* at 30.

established the blueprint for successfully prosecuting publishers of these Internet mayhem manuals. The *Rice v. Paladin* decision provides prosecutors with a playbook for deterring the propagation of bomb-making instruction sites while avoiding nonsuits due to First Amendment protection. Congress should enact the modified Feinstein Amendment and encourage federal prosecutors to seek out those who enable these and future massacres.

## APPENDIX A

## "The Feinstein Amendment"

141 Cong. Rec. S7682 (daily ed. June 5, 1995)

S. 735

It shall be unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person intends or knows, that such explosive materials or information will likely be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce.

## APPENDIX B

*"DOJ Proposed Modification to Feinstein Amendment"*

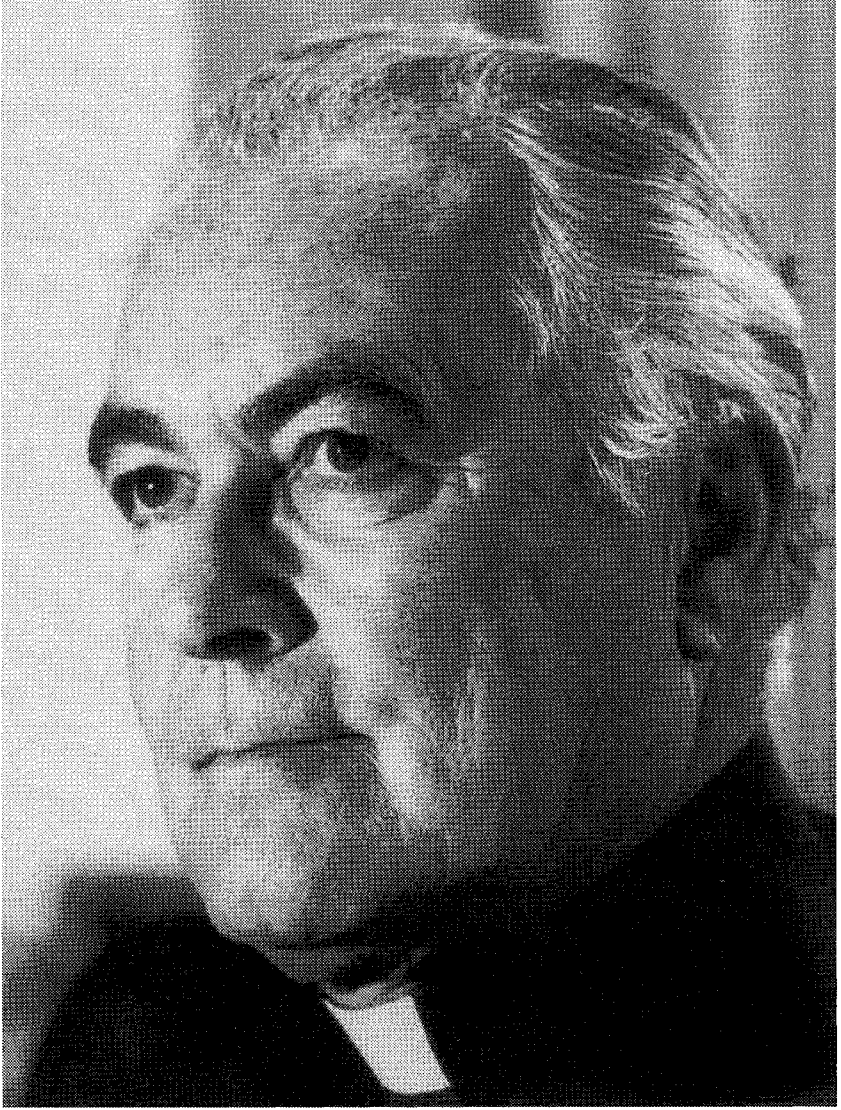
available at <http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html#VIC> at Section V (c) (last visited November 26, 2001)

It shall be unlawful for any person—

(a) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of such an explosive, device or weapon, intending that such teaching, demonstration or information be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a State or local criminal offense affecting interstate commerce, or

(b) to teach or demonstrate to any particular person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any particular person, by any means, information pertaining to, in whole or in part, the manufacture or use of such an explosive, device or weapon, knowing that such particular person intends to use such teaching, demonstration or information for, or in furtherance of, an activity that constitutes a Federal criminal offense or State or local criminal offense affecting interstate commerce.

For purposes of this section, the term "explosive" has the meaning set out in 18 U.S.C. § 844(j). The term "destructive device" has the meaning set out in 18 U.S.C. § 921(a)(4). The term "weapon of mass destruction" has the meaning set out in 18 U.S.C.A. § 2332a(c)(2).



*Rev. Theodore M. Hesburgh, C.S.C.*

