One Click to Suicide: First Amendment Case Law and its Applicability to Cyberspace

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by

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To my parents,
for their support and encouragement.

To Dr. Dale Herbeck,
for his guidance and leadership.

To all those who have read countless drafts and versions,
thank you.

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CHAPTER ONE:

CYBERSPACE, HARM-INDUCING WEBSITES, AND THE FIRST AMENDMENT

Suzanne Gonzales: A Tragedy, Case Study, and Legal Problem

It was unexpected. It would devastate. It would forever change existence into "before" and "after." It was an email: simple and succinct, but one that would strike a blow to the senses, as Mike and Mary Gonzales read the email from their daughter Suzanne: "Dear Mom, Dad, and Jennifer: I will make this short, as I know it will be hard to deal with. If you haven't heard by now, I have passed away."[1]

Suzanne, their nineteen-year-old, with the radiant smile, full college scholarship, and network of caring friends, ended her life alone in a hotel room just a few miles from her college dorm. Suzanne expertly mixed a fatal cocktail of potassium cyanide, ended her life, and broke the hearts of those who loved her.

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[1] CNN, "Parents: Online Newsgroup Helped Daughter Commit Suicide," http://www.cnn.worldnews.printhtis.clickability.com/pt/cpt?action=cpt&title…%2F2005%2FUS%F11%2FO4%2Fsuicide.internet%2Findex.html&partnerID=2006 (accessed November 9, 2008). See also: San Francisco Gate, "A Virtual Path to Suicide: Depressed student killed herself with help from online discussion group," http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/06/08/MN114902.DTL&type=printable (accessed November 9, 2008).

Sadly, Suzanne's story is not unique. The Centers for Disease Control and Prevention report that approximately 4000 people between the ages of 15 and 24 commit suicide each year, establishing suicide as the third leading cause of death among young people.[2] Suzanne's story, however, does contain a vital difference – days after her suicide, it was discovered that Suzanne frequented a website called "ASH: Alt.Suicide.Holiday – Methods File" and posted her intentions on the site, complete with a "countdown clock" to the date of her death.[3] Her intentions were visible to all viewers, some of whom may have encouraged Suzanne to execute her plan. The website, in addition to providing her a means to publicize her plan, facilitated her suicide because Suzanne followed the step-by-step instructions pertaining to potassium cyanide, her chosen method of death, and ended her life. Inherent in Suzanne's tragic story is a larger legal question: Are dangerous websites, such as those containing explicit suicide instructions like "Methods File," protected under First Amendment freedom of expression qualifications? Historically, the medium of cyberspace has posed unique problems in terms of freedom of speech, since the worldwide web is unlike any other form of communication. The First Amendment protects political speech and works of satire or parody from punishment, but the First Amendment does not afford protection to expression that is obscene, defamatory, commercial, or speech that incites lawless action. Questions have been raised about the place of cyber expression – where on the free

[2] CNN.

[3] "The Methods File," http://www.depressed.net/suicide/suicidefaq/index.html (accessed May, 2009).

speech spectrum does Internet communication fall? No cases exist which address the question of free expression within cyberspace:

> 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. A few decisions, accompanied by a spate of law review articles and books have, it is true, come forward, but the issues are still so new that no distinct "majority" view has had time for its views to set in the public imagination, let alone to be integrated into our increasingly rickety constitutional consensus.[4]

The case study of Suzanne Gonzales emphasizes the legal problem that no case law addressing the question of free speech within cyberspace exists, and neither legal decisions nor regulations have been extended to the Internet. Various attempts to regulate the Internet, including the Communications Decency Act (CDA), Child Online Protection Act (COPA), and the Child Pornography Prevention Act (CPPA), have either been undecided or struck down by the courts as vague, overbroad, and failing the strict scrutiny test.[5] Although the Acts were created with the intention of combating sexually explicit speech, the underlying principle is that attempts to regulate website content have been undermined, and no precedent exists for cyberspace monitoring. Regardless of content, whether the site contains sexually explicit speech or harm-facilitating material,

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[4] John Wirenius, *First Amendment, First Principles: Verbal Acts and Freedom of Speech* (New York: Holmes & Meier, 2000), 196.

[5] *Reno v. ACLU*, 521 U.S. 844 (1997), *Ashcroft v. ACLU*, 535 U.S. 564 (2002), and *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

the important principle illustrated by the CDA, COPA, and CPPA is that the Internet currently poses problems to legislators in terms of regulation.[6]

Most legal analysis, when attempting to address the unique challenges posed by the Internet, has considered whether the websites "incite" unlawful conduct, an approach consistent with case law concerning expression that incites imminent lawless action.[7] Issues in terms of applicability arise, however, when attempting to utilize the framework presented by the incitement approach. A new means of addressing the problem is linked to an approach likening harmful speech on the Internet to instruction manuals that aid and abet, a framework not considered in legal analysis to date. Case law exists regarding *print* instructional manuals that counsel in criminal or dangerous behavior, and many of these manuals share characteristics found within Internet websites such as "Methods File." Further, although the case law pertaining to print instructional manuals established that First Amendment protection does not apply to speech that aids and abets in criminal behavior, the courts have failed to explicitly define the content that comprises an instructional manual. Expression relating to instructional manuals serves as an example of speech that does not have a clearly defined legal definition. The need exists to provide a legal definition of the components of instructional manuals, and it may be argued that the narrow view of what constitutes instructional manuals should be extended to websites that share similar components in instructing in harmful or fatal activities. A clearer

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[6] 521 U.S. 844 (1997), 535 U.S. 564 (2002), 535 U.S. 234 (2002).

[7] *Brandenburg v. Ohio,* 395 U.S. 444 (1969), *Hess v. Indiana,* 414 U.S. 105 (1973), *Herceg v. Hustler Magazine*, 814 F. 2d 1017 (5th Cir. 1987), *People v. Rubin*, 96 Cal. App. 3d (Cal. Ct. Appl. 1979), and *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982).

definition of an instructional guide would provide for application of the law to dangerous websites on a case-by-case basis and would avoid making overbroad, sweeping laws that may unnecessarily censor websites that deserve First Amendment protection.

The idea of explicit definition also comes into play regarding case law pertaining to speech that aid and abets, and advocates criminal activity; case law has not distinguished between speech that *actually* aids and abets, and speech that may only *advocate* criminal activity. Dangerous or harmful websites share many characteristics to print instructional manuals; therefore it may be argued that the best legal treatment for dangerous websites that aid and abet is to place them within a *pre-existing category* of law, because the courts have not provided a clear conceptual framework regarding Internet communications of a harmful or dangerous nature.

Breadth of Cyberspace: Breadth of the Problem

The medium of cyberspace is, without debate, a powerful resource in the field of communication, yet the tragic case of Suzanne Gonzales illustrates that the mere click of a mouse, however, may also yield graphic and disturbing content leading to unlawful activity and even death. Consider:

1. On an empty stomach, take a small glass of cold tap water. (Not mineral water nor any sort of juice or soda water because of its acidity).
2. Stir 1 → 1.5 grammes of KCN [potassium cyanide] into the water. More than that causes irritation to the throat.
3. Wait 5 minutes to dissolve.
4. It should be drunk within several hours.

5. Consciousness will be lost in about a minute.
6. Death will follow 15 - 45 minutes later.[8]

(Complete entry for Cyanide may be found in Appendix A.)

This information, posted on the "Methods File" website, and utilized by Suzanne Gonzales in ending her life, is available to anyone, anytime, with the mere click of the mouse. The site achieved national prominence after the San Francisco Gate, in a June 8, 2003 article entitled "A Virtual Path to Suicide," reported that the fourteen suicides attributed to the site are "listed by the group as 'success stories' but cannot be verified: the individuals used anonymous screen names, and the group has refused to disclose their true identities."[9]

"Methods File" is, unfortunately, not the only dangerous Internet site in cyberspace, as other numerous and unregulated websites exist that counsel in dangerous or criminal behavior. A computer mouse serves as the key that will unlock the Pandora's box of destructive, violent, and potentially fatal behavior, such as instructions on the alternate methods to manufacture explosives, guns and silencers. Sites exist containing instructions on how to make bombs from tennis balls, mailboxes, or fertilizer, along with the best method of blowing up bridges. The "Anarchist's Cookbook," for example, is an Internet site brimming with advice pertaining to approximately one hundred and forty topics, including "Counterfeiting Money," "The Art of Lock-picking," "Electronic Terrorism," "Fuse Bomb," Portable Grenade Launcher," and "How to Kill Someone with

[8] "The Methods File."

[9] San Francisco Gate.

Your Bare Hands."[10] There are web sites, such as "House of Thin,"[11] that are pro-anorexic, and contain instructions on the acquisition and maintenance of eating disorders. All these sites are accessible by a single click of the mouse. Further, a simple Google exercise yields an immense, troubling number of such sites, illustrating the breadth and depth of the issue. Six specific sites have been selected for assessment, which represent the three types of websites found in cyberspace, whether it be protected, unprotected, or ambiguous under the qualifications of the First Amendment. Sites have been chosen for examination because of their characteristics and placement along the free speech spectrum. Further, the categories of websites coincide with the law, as divisions can be made between websites *deserving* First Amendment protection, sites that are *unsheltered* under the First Amendment, and sites that are *ambiguous* and offer dual-uses. An examination of each site is necessary to demonstrate the broad reach of the legal problem, as well as the various types of harmful websites existing in cyberspace.

A classification of such sites serving as examples of egregious material found on the Internet is warranted; the six sites to be examined can best be categorized by the notion of a spectrum, ranging from sites that *should not* be protected under the First Amendment, to websites that *should* be offered the shelter of free speech qualifications, with ambiguous sites falling in between. "Methods File" and the "Terrorist's Handbook" are the first two sites to be examined; they contain expression without value, and are, from all angles of analysis, negative, harm-facilitating sites. "Methods File" and the

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[10] "The Anarchist's Cookbook," http://home.scarlet.be/comicstrip/anarcook/indanarcook.html (accessed July, 2009).

[11] "House of Thin," http://www.houseofthin.com (accessed November 9, 2008).

"Terrorist's Handbook" fall at the end of the spectrum as content containing illegal instructions that result in harm.

The next sites to be examined are those containing expression that may be characterized as tasteless but within the bounds of the First Amendment, and include websites such as "House of Thin" and "Word Press/Blog about: Deviant Sex." Extending the discussion of the analysis represents examination of the other end of the free speech spectrum, as pro-anorexic or pro-deviant sex blogs are *not* illegal.

A final exploration pertains to sites raising questions of ambiguity under First Amendment protections and restrictions; the "Anarchist's Cookbook" and the "Homemade Drugs" websites represent examples of dual-use expression that are *not solely* illegal, and users may find instructions for legal activities within the site; these sites function as the middle of the spectrum of analysis. The extensive number of such sites indicates the breadth of the legal problem, and emphasizes that a legal remedy is not only advised, but necessary.

Harm-Facilitating Websites

"The Methods File"

"The Methods File" may be considered a type of social networking site, as the original site contained blogs and message boards. Ellen Luu describes the characteristics of social networking sites, which may aid users, but may also provide detailed instructions that result in harm:

> Online social networking websites such as MySpace, Facebook, and other newsgroups and message boards provide users with a unique way to socialize. Users create profiles, post pictures, and contribute to web-based discussions to maintain relationships. Newsgroup users form online communities based particularly around certain topics where they can find "a valuable source of information, support and friendship." They share not only political opinions and daily musings, but also very personal struggles and concerns.[12]

Luu emphasizes the social nature of certain networking sites, but also cautions that the benefits are countered by many harmful or dangerous outcomes. She utilizes a site such as "Methods File" as an example: "Individuals suffering from depression may find a community message board…Unfortunately, these individuals may also find community groups that trade detailed information on how to commit suicide as well as provide psychological and emotional encouragement for suicide."[13]

The problem of web-assisted suicide is growing, and statistics indicate that the practice is becoming more widespread: "While statistical information on how many people in the United States have visited these websites and subsequently committed suicide is limited, an estimated fifty-nine people in Japan in January 2005 committed

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[12] Ellen Luu, "Web-Assisted Suicide and the First Amendment," *Hastings Constitutional Law Quarterly* 36 (2009): 307. See also: Brian H. Holland, "Inherently Dangerous: The Potential for an Internet-Specific Standard Restricting Speech That Performs a Teaching Function," *University of San Francisco Law Review* 39 (Winter 2005), 353-411.

[13] Luu, 307.

suicide after visiting similar websites."[14] Japan is not the only country with statistical information detailing suicides; Luu also cites the United Kingdom as a country in which the rates of suicide are increasing with use of websites such as the "Methods File:" "In the United Kingdom, these websites have been implicated in the deaths of at least sixteen young people in the years leading to 2006."[15]

Statistics suggest that web-assisted suicides are occurring more frequently; further, websites detailing the best methods on suicide have certain characteristics:

> Perhaps the ease with which web-assisted suicide can occur justifies the determination that there is a compelling interest. Cyber-speech promoting suicide (1) is instantaneous, (2) provides for wide dissemination, (3) bridges distance, and (4) provides for anonymity - factors that make cyber-stalking dangerous and which provide important considerations for the drafting of cyber-stalking statutes.[16]

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[14] Luu, 308.

[15] Luu, 308.

[16] Luu, 325. See also: Brian H. Holland, "Inherently Dangerous: The Potential for an Internet-Specific Standard Restricting Speech That Performs a Teaching Function," *University of San Francisco Law Review* 39 (Winter 2005), 353-411, in which he argues that the nature of the Internet allows for the creation of smaller communities composed of individuals isolated from society because of a particular characteristic or trait (such as depression); cyberspace offers such individuals the opportunity to connect with other marginalized members of society.

Luu also details the ease through which the social networking features provide users with the means to contact other site frequenters: "Individuals can send information and instructions on how to commit suicide through e-mail, chat rooms, and instant messaging nearly instantaneously."[17] The networking aspects provide a level of social accessibility, but also allow for distribution to a wide audience: "With the use of websites, chat rooms, and community boards, individuals can distribute information and instructions on how to commit suicide to a wide group of particularly vulnerable individuals."[18]

Further, interactive websites pertaining to suicide are often removed from societal discourse, due to the fact that society may place a stigma upon verbally discussing taboo topics such as suicide. Discussing the issue with friends, peers, or other similarly-afflicted individuals provides a level of comfort, as Luu further emphasizes:

> These individuals may suffer from depression or suicidal thoughts and may not want to speak to friends, family, or psychologists. Instead, they can interact with people from all over the world who are willing to discuss and instruct on how to commit suicide. The online social networks are particularly compelling due to the public's discomfort with suicide. Many do not discuss or openly encourage suicide so the topic is shrouded with secrecy and stigma. However, on the internet, individuals can overcome hesitation or unwillingness and provide information and instruction under the "veil of anonymity."[19]

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[17] Luu, 325.

[18] Luu, 325. See also: Holland.

[19] Luu, 325.

For individuals suffering from depression, anonymity provides a level of secrecy, but also raises an extreme level of danger, for other users may target a particularly vulnerable individual and encourage the completion of suicide: "Anonymity also allows individuals to monitor the activities of vulnerable users. They can watch the emotional and psychological progress of an individual and provide encouragement and instruction for committing suicide when that individual is most vulnerable."[20] The harm extends even further, however, and can often involve cyber-stalking, a more severe form of Internet misuse: "In an even more frightening scenario, individuals can adopt methods used in cyber-stalking to encourage suicide. For example, an elicitor can recruit a third party to anonymously provide information and encouragement to a person the elicitor knows is contemplating suicide."[21]

The archived site of ASH, known as the "Methods File," meets several of these criteria, and describes its purpose as "containing information on many different ways to end your own life."[22] Selection of a site such as "Methods File" represents website content that advocates harm, and "Methods File" is *not* ambiguous in terms of free speech questions because no possibility exists that this site may be interpreted as being beneficial in any sense, for any user.

Suzanne, armed with the information obtained from the site, posted that potassium cyanide was her selected method of death. Further, she posted many warnings about her intended course of action in the weeks preceding her death, with "count-down"

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[20] Luu, 325.

[21] Luu, 325.

[22] "The Methods File."

references to the actual day of the suicide, so there could be no ambiguity regarding her intentions. The "Methods File" is still in existence, and its graphic, explicit contents and instructions are available for any individual with Internet access.

Content in the "Methods File" is organized in two sections, "Death by Poisons," and "Death by Non-Poisons," and the website homepage includes a "Preamble," written by the site's creator, directed towards those opposed to the instruction of suicide. The custodian of the site writes:

> Comments on the content of the file are welcome, generally speaking. If your comments are of the kind "You shouldn't help people kill themselves, you should help them towards a better life instead," you're wasting your time. I've grown very tired of that debate, and will probably no longer reply to mail with that general content. The most basic difference in opinion between me and those who have emailed me telling me I'm a monster, seems to be that they think that death is an inherently Bad Thing, while I don't.[23]

The "Methods File," consistent with the tone indicated in the preamble, is written in declarative sentences with little or no emotion behind the destructive instructions, which are clearly stated, and organized in bullet fashion. Content is explicit and includes general instructions to those contemplating suicide, along with "helpful hints," as found in the discussion of dissolving fatal doses of pills with alcohol: "Alcohol helps dissolve the drugs. Don't drink any beforehand, but wash the tablets down with vodka or similar, and then drink afterwards while you're still conscious."[24] Further, the site offers users

[23] "The Methods File," Preamble.

[24] "The Methods File," Methods: Poison.

effective counter-measures, suggesting an anti-histamine for the vomiting that accompanies the ingestion of large doses of pills. In addition, "Methods File" counsels users to "use a large airtight plastic bag over your head plus something around your neck to hold it on," as such a measure "transforms a 90% certainty method into a 99%."[25] Practical logistics are addressed as well, as the site advises that the day best suited for suicide is Friday, since "nobody will miss you until Monday if you work. Bolt all the doors if you can. Say you'll be out over the weekend visiting someone, so people don't expect a reply to telephone."[26]

Clarity and organization permeates the site, and the Poisons section, for example, is divided into groups by name, along with corresponding information regarding necessary fatal dosage, certainty of success, time taken to kill, availability, and additional notes. Elements of the entry for cyanide, or the poison utilized by Suzanne Gonzales in ending her life, demonstrate the breadth and depth of available information, with detailed, specific information such as doses, "Dosage: 50 mg Hydrogen Cyanide gas, 200-300 mg Cyanide salts," and time requirements for death: "seconds for HC, minutes Cs (empty stomach) hours (full s)."[27] Additional notes include methods of ingestion of cyanide to ensure the best success rates:

> It helps to have an empty stomach (since the salts react with the stomach acids to form H.C.). A full stomach can delay death for up to four hours with the salts. Antidotes to cyanide poisoning exist, but they have serious side effects. What you

[25] "The Methods File," Methods: Poison.

[26] "The Methods File," Methods: Poison.

[27] "The Methods File," Methods: Poison.

> can do, is instead of taking the salts directly, drop 500mg or so into a strong acid, and inhale the fumes. This will be pure Hydrogen Cyanide, and you should die in 10 to 20 seconds.[28]

Information, consistent with the details for the cyanide entry, is also posted for many other drugs, including aspirin, acetaminophen, sleeping tablets, alcohol, bleach, petrol, insecticide, rat poison, potassium chloride, and carbon monoxide; there are approximately seventy total entries contained in the Poisons sections.

Similarly, various methods are presented in the "Methods Other Than Poison" section, with instructions provided for alternative methods of suicide, such as hanging, asphyxiation, jumping, slitting wrists, bullets, decapitation, drowning, and electrocution. Step-by-step, detailed instructions are as explicit as found in the Poisons section, and are structured in similar manner, with subheadings relating to time to kill, availability, certainty of death, and general notes. The imperative nature of the site is reflected, for example, in the instructions regarding the specific ammunition choice needed to produce a successful outcome:

> Lots of will power needed to fire gun ('hesitation marks' are bullets/pellets embedded in the wall, when you jerk the gun as you fire). Bullet can miss vital parts in skull, deflect off skull. If you have a choice, use a shotgun rather than a rifle or a pistol, since it is so much more effective. ("shotgun" entry later). Ammunition to use is: .458 Winchester Magnum, or soft-point slugs with .44 Magnum. Also you could use a sabot round, which is a plastic wedge with a smaller thing in it. These rounds are rather overkill, the phrase "elephant gun" has

[28] "The Methods File," Methods: Poison.

> been used about the .458 Winchester, but if you're going to go, do it with a bang. Note, people usually survive single .22 shots to the temples. The other problem with guns is that it is bloody messy. Your next of kin will really enjoy cleaning up after you, washing the coagulated blood & brains out of corners etc.[29]

Use of the imperative verbs underscore the instructional and commanding nature of the "Methods File," and the detailed instructions are presented in an authoritative manner that is particularly dangerous because it implies credibility. The authoritative tone of certainty is also evident in the section entitled "Death by Asphyxiation," where readers may view a table of hanging drop heights based on the individual's weight.

The clear instructions and easy accessibility of information contained on the "Methods File" website, particularly the cyanide entry, arguably aided Suzanne Gonzales in her death. Questions arise regarding violence-conducive speech, particularly as they result in consequences as drastic and tragic as those of Suzanne Gonzales. Frederick M. Lawrence explains:

> When we seek to locate the boundaries of freedom of expression with respect to violence-conducive speech, we face a clear dilemma. How can we limit speech based solely on some evaluation of its consequences, yet how can we fail to take consequences into account?"[30]

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[29] "The Methods File," Methods: Other Than Poisoning.

[30] Frederick M. Lawrence, "Violence-Conducive Speech: Punishable Verbal Assault or Protected Political Speech?," in *Freedom of Speech and Incitement Against Democracy*, ed. David Kretzmer and France Kershman-Hazan (The Hague, Netherlands: Kluwer Law International, 2000), 11.

Mike Gonzales emphasizes the consequences when he termed "the knowledge, the tools, their psychological encouragement" the equivalent of "brainwashing," and argued that "they are not being held responsible."[31] Even the name of the site, "The Methods File," reiterates and is indicative of its sole purpose: the provision and dissemination of information and instructions on the various and most effective methods of ending one's life.

The case of Suzanne Gonzales thus represents an opportunity to examine the larger legal questions regarding freedom of speech and the feasibility of cyber content regulation; her tragic story suggests that web-assisted suicides represent new concerns linked to the nature of the Internet, and Ellen Luu cautions law-makers about the difficult First Amendment problem raised by websites assisting users in suicide:

> Cyber-speech used to provide information about suicide and to promote suicide is a new concern that has arisen with the changing nature of internet use and the increasing prevalence of internet use in our daily lives. Just as lawmakers have reacted to the threats of cyber-stalking and cyber-harassment by modifying existing legislation or drafting new legislation, they should act similarly with the new threat of cyber-speech for suicide promotion. The factors that made cyber-stalking particularly problematic, including dangers accompanied with anonymity, wide dissemination, instantaneous dissemination, and the narrowing of proximity, are present in the use of the internet to promote suicide. Because cyber-speech that promotes suicide does not fall neatly into traditional categories of unprotected speech, legislators must pay careful attention to what the proposed

[31] CNN.

> legislation intends to prohibit. A statute that prohibits general information about suicide or suicide methods posted on internet community boards or social networking sites may in fact violate the First Amendment. However, a statute that prohibits intentionally and knowingly providing information and methods for committing suicide through interstate commerce to a specific recipient who has implicitly or explicitly indicated a desire for such information, with the intent and knowledge that the recipient uses that information to commit suicide, may survive First Amendment scrutiny.[32]

"Methods File," while serving as a case study on one end of the free speech spectrum to indicate the dangers inherent in certain Internet websites, also illustrates the harm-facilitating nature of such websites and the legal problems posed by the existence of pro-suicide sites and instructions. A similar problem is raised by the "Terrorist's Handbook," a site which counsels users on bomb and explosive-making.

"The Terrorist's Handbook"

Websites detailing instructions regarding bombs and explosives, projectile weapons, rockets, or cannons represent another uncharted aspect of cyberspace; these websites have grown unchecked during the rise of the Internet and indicate that the legal problem centering upon harm-facilitating websites extends beyond just the "Methods File," a single site. The "Terrorist's Handbook" functions as an example of a website

[32] Luu, 328.

counseling users on a broad range of illegal activities.[33] While the site begins with a disclaiming notice, the custodian does acknowledge the ease with which anyone, anywhere, with a click of a mouse, *could*, in fact, utilize the information:

> Gunzenbomz Pyro-Technologies, a division of Chaos Industries (CHAOS), is proud to present this first edition of The Terrorist's Handbook. First and foremost, let it be stated that Chaos Industries assumes no responsibilities for any misuse of the information presented in this publication. The purpose of this is to show the many techniques and methods used by those people in this and other countries who employ terror as a means to political and social goals. The techniques herein can be obtained from public libraries, and can usually be carried out by a terrorist with minimal equipment. This makes one all the more frightened, since *any lunatic or social deviant could obtain this information, and use it against anyone.* (Italics added for emphasis.)[34]

The custodian of the website further states that the explicit instructions and information contained within the Terrorist's Handbook are posted publically so viewers can recognize the ease with which a terrorist may carry out his activities.

The Table of Contents, appearing after the Introduction, is exhaustive (See Appendix B for the complete Table of Contents), and includes major topics such as:

> 2.0 BUYING EXPLOSIVES AND PROPELLANTS
> 2.1 ACQUIRING CHEMICALS

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[33] "The Terrorist's Handbook," http://www.capricorn.org/~akira/home/terror.html (accessed August, 2009).

[34] "The Terrorist's Handbook," Introduction.

The Table of Contents indicates the breadth of illegal information contained within the "Terrorist's Handbook," and like "Methods File," the "Terrorist's Handbook" contains step-by-step, explicit instructions. The entry on acquiring chemicals illegally for constructing bombs emphasizes that the activities on which the site counsels readers are criminal in nature:

> The first section deals with getting chemicals legally. This section deals with "procuring" them. The best place to steal chemicals is a college. Many state schools have all of their chemicals out on the shelves in the labs, and more in their

[35] "The Terrorist's Handbook," Introduction.

> chemical stockrooms. Evening is the best time to enter lab buildings, as there are the least number of people in the buildings, and most of the labs will still be unlocked.[36]

"The Terrorist's Handbook" provides additional step-by-step instructions on the best means to enter a building to illegally procure chemicals for bomb-building:

> One simply takes a book-bag, wears a dress shirt and jeans, and tries to resemble a college freshman. If anyone asks what such a person is doing, the thief can simply say that he is looking for the polymer chemistry lab, or some other chemistry-related department other than the one they are in. One can usually find out where the various labs and departments in a building are by calling the university.[37]

The site cautions users about potential security systems in place but provides the means to circumvent detection, and even defines users of the instructions as "terrorists," indicating the illegality of such material:

> Terrorists check for security systems. If one just walks into a lab, even if there is someone there, and walks out the back exit, and slips the cardboard in the latch before the door closes, the person in the lab will never know what happened. It is also a good idea to observe the building that one plans to rob at the time that one plans to rob it several days before the actual theft is done. This is advisable since the would-be thief should know when and if the campus security makes patrols through buildings. Of course, if none of these methods are successful, there is

[36] "The Terrorist's Handbook," Acquiring Chemicals.

[37] "The Terrorist's Handbook," Acquiring Chemicals.

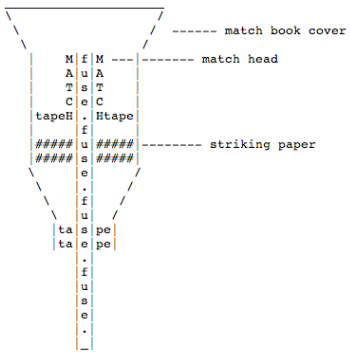
always section 2.11, but as a rule, college campus security is pretty poor, and nobody suspects another person in the building of doing anything wrong, even if they are there at an odd hour.[38]

The instructions on obtaining chemicals portray the tone of the site as conversational; the custodian or author of the information appears to simply be counseling viewers on the necessary methods to successfully engage in criminal activty. Noticeably absent, except for a single sentence in the disclaimer, are repeated warnings that the instructions are against the law. The instructions, further, besides being of a step-by-step nature, also contain illustrations to accompany written text with the intention of aiding the reader in his harm-facilitating activities. Consider the section of the site concerning fuse ignitions, as well as the subsequent print-screened illustration:

1. To determine the burn rate of a particular type of fuse, simply measure a 6 inch or longer piece of fuse and ignite it. With a stopwatch, press the start button at the instant when the fuse lights, and stop the watch when the fuse reaches its end. Divide the time of burn by the length of fuse, and you have the burn rate of the fuse, in seconds per inch.
2. After deciding how long a delay is desired before the explosive device is to go off, add about 1/2 an inch to the premeasured amount of fuse, and cut it off.
3. Carefully remove the cardboard matches from the paper match case. Do not pull off individual matches; keep all the matches attached to the cardboard base. Take one of the cardboard match sections, and leave the other one to make a second igniter.

[38] "The Terrorist's Handbook," Acquiring Chemicals.

4. Wrap the matches around the end of the fuse, with the heads of the matches touching the very end of the fuse. Tape them there securely, making sure not to put tape over the match heads. Make sure they are very secure by pulling on them at the base of the assembly. They should not be able to move.
5. Wrap the cover of the matches around the matches attached to the fuse, making sure that the striker paper is below the match heads and the striker faces the match heads. Tape the paper so that is fairly tight around the matches. Do not tape the cover of the striker to the fuse or to the matches. Leave enough of the match book to pull on for ignition. The match book is wrapped around the matches, and is taped to itself. The matches are taped to the fuse. The striker will rub against the match heads when the match book is pulled.
6. When ready to use, simply pull on the match paper. It should pull the striking paper across the match heads with enough friction to light them. In turn, the burning match heads will light the fuse, since it is adjacent to the burning match heads.



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[39] "The Terrorist's Handbook," Fuse Ignition.

Explicit, step-by-step instructions permeate the site and counsel the reader on exact dosage information, time needed to carry out the instructions, as well as list the necessary materials and equipment to break the law. The entries often resemble recipes in that they measure precise quantities, provide a listing of requisite items, and contain numbered steps.

The site concludes with a listing of available distributors and suppliers, and content is divided into two columns with the company name and address, as well as the materials sold at each location, emphasizing the idea that the information found on the site, which is accessible to anyone, can be further *acted upon* by purchasing the materials to create the explosives. Like "Methods File," the "Terrorist's Handbook" represents one end of the spectrum concerning Internet content, and would, arguably, almost *always* result in harm or death if the step-by-step instructions are followed.

Public interest in bomb information, found within the "Terrorist's Handbook's" instructions, has been increasing since tragic events such as the Oklahoma City Bombing, and concerns have arisen regarding the easy accessibility to bomb information, particularly in cyberspace. Rabbi Marvin Hier, of the Simon Wiesenthal Center in Los Angeles, an organization tracking hate groups, commented that while the First Amendment does apply to cyberspace, issues arise due to the far-reaching access of the web and wide availability of content:

> The Wiesenthal Center has located, both prior to and since the Oklahoma massacre, numerous 'recipes' for building bombs. Information once only available behind the counter of a few counterculture bookstores is now being promoted into millions of homes in America on a daily basis. Under our system

> of laws and freedoms, we are unable to stop the flow of such dangerous information to people bent on destruction…Cyberspace offers direct, instantaneous, cheap, mainstream communications in the marketplace of ideas. Further, young people – a target group for racists – are especially drawn to this cutting edge of technology.[40]

Sites such as the "Terrorist's Handbook" represent pressing legal concerns, which are increased by the nature of the Internet as a medium of communication. The "Terrorist's Handbook" is only one of many sites containing such explicit instructions. The bounds of the problem can be further explored by consideration of sites that represent expression falling on the opposite end of the free speech spectrum, such as websites that may be deemed tasteless or offensive.

Tasteless or Offensive Websites

"House of Thin"

"Methods File" and the "Terrorist's Handbook" represent websites found at one extreme end of the free speech spectrum, and may best be characterized as egregious sites unworthy of First Amendment protection. Examining websites on the *opposite* end of the continuum illustrates the broad range of website content found in cyberspace, and suggests that while certain content may be offensive or tasteless to some, the First Amendment *does* protect the expression. It is important to note the distinction between

[40] Jonathon Wallace and Mark Mangan, *Sex, Laws, and Cyberspace: Freedom and Censorship on the Frontiers of the Online Revolution* (New York: Holt, 1997), 165.

sites that contain inherent elements of *illegality* and sites that may merely be described as *tasteless* or *offensive*. Sites counseling users on illegal behavior include content relating to topics such as suicide, bomb-building, explosives, evading the law, or murder. Websites in cyberspace that fall under the category of tasteless or offensive are *legal* under the First Amendment, and do not contain discussion regarding activity that is against the law. While certain topics found within tasteless sites may be taboo within society, the First Amendment *does* offer the sites protection, provided the site does not contain child pornography or obscenity.

"House of Thin," a pro-anorexic website, is an example of a tasteless or offensive website found in cyberspace.[41] "House of Thin" contains discussion sections pertaining to eating disorders such as anorexia or bulimia, as well as links to external sites with additional information pertaining to body image. Further tools found within "House of Thin" include calculators to compute body fat percentage and body mass index, news articles, and support groups for those individuals afflicted with anorexia or bulimia.

Noticeably absent from "House of Thin" are tricks, tips, or "thinspiration" to assist users with the maintenance of an eating disorder. The site, instead, is informational in nature, and while some individuals may utilize the site to attempt to acquire an eating disorder, the website is more discussion-oriented and information-focused. While the site does not contain specific step-by-step instructions of the kind within "Methods File" or "Terrorist's Handbook," it is important to note that the site is included within the discussion of harm-facilitating websites because the emphasis of examination is upon sites that *contain the potential* to induce or facilitate harm. Although numbered steps are

[41] "House of Thin."

absent, the possibility still exists that an individual could utilize the information to their detriment, which accounts for the inclusion of "House of Thin" in the assessment of harm-inducing websites. The inclusion of such a site clearly illustrates the notion of a continuum pertaining to free speech, and suggests that its placement at the other extreme end as a mere tasteless or offensive website affords it First Amendment protection, in contrast to sites such as "Methods File" or "Terrorist's Handbook." Further, the bounds and range of the *type* of websites found in cyberspace are underscored with the assessment of a site such as "House of Thin." Additional sites, such as blogs concerning deviant sexual practices, also serve as examples of speech that may be characterized as tasteless or offensive, and further underscore the notion of a free speech spectrum.

"Word Press/Blog about: Deviant Sex"

An additional website that is characterized as tasteless or offensive expression concerns deviant sexual behavior, a type of website not uncommon in cyberspace. "Word Press/Blog about: Deviant Sex"[42] serves as an example of a website containing information pertaining to a variety of deviant sexual practices, such as intercourse with sheep or other animals. The site, presented in a blog format, is discussion-oriented and encourages users to become engaged in the interactive nature of the medium, as many users post questions and queries, and multiple threads, or strings of conversation, are not unusual. A heading proclaims that the site contains "Blogs, Pictures, and More!" and

[42] "Word Press/Blog about: Deviant Sex," http://wordpress.com/tag/deviant-sex (accessed November 9, 2008).

blogs are also found relating to topics such as "Real Doll Sex Machine." While the discussion of sex toys or dolls is often taboo within society, conversations within cyberspace, on a site such as "Word Press," remain protected under the First Amendment, because any instructions or information provided are restricted to *legal* material. Unless the content found within "Word Press" leads to criminal activity such as rape, it functions as expression falling at the opposite end of the free speech spectrum from "Methods File" or "Terrorist's Handbook;" while arguably tasteless or offensive, the site is, nonetheless, still deserving of the shelter of free speech.

Similar reasons pertaining to site inclusion parallel those offered for "House of Thin;" the important point to note is that the focus of scope is upon sites that *contain the potential* to induce or facilitate harm. Although numbered steps do not appear in "Word Press," likelihood still exists that an individual may view the site, process its contents, and utilize the information to their detriment by engaging in acts that *are* illegal, such as rape. Consider a featured article entitled "Sex Acts Required for Promotion;" the story details an instance in which "private security guards at the U.S. Embassy in Kabul were pressured to participate in naked pool parties and perform sex acts to gain promotions or assignment to preferable shifts, according to one of 12 guards who have gone public with their complaints."[43] Arguably, an individual viewing the "Word Press" website may view the article and decide that engaging in sexual acts, such as rape, is desirable or worthy because of the status or prestige gained by such a practice. "Word Press," thus, is a valuable inclusion within the examination of harm-facilitating websites because it illustrates the idea that a free speech spectrum best characterizes Internet

[43] "Word Press/Blog about: Deviant Sex."

communications, as well as underscores the notion that varying *types* of websites must be considered while constructing a viable legal solution.

Dual-Use Websites

"The Anarchist's Cookbook"

"The Terrorist's Handbook," along with "Methods File," serves as an example of a website falling on one extreme end of the free speech spectrum, and represents website content that is so egregious as to deem First Amendment protection unwarranted. In contrast, the "House of Thin" and the "Word Press" websites function as representations of content that should be afforded the shelter of free speech qualifications. Dual-use sites, however, fall between the two extremes of the free speech spectrum, and are more ambiguous in nature, especially since they contain both legal and illegal uses. Uncertainties arise relating to the means to prevent harmful, illegal uses from existing in cyberspace, while still affording protection to the legal, beneficial instructions.

A dual-use site such as "Anarchist's Cookbook" functions as an example of a classically ambiguous site in terms of the First Amendment, and perhaps represents the most well-known, infamous website in cyberspace. "The Anarchist's Cookbook," further, is recognized for the breadth of content found within the entries. The site is a simple one, containing links to approximately one hundred and forty instructional entries, ranging from "Electronic Terrorism," "Hacking," "Counterfeiting Money," "Credit Card Fraud," "How to Get a New Identity," and "Phone Taps."[44] The "Anarchist's

[44] "The Anarchist's Cookbook."

Cookbook," unlike the "Methods File" or the "Terrorist's Handbook," contains information that is dual-use in nature, and could be utilized in a legal *or* illegal fashion. The instructional topics, for example, may have socially constructive uses. Consider the entry pertaining to obtaining a new identity. An individual or family in danger of a predator or a violent ex-family member would benefit from utilizing the instructions contained in the section. While witness protection programs do exist and afford individuals shelter from a difficult or dangerous situation, having access to helpful instructions pertaining to the necessary steps to obtaining a new identity would assist an individual in a dire situation.

The ambiguous nature and dual-use characterization of "Anarchist's Cookbook" is further underscored when one considers that following the instructions contained in "Anarchist's Cookbook" will not *always* result in death or harm. Consider the entry on Computer Hacking, in which the author of the entry characterizes the diminishing number of devoted hackers as a problem; the author further describes a quality hacker as an individual who is lacking moral judgment:

> Welcome to the world of hacking! We, the people who live outside of the normal rules, and have been scorned and even arrested by those from the 'civilized world,' are becoming scarcer every day. This is due to the greater fear of what a good hacker (skill wise, no moral judgments here) can do nowadays, thus causing anti- hacker sentiment in the masses. Also, few hackers seem to actually know about the computer systems they hack, or what equipment they will run into on the front end, or what they could do wrong on a system to alert the 'higher' authorities who monitor the system. This article is intended to tell you about some

> things not to do, even before you get on the system. I will tell you about the new wave of front end security devices that are beginning to be used on computers. I will attempt to instill in you a second identity, to be brought up at time of great need, to pull you out of trouble. And, by the way, I take no, repeat, no, responsibility for what we say in this and the forthcoming articles.[45]

While the author does present a disclaimer, the overall tone of his introduction diminishes his warning, and instead indicates his superseding glorification of being a successful hacker, someone he describes as having a "second identity," with a lack of moral compass. The dual-use nature of the site is further emphasized when one considers the variety of purposes a tutorial on computer hacking may offer; arguably, some benefit exists in providing individuals with the means to hack into a computer. A situation concerning terrorist plans or perhaps a high schooler's scheme to plant a bomb within school walls might require skills of computer hacking to access the information and prevent such an attack before it occurs. Entries such as obtaining a new identity or computer hacking thus function as illustrations of potential beneficial aspects of the dual-use generalization of "Anarchist's Cookbook."

On the other hand, the site contains *illegal* uses as well, underscoring the classic ambiguity problem dual-use sites may raise. The "Anarchist's Cookbook," as does "Methods File" or "Terrorist's Handbook," also contains step-by-step instructions that are explicit, detailed, and presented in a chronological, authoritative fashion, which indicates the *harmful aspect* of the dual-use characterization of the site. Consider a portion of the entry for counterfeiting money:

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[45] "The Anarchist's Cookbook," Basic Hacking Tutorial II.

1. The press to use should be an 11 by 14 offset, such as the AB Dick 360. Make 2 negatives of the portrait side of the bill, and 1 of the back side.
2. After developing them and letting them dry, take them to a light table. Using opaque on one of the portrait sides, touch out all the green, which is the seal and the serial numbers. Now, make sure all of the negatives are registered (lined up correctly) on the flats.
3. Take a lithographic plate and etch three marks on it. These marks must be 2 and 9/16 inches apart, starting on one of the short edges. Do the same thing to 2 more plates.
4. Then, take 1 of the flats and place it on the plate, exactly lining the short edge up with the edge of the plate. Burn it, move it up to the next mark, and cover up the exposed area you have already burned. Burn that, and do the same thing 2 more times, moving the flat up one more mark. Develop all three plates. You should now have 4 images on each plate with an equal space between each bill.[46]

This excerpt contains details with exact measurements, as well as the specific supplies needed; the instructions regarding counterfeiting money conclude with the proper paper to utilize and the best methods of printing. Counterfeiting money, and corresponding instructions pertaining to the best methods to engage in such behavior, is *always* illegal, and emphasizes the *illegal* aspects or uses of the site.

It is important to note that the "Anarchist's Cookbook" represents neither extreme of the spectrum of speech found in cyberspace, because the information contained in the

[46] "The Anarchist's Cookbook," Counterfeiting Money.

entries is neither solely legal or illegal, and can be employed to obtain results that are either within or against the law. Eugene Volokh describes the legal dilemma arising from dual-use expression:

> We'd like, if possible, to have the law block the harmful uses without interfering with the legitimate, valuable ones. Unfortunately, the obvious solution – outlaw the harmful use – will fail to stop many of the harmful uses, which tend to take place out of sight and are thus hard to identify, punish, and deter.[47]

Volokh's words underscore the legal issues raised by certain content found in cyberspace, particularly dual-use sites such as the "Anarchist's Cookbook."

"Homemade Drugs"

Websites counseling readers on the manufacture of homemade drugs represent another type of expression found within cyberspace, and share similarities to "Anarchist's Cookbook" in that the instructions may result in either legal or illegal outcomes, depending on the purpose and use of each drug. The "Homemade Drugs Library" is an example of an additional site with dual-use applications. The ambiguity problem is similar to the issues raised by the "Anarchist's Cookbook" because instructions are found pertaining to both legal *and* illegal drugs.

[47] Eugene Volokh, "Crime-Facilitating Speech," *Stanford Law Review* 57 (March 2005): 1127.

The "Homemade Drugs" website is one containing a variety of sections, including topics such as Semi-Legal Recreational Drugs, Homemade Drugs, and Legal Drugs.[48] The Homemade Drugs section presents an introduction stating its purpose; the proper use of simple household ingredients will allow for ease of manufacturing drugs. Consider the Opium Poppy Seeds entry:

> Opium poppy seeds contain opiate alkaloids as found in opium. Opium is a very powerful narcotic substance from which heroin is derived. The raw substance required for this procedure is a handful of Opium Poppy Seeds, known by its botanical name Papaver Somniferum (Opium Poppy Flower). These are tiny round seeds that contain the opium alkaloid and can be found in gardening shops, online seed companies or specialised online retailers. It should be known that this substance is extremely addictive; an alternative exists by the name of the California Poppy which is a lot less addictive than Papaver Somniferum.
>
> 1. Once you have the seeds place a handful in a coffee grinder and reduce to a powdered substance.
> 2. For use adding tobacco, roll with rolling paper and smoke.
> 3. Alternatively, the powder can be used to make a herbal tea: simply add to hot water, dissolve and filter, do not boil the water with the powdered seed as it destroys the opium alkaloid.[49]

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[48] "Homemade Drugs," http://www.linkbase.org/articles/Homemade-Drugs.htm (accessed November, 2009).

[49] "Homemade Drugs."

In addition to the step-by-step instructions found within the site, the custodian of the site also provides links to online shops selling necessary supplies; the conclusion of the section regarding Magic Mushrooms, for example, has the link instructing site viewers to "Click HERE for an online shop selling Magic Mushroom supplies (in the shrooms section)."[50] This type of content represents the *illegal* applications of the website, for manufacturing opiates is behavior against the law.

The "Homemade Drugs" website, however, consistent with its dual-use characterization, contains instructions and information relating to material that is *not illegal*. The ambiguity problem raised by dual-use sites is again emphasized, because questions arise as to the means to regulate egregious, illegal material unprotected by the First Amendment, and information that *is* legal or contains societal uses. Sections within "Homemade Drugs" pertaining to "Drug Dealing" serve as examples of the First Amendment dilemma, and offer viewers information on several topics, including: "Police and Authorities," "Drug Dealers," "Drug Suppliers," "End Users," "Products and Manufacturers," "Funds and Profit," and the "Need for Security." Detailing the steps involved in the process of dealing drugs, as well as the functions and roles of each individual involved, the "Homemade Drugs" website provides helpful information for anyone either possessing mere curiosity about the process, or desiring instructions in order to become successfully engaged in drug dealing. Possessing similar characteristics to the "Anarchist's Cookbook," the "Homemade Drugs" website thus represents another example of a dual-use website found through the click of a mouse.

[50] "Homemade Drugs."

The six websites examined illustrate the larger legal problem that exists as it pertains to Internet communications; further, the websites, as part of the free speech spectrum, represent the variety of expression found within cyberspace. "Methods File" and "Terrorist's Handbook" functioned as extreme and egregious examples of speech falling at the end of the continuum, which would *not* be afforded protection under the First Amendment because of the impossibility of material being used in a beneficial manner. The "House of Thin" and "Word Press: Deviant Sex" websites represented expression that *would* be afforded free speech protection because of their instructions and discussion of *legal* behavior, while the "Anarchist's Cookbook" and "Homemade Drugs" websites illustrate dual-use applications for speech, and underscore the classic ambiguity problem as it relates to free expression. The issue pertaining to line demarcations and divisions between speech that is *protected* and speech that is *unprotected* is thus a *classic* problem under the First Amendment, which the nature of the web exacerbates. As the selection of websites indicates, certain expression appearing in cyberspace deserves the shelter of the First Amendment, while other harm-facilitating speech does not. A closer examination of the classic First Amendment problem, its protections and restrictions, and relation to the Internet is, therefore, necessary and warranted.

The Nature of the Web: A Classic First Amendment Problem

In Suzanne's case, the instructions posted on the suicide site led to activity that was not only tragically fatal, but also illegal, as do instructional sites that counsel on the manufacture of drugs and explosives, and all raise the larger legal question inherent in their content: when does speech lose the Constitutional protection afforded by the First

Amendment? Is harm-facilitating speech worthy of protection? The classic First Amendment problem, studied within the medium of cyberspace, has historically posed unique problems in the First Amendment legal framework because the Internet is unlike any other medium of communication.

Statistics indicate the growing influence of the Internet, and cyberspace, as it continues to grow and flourish, will only continue to raise further questions about its place on the legal spectrum. The technological changes responsible for the advent of, and evolution of cyberspace as a form of expression present distinctive challenges for the court of law, and these challenges will not diminish as the influence of cyberspace continues to expand. Statistics indicate the growing importance of the Internet as a medium of communication: "The growing ubiquity of this form of communication is breathtaking: in 1996, it was estimated that as many as 40 million individuals have access to the Internet, and that figure is expected to grow to 200 million by the end of the century."[51] Further, the number of adolescents who have public access to the Internet, particularly through their schooling system, is increasing: "Efforts made in the 1990s to improve public Internet access have been quite successful…By 1996, 65% of public high schools and 77% of public libraries had Internet links. In 1998, 84% of public libraries were connected to the Internet in some capacity, with 73% offering public access to the

[51] Wirenius, 195.

Internet."[52]

The nature of the Internet, and its wide availability, has presented unique problems in terms of content, particularly as it relates to First Amendment concerns. The protection of minors from physical or psychological harm is often utilized as a defense for regulation of the web, or even criminalizing online speech that results in harm; sexual expression on the web is often enumerated as an example of harmful speech in cyberspace. This justification was the basis for

> two criminal laws passed in the late 1990s by the United States Congress to control sexual expression on the Internet. The first law, the 1996 Communications Decency Act, or CDA, banned any "indecent" online communications that were "available" to minors, [which] was defined in the CDA basically as any words, ideas, or images depicting or describing sexual or excretory activities or organs, if deemed "patently offensive" according to "contemporary community standards." Because it unconstitutionally reduced the adult population of the Internet to writing, publishing, and reading "only what is

[52] Dina L. G. Borzekowski and Vaughn I. Rickert, "Adolescents, the Internet, and Health: Issues of Access and Content," in *Children in the Digital Age: Influences of Electronic Media on Development*, ed. Sandra L. Calvert, Amy B. Jordan, and Rodney E. Cocking (Westport, Conn.: Praeger, 2002), 71.

> fit for children," the CDA was invalidated as a violation of the First Amendment in *Reno v. ACLU*.[53]

Reno v. ACLU emphasizes the difference between *illegal* content and *harmful* content, which have differing treatments under the law. The First Amendment concerns raised by websites examined as case studies relate to the idea that harmful content cannot be criminalized by national laws, as illegal material can:

> The difference between illegal and harmful content is that the former is criminalized by national laws, while the latter is considered offensive or disgusting by some people but certainly not criminalized by national laws. So, within this category of Internet content, we are dealing with legal content which may offend some Internet users or content that may be thought to harm others, e.g. children with their accessing of sexually explicit content.[54]

This concern with sexually explicit content led the United States Congress to pass a second law criminalizing the expression:

> A second law, the Child Online Protection Act, or COPA, was passed in 1998. COPA criminalized a narrower category of speech than the CDA: instead of "indecent" or "patently offensive," the standard was now "harmful to minors," or "obscene as to minors." This was basically a variation – watered down for minors

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[53] Marjorie Heins, "Criminalizing Online Speech to "Protect" the Young: What are the Benefits and Costs?," in *Crime and the Internet*, ed. David Wall (New York: Routledge, 2001), 100.

[54] Yaman Akdeniz, "Controlling Illegal and Harmful Content on the Internet," in *Crime and the Internet*, ed. David Wall (New York: Routledge, 2001), 116.

> – on the three-part US test for constitutionally unprotected obscenity – that is, (1) whether, according to "contemporary community standards," the communication is designed to "pander the prurient internet"; (2) whether it depicts or describes sexual acts or nudity "in a manner patently offensive with respect to minors"; and (3) whether it "lacks serious literary, artistic, political, or scientific value for minors"… Yet it had the same basic legal flaw as the CDA: because of the economics and technology of the Web, it forced most speakers to self-censor their material to the level of a hypothetical minor – whether child or teenager was not clear…A federal judge in Philadelphia struck down COPA as a violation of the First Amendment.[55]

These concerns with content arise particularly because of the unique nature of the web as it exists as a medium of communication; the Internet may serve as a platform for any individual with any idea, and cyberspace allows for instant access and the availability of information at one's fingertips. Robert Corn-Revere eloquently describes the nature of the Internet, as well as its potential implications concerning the classic First Amendment problem, particularly as these factors relate to freedom of speech:

> The consensus thus far is that the Internet fulfills the ultimate promise of the First Amendment and should receive the highest level of constitutional protection. The Supreme Court found that the information available on the Internet is as 'diverse as human thought' with the capability of providing instant access to information on topics ranging from 'the music of Wagner to Balkan politics to AIDS prevention to the Chicago Bulls.' Judge Stuart Dalzell of the U.S. District Court

[55] Heins, 100.

> for the Eastern District of Pennsylvania characterized the Internet as 'a never-ending worldwide conversation' and 'the most participatory form of mass speech developed.' Judge Lowell Reed wrote that in 'the medium of cyberspace…anyone can build a soap box out of Web pages and speak her mind in the virtual village green to an audience larger and more diverse than any of the Framers could have imagined.' Another district court judge, noting that 'it is probably safe to say that more ideas and information are shared on the Internet than in any other medium,' suggested that it may be only a slight overstatement to conclude that 'the Internet represents a brave new world of free speech.'[56]

The important point established by the CDA, COPA, and CPPA is that the Internet receives a full measure of First Amendment protection, as the Acts were struck down as violations of free speech qualifications due to their overbreadth and vagueness. Consideration of the Acts is a necessary step in the discussion of harm-facilitating websites because the implication derived from the case law is that dangerous Internet sites cannot be dismissed as benign; they, too, receive full protection. The important First Amendment principles outlined by the case law concerning the CDA, COPA, and CPPA is that free speech ideas are generalized to the Internet, and the *Reno* case stands for the proposition that certain websites within cyberspace are protected.

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[56] Robert Corn-Revere, "Caught in the Seamless Web: Does the Internet's Global Reach Justify Less Freedom of Speech?," in *Who Rules the Net?: Internet Governance and Jurisdiction*, ed. Adam Thierer and Clyde Wayne Crews, Jr. (Washington, D.C.: Cato Institute, 2003), 220.

Questions arise, however, pertaining to *which types* of speech are given or denied protection of the First Amendment. The First Amendment problem emerges as a result of the breadth and depth of material existing in cyberspace, and as in non web-related litigation, questions relate to where demarcation lines are to be drawn. Illegal content is criminalized in a way that harmful material is not, but for types of websites that contain *both* types of content that may result in death or suicide, for example, what speech should be deemed protected or unprotected?

Despite the unique nature of the Internet, it is *crucial* to note that this First Amendment problem is the same. The underlying issue still relates to the *breadth and scope of the shelter* of the First Amendment: when is expression protected and when does it lose protection? The distinctive characteristics of cyberspace as a medium of communication do not diminish the *basic First Amendment issue* that still applies:

> Our infatuation with the wonders of the Internet and our proclivity to create new laws to regulate speech conveyed on the new media blind us from recognizing what should be an obvious fact. The very same questions about the scope and nature of freedom of expression that have plagued generations of citizens and legal scholars continue to trouble us today. More importantly, those problems don't appear to be going away anytime soon. A First Amendment maxim for the new millennium emerges: the more technology changes, the more free speech issues remain the same.[57]

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[57]Clay Calvert, and Robert D. Richards, "New Millennium, Same Old Speech: Technology Changes, but the First Amendment Issues Don't," *Boston University Law Review* 79 (October 1999): 959.

The notion that the First Amendment issues remain the same raises questions relating to cyber communications; when does speech lose its protection? The CDA, COPA, and CPPA line extended protection to speech within cyberspace, and attention must be turned towards specific attempts to regulate speech. An examination of the categories of speech that are both protected and unprotected under the First Amendment is thus warranted to determine where on the free speech spectrum Internet expression falls.

Categorical Approach

The limitations of both the protections and the restrictions of the First Amendment are always subjects of considerable scholarly and legal study due to the far-reaching implications established by case law, and the potential application of First Amendment standards to cyberspace is no exception. The classic First Amendment problem applies to Internet communications as well, and raises similar questions regarding both the categorical approach and whether harm-facilitating speech on the web should be afforded protection. The First Amendment protects political speech and works of parody or satire from punishment, but does not afford protection to expression deemed obscene, defamatory, or speech that is commercial in nature. Speech inciting lawless activity is also denied protection. This two-tier theory of the First Amendment suggests that two types of speech exist, and that *high-value speech* is worthy of First Amendment protection, while *low-value speech* is not. *Chaplinksy v. New Hampshire*, a 1942 case, concerned fighting words, and the case decision emphasized that fighting words are unprotected under the First Amendment. Justice Murphy, in the dicta of the decision, proceeded to elaborate upon theories of the First Amendment, and established this idea of

a categorical approach, or a framework in which speech would either be protected or unprotected based upon the label that is attached to the expression in question:

> 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 which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[58]

It is important to note, however, that the list established by *Chaplinsky* is only a *starting point* for First Amendment jurisprudence, and that certain types of speech have moved or changed categories; this state of flux is emphasized in the two-tier approach to the First Amendment. The theory behind the two-tier approach is that distinctions in the *value* of speech prevent speech dilution; treating child pornography in the same manner as public debate, for example, would erode the guarantees provided by the free speech protections, since a "lowest-common-denominator" framework would be adopted to encompass all types of expression. Geoffrey Stone further discusses the distinctions between high-value and low-value speech inherent within the two-tier theory, and explains that once a court has determined that speech is of a low value, it performs a categorical balancing test, through which it characterizes and describes the specific circumstances in which the

[58] *Chaplinksy v. New Hampshire,* 315 U.S. 568, 571 (1942).

speech may be restricted or regulated.[59] By contrast, in evaluating high-value speech, a court would not utilize a content-neutral balancing approach, but a *speech-protective* analysis that is further-reaching in its scope. Thus, low-value theory functions to preserve the autonomy of high-value speech from government regulation.[60]

Certain landmark cases relate to this categorical approach, and provide further guidance as to which types of speech are high-value or low-value under the Constitution. The state of flux within the two-tier approach is evidenced when one considers that an exploration of case law indicates that certain changes to low-value speech have surfaced, particularly through Supreme Court decisions. The list of low-value speech has both expanded to include commercial speech and incitement, and diminished, because lewd expression, while certainly not considered *high-value*, has moved *out* of the realm of low-value speech to be protected under the First Amendment.

An assessment of each category of speech established through case law is thus warranted. Further examination of the two-tiered approach, as well as the categories of high-value speech and low-value speech, is also necessary in order to demonstrate that cyber communications do not fit the characteristics of any unprotected category of speech. The difficulty in defining web-based communications that induce harmful behavior relates to demarcations and divisions, and the central question pertains to the *placement* of Internet communications.

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[59] Geoffrey R. Stone, "Content Regulation and the First Amendment," *William and Mary Law Review* 25 (1983): 189-252.

[60] Stone.

Brandenburg v. Ohio, a 1969 case, concerned speech advocating imminent lawless action, or expression that encourages *immediate* action against the law. *Brandenburg* outlined the theory that *abstract advocacy* is protected under the First Amendment, but *actual encouragement* is unprotected under free speech qualifications.[61] Incitement is thus closely linked to fighting words, as it is found to be low-value speech within the two-tiered framework of the First Amendment.

The 1973 case of *Miller v. California* concerned obscenity, and determined that obscenity is not afforded the shelter of the First Amendment because it is *low-value speech*. The defendant Marvin Miller was convicted for disseminating advertising brochures containing explicit sexual illustrations. Under California law, the judge instructed the jury to evaluate the prurience of the materials not according to national standards, but to state standards.[62] When the state court of appeals sustained Miller's conviction, the case progressed to the Supreme Court.

The Supreme Court established a new rule concerning obscenity, which changed the test of *Roth v. United States* by removing the "utterly worthless" requirement and defining "contemporary community standards" to mean state or local standards – not necessarily national ones. The *Miller* test has three prongs to determine whether a work is obscene:

(1) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;

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[61] 395 U.S. 444 (1969).

[62] *Miller v. California*, 413 U.S. 15 (1973).

(2) Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

(3) Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[63]

Miller, as a landmark case, established that obscene expression remains unprotected under the United States Constitution, and obscenity functions as an example of low-value speech.

New York Times v. Sullivan, another case within the categorical approach, concerned defamation, a second example of low-value speech. L.B. Sullivan, the commissioner of Public Affairs in Montgomery, Alabama, sued the *New York Times* for defamation, because under Alabama Law, published words are defamatory if they "tend to injure a person libeled by them in his reputation, profession, trade, or business." The Alabama jury awarded damages to Sullivan, and the *New York Times* appealed to the United States Supreme Court after the Alabama Supreme Court upheld their verdict against the newspaper.[64]

The Supreme Court reversed the decision, and in doing so, they extended the protection of the Constitution to defamatory speech of a certain type, that which criticized public officials in matters concerning their official conduct. However, the critical portion of the case decision to note was that defamatory speech is *not* protected if it was communicated with *actual malice*. Expression uttered with actual malice serves as an additional example of low-value speech under the two-tiered approach of the First

[63] 413 U.S. 15, 21 (1973).

[64] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

Amendment. The *Times-Sullivan* test thus established that legal action by public officials of libel would not be allowed in the courts of law unless the plaintiff assumed the burden of proof to show the defamation was communicated with actual malice, or "with knowledge that it was false or with reckless disregard of whether it was false or not."[65] Defamatory language, expressed with actual malice, is, therefore, low-value speech not protected under the First Amendment.

Fighting words, another type of unprotected speech within the categorical approach to the First Amendment, were addressed in *Chaplinsky v. New Hampshire*, and the case decision recognized that fighting words serve as a further category of low-value speech. Walter Chaplinsky, a Jehovah's Witness, was distributing materials on the streets of Rochester, New Hampshire, and he called the City Marshall a "God damned racketeer" and a "damned Facist." Chaplinsky was subsequently arrested and convicted of breach of peace. The Supreme Court unanimously upheld his conviction, rejecting the argument that his language was afforded protection by the Constitution. The Court ruled that fighting words were

> those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[66]

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[65] 376 U.S. 254, 280 (1964).

[66] *Chaplinksy v. New Hampshire,* 315 U.S. 568, 572 (1942).

Chaplinksy thus divided speech into two categories, worthwhile and worthless, or speech which is *protected* or *unprotected*, respectively. Worthless, or unprotected speech, includes fighting words; further, the *Chaplinsky* definition of "fighting words" encompasses both *fight-provoking* words, as well as *foul language* in general, which do not generally breach the peace or result in a fight. Fighting-words, therefore, as low-value speech, are worthless expression and remain unprotected.

Watts v. United States centers upon threats, another category of low-value, unprotected speech, which possess similarities to fighting words. At a political rally, Watts, the defendant, uttered the remark that "if they ever make me carry a rifle, the first man I want to get in my sight is L.B.J."[67] Watts was convicted under a federal law that made it illegal to "knowingly and willingly" threaten the life of the US President; the Supreme Court, however, decided that the threat was constitutional, since his speech did not prove to be a true threat. The Court classified Watts' expression as political hyperbole, which does not fall under the category of a "true threat."[68] Although the Court found Watts' speech to *not* be a threat, the case establishes the principle that a true threat, an example of low-value speech, is another category of speech that is unprotected under the First Amendment.

The categorical approach also applies to commercial speech, which is a final type of low-value speech that is not sheltered under the First Amendment. The 1976 case of *Virginia State Board of Pharmacy v. Virginia Citizens Council* established that First Amendment protection is not afforded to untruthful commercial advertising. Virginia

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[67] *Watts v. United States*, 394 U.S. 705, 706 (1969).

[68] 394 U.S. 705, 706 (1969).

law provided that a licensed pharmacist is guilty of unprofessional conduct if he publishes or advertises the price of any prescription drugs, and the Virginia Citizens Council challenged the statute as an unconstitutional infringement on the freedom of speech. The Supreme Court found the statute unconstitutional, and extended the First Amendment to advertising that had consumer interest and social interest, with the caveat that ads must advertise legal actions and be truthful:

> What is at issue is whether a State may completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information's effect upon its disseminators and its recipients. Reserving other questions, we conclude that the answer to this one is in the negative.[69]

Misleading or false commercial speech, therefore, is a category of low-value speech that is *not* protected under freedom of speech qualifications.

Just as the categorical approach deems certain speech *unprotected*, the two-tiered approach to the First Amendment has also recognized some types of expression to be *high-value speech,* and therefore *protected*. Classic examples of high-value speech include religious expression, political speech, reasoned, public discourse regarding societal issues and concerns, as well as works of literature. Because the expression is considered to have some value or purpose, as compared to child pornography, for example, the shelter of the First Amendment applies, and a *compelling interest* must be shown for the government to intervene and suppress such expression.

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[69] *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 773 (1976).

The categorical approach suggests that distinct limits and restrictions exist regarding First Amendment protection of certain expression; legal issues arise relating to sites such as "Methods File" or "Terrorist's Handbook," for they do not neatly fit into these pre-existing categories of law, nor is there a clear characterization of whether certain websites are high-value speech or low-value expression:

> Cyber-speech that promotes suicide does not fall neatly within these unprotected categories of speech. General information on different methods to commit suicide posted on the website may be protected speech. It is not obscene and does not constitute "fighting words" or incitement of immediate lawless action. In contrast, a web-post that directly responds to an individual's request for information on a specific method leads to a different conclusion. This speech may in fact be "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[70]

Speech on a harm-facilitating website cannot be classified as obscene, defamatory; nor can it be deemed fighting words, true threats, or even commercial in nature. Arguments have been made regarding classifying harm-inducing websites as speech that incites, but analysis demonstrates the ultimate inapplicability of the incitement framework. Where on the free-speech spectrum does Internet communication fall?

[70] Luu, 324.

Potential Frameworks for Application

Assessment of the legal problem indicates that despite the unique nature of the Internet, the First Amendment problem remains the same; further, assessment of the categorical approach would suggest that cyber-communications do not fit into any pre-existing categories of law. In recognition of the fact that Internet communications are unlike any other type of speech, two alternate frameworks have been suggested, particularly since harm-facilitating websites do not fit into traditional low-value speech categories.[71]

Pre-existing case law has suggested these approaches, and each framework implies a different method for addressing and targeting cyber-speech that facilitates harm. These approaches, developed through a chronology of case law, serve as varying schemes that may be utilized as a legal framework for application to dangerous Internet websites. One manner of addressing harm-facilitating websites is through an *Incitement Approach*, which likens certain websites to incitement, or encouragement of lawless action. Under this approach, two veins of cases exist, and concern theories of *Imminent Lawless Action* and *Copycat.* The *Instructional Approach*, a second framework for application, also recognizes the need to address harm-inducing websites, and draws similarities between instruction manuals (or printed guides), behavior that aids and abets, and website material containing specific instructions. Thus, within the Instructional Approach, two branches

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[71] See Eugene Volokh, "Crime-Facilitating Speech," *Stanford Law Review* 57 (March 2005): 1095-1222, in which he discusses the dilemma posed by Internet expression, and argues that no neat classification of harmful or dual-use speech exists.

of cases are found, and pertain to an *Aiding and Abetting Theory,* and an *Instruction Manual Theory*.

The Instructional Approach is a new framework, not suggested by legal analysis to date. Currently, most legal approaches do recognize that dangerous or harmful websites exist, and that the theories of free speech apply to cyberspace. However, most legal scholars attempt to place harm-facilitating websites in a certain category of protected or unprotected speech such as incitement, but issues pertaining to applicability are inherent in those alternate approaches. The Instructional Approach places speech deemed harmful in a new category by likening the expression to *instruction manuals*, which offers a unique solution not offered in prior research.

These alternate frameworks emphasize the concern that Internet communications cannot be neatly characterized as either high-value speech or low-value speech, and underscore the difficulties in resolving questions of the First Amendment as they pertain to the medium of cyberspace. An exploration of each potential framework is necessary to determine which approach is most applicable to harm-inducing websites.

CHAPTER TWO:

INCITEMENT AND INSTRUCTIONAL APPROACHES – LEGAL THEORY AND CRITIQUE

First Amendment protections or restrictions are particularly difficult to resolve in the medium of cyberspace, because the typical categorical approach has limitations due to the unique nature of the Internet. Websites such as "Methods File" and "Terrorist's Handbook," as particularly egregious expression, represent speech falling on one end of the free speech spectrum; "House of Thin" and the "Word Press" sites, while tasteless and offensive, serve as material falling on the opposite end of the continuum. "Anarchist's Cookbook" and "Homemade Drugs Library" function as examples of dual-use content, and raise questions regarding the best methods to address these problematic websites.

Concerns arise relating to the place of Internet communications on the free-speech spectrum. Specific case law addressing the issue of free expression on the Internet does not exist, particularly concerning sites that contain harm-facilitating speech; different approaches, however, have been suggested. The varying schemes may be utilized as a legal framework for application to dangerous Internet websites.

The schemes containing potential for website application are best divided into two broad approaches: the Incitement Approach, and the Instructional Approach, each containing two separate veins of case law. Within the Incitement Approach, two lines of cases exist: the Imminent Lawless Action Cases, and the Copycat Cases. Imminent lawless action case law concerns speech that encourages the audience members to

immediately engage in behavior against the law, while the copycat cases imply a degree of imitation or mimicry by receivers of media messages.

The Instructional Approach also contains two branches of cases: Aiding and Abetting Cases and Instruction Manual Cases. Aiding and abetting case law centers upon *actual assistance* by a speaker, instead of merely instructing or encouraging, while instruction manual cases serve as a specific category of case law under the aiding and abetting branch of legal theory. Messages under the Instruction Manual approach are *action-oriented,* as the speaker goes *beyond* assistance by providing comprehensive, printed guides to audience members.

However, despite suggestions of alternate frameworks, particular issues arise pertaining to *application* of the theories to harm-facilitating websites; three of the potential theories ultimately prove ineffective as a legal remedy because of certain inherent difficulties or limitations in extending the theory to the world-wide web. First, application of the legal theory of Imminent Lawless Action to cases arising as a result of harm-facilitating websites proves impossible, because of questions pertaining to *imminence*, *face-to-face* and *direct address communication*, as well as issues of *association* and *subsequent intent*. These requisite legal elements of incitement remain difficult to address within Internet communications due to the fact that many of these factors may be lacking within cyberspace. Assessment of this particular theory, therefore, indicates inapplicability on both the *conceptual* and *applied* levels.

A second proposed legal solution relates to application of the Copycat Theory to cyberspace, but like the Incitement Theory, application remains infeasible for reasons pertaining to *foreseeability*, *a close connection* between copycat behavior and creation of

a message, and the *value of the speech*. If this legal framework were adopted, courts would be unable to determine whether website creators owe a *duty of care* to the individuals who view the sites, and the copycat line of legal reasoning thus proves an ineffective legal remedy for the problem of harm-inducing websites, especially since many of the necessary legal elements are not found within cyberspace boundaries.

Finally, consideration of the applicability of the Aiding and Abetting Theory illustrates problematic aspects inherent within this legal framework as well; difficulties include the inability to prove the requisite factors of *actual assistance* or *acting knowingly* through Internet communications. Assessment of the aiding and abetting theory suggests that an aiding and abetting lawsuit would not be appropriate or possible for websites containing harmful material.

The fourth and final legal theory also contains problematic aspects as it is *currently conceptualized*, but offers *hope* for application to harm-facilitating websites, because a new legal remedy *can* be formulated to address potential issues of *underdevelopment* and *ambiguity*. Unlike the other suggested legal theories, a framework pertaining to Instruction Manuals offers a potential outlet through which harmful cyber-communications can be reached, without unnecessarily censoring websites deserving of First Amendment protection. A new legal solution would offer clarification and synthesis, which would, in turn, allow for *application* to dangerous sites within cyberspace.

A further exploration and assessment of the legal history of each line of cases is warranted to assess their applicability to harm-facilitating websites. Ultimately, however, it is the instructional manual approach that proves to be the most applicable.

Incitement Approach

Imminent Lawless Action Theory

Case Law

The notion of imminent lawless action, an idea established in the 1969 case of *Brandenburg v. Ohio*, provides the landmark decision concerning imminent lawless action, and serves as the culmination of a long line of Supreme Court cases concerning bad tendency and clear and present danger theories of speech.[1] Clarence Brandenburg, Ku Klux Klan leader in Ohio, engaged in a rally in a rural part of the state, and during his speech, threatened revenge upon the President, Congress, and the Supreme Court. His words included the possibility of revenge enacted upon "niggers," "Jews," and those who supported these groups, as well as the argument that the President and Congress continue to "suppress the white, Caucasian race." Brandenburg subsequently announced plans for a march on Washington to occur on the Fourth of July.[2]

Brandenburg was consequently prosecuted under an Ohio criminal syndicalism law that made it illegal to advocate the use of violence to accomplish reform of a political

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[1] *Schenck v. United States,* 249 U.S. 47 (1919), *Frohwerk v. United States,* 249 U.S. 204 (1919), *Debs v. United States,* 249 U.S. 211 (1919), *Abrams v. United States,* 250 U.S. 616 (1919), *Gitlow v. New York,* 268 U.S. 652 (1925), *Whitney v. California,* 274 U.S. 357 (1927), *Dennis v. United States,* 341 U.S. 494 (1951), and *Yates v. United States*, 354 U.S. 298 (1957).

[2] *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

or industrial nature. Similar syndicalism acts had been at the center of prior Supreme Court cases, such as *Whitney v. California*, in which Anita Whitney's conviction under the Act was upheld, since the Court found that she had engaged in speech that was a threat to society.[3] However, *Brandenburg v. Ohio* overturned the 1927 *Whitney* decision, and made the crucial distinction between the *advocacy* of ideas and the *actual encouragement* of illegal action. The per curiam decision established a two-pronged test for speech deemed threatening:

> The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy was directed to inviting or producing imminent lawless action and was likely to incite or produce such action.[4]

Thus, the speech in question must first invite someone to commit an illegal act, and must also be *likely* to produce such lawless action. Gregoy Askelrud summarizes the two-prong test established in *Brandenburg:*

> First, a court must consider whether the speech was directed to incite or produce imminent lawless action as opposed to mere abstract advocacy, not directed at producing any type of immediate behavior. Second, a court must consider the likelihood by determining whether the lawless activity is likely to occur as an immediate result of the speech. Therefore, the test as a whole forbids protection

[3] *Whitney v. California,* 274 U.S. 357 (1927).

[4] 395 U.S. 444, 447 (1969).

> of any speech that is directed to inciting or producing imminent lawless action and is likely to produce such action.[5]

The Court made the distinction between *abstract advocacy* of ideas, which is protected under the First Amendment, and the *actual incitement*, or encouragement, of lawless conduct, which is not afforded protection under freedom of speech qualifications. By requiring the government to prove that the danger presented in a speaker's words was not merely imaginary but instead *real* or *actual*, *Brandenburg* extended First Amendment protection to speech not previously protected. Thus, even speech considered "threatening" is provided protection, *unless* the state can prove that the advocacy is directed to inciting or producing imminent lawless action.

Determining whether speech contains the element of imminence is a difficult legal test, and imminence may be defined as "near at hand; mediate rather than immediate; close rather than touching; impending; on the point of happening; threatening; menacing; perilous."[6] Subsequent cases, occurring after *Brandenburg*, attempted to clarify the meaning of both imminence and incitement. The 1973 case of *Hess v. Indiana* further explained the nature of incitement by adding the requirement that the communication must be "face to face" and directed towards a specific individual or group. Case specifics pertain to Gregory Hess, who was arrested and convicted of disorderly conduct based upon his statement during an antiwar protest at Indiana

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[5] Gregory Akselrud, "*Hit Man*: The Fourth Circuit's Mistake in *Rice v. Paladin Enters.*, *Inc.*," *Loyola of Los Angeles Entertainment Law Journal* 19 (1999): 382.

[6] Theresa J. Pulley Radwan, "How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals," *Seton Hall Constitutional Law Journal* 8 (1997): 66.

University, saying "we'll take the fucking street later (or again)."[7] His controversial words were spoken as the sheriffs cleared demonstrators from the street due to their failure to respond to verbal directions. The sheriff, hearing the expletive, arrested Hess on the disorderly conduct charge; two bystanders, however, indicated that Hess did not appear to exhort or urge the crowd to return to the street. They also observed that his statements were not of a discernibly louder volume than the others in the area.

Hess, appealing his conviction, claimed that the charge should be reversed because the statute was overbroad in outlawing activity protected under the First and Fourteenth Amendments. Thus, according to Hess, his freedom of speech was restricted. The Supreme Court agreed, and reversed his conviction, finding that his words did not intend, nor were likely to produce imminent lawless action, as stipulated in the *Brandenburg* test; hence, his words could not be punished by the State merely because they may have a *tendency* to lead to violence:

> The undisputed evidence show[ed] that the defendant's statement was not directed to the sheriff or to any other person or group, and the statement, at best, [was] counsel for present moderation, and at worst, amounted[ed] to nothing more than advocacy of illegal action at some indefinite future time.[8]

Thus, *Hess* provided the criteria that the speech must be directed to a specific individual or group, and that it must be of a face-to-face nature. By merely designating speech as "threatening," First Amendment rights may be curtailed, so the face-to-face and direct address requirements further broaden the nature of protected speech.

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[7] *Hess v. Indiana,* 414 U.S. 105, 107 (1973).

[8] 414 U.S. 105 (1973).

Additional guidance regarding incitement is provided in *Herceg v. Hustler*, which explores the distinction between *abstract* advocacy and *actual* encouragement, and examines the boundaries of these criteria. The case was established as a result of the tragic events pertaining to Troy, a fourteen-year-old adolescent who obtained a copy of *Hustler* Magazine containing an article entitled *Orgasm of Death*, which detailed the process of autoerotic asphyxiation. *Orgasm of Death* included specific information about performing the act, but also contained multiple warnings cautioning readers that the facts were solely presented for educational purposes, and that the act should not be attempted at home. Troy was found hanging in his bedroom, with the magazine at his feet, opened to the page of the article.[9]

Troy's mother brought suit following her son's death, and alleged that the article incited him to attempt the act, leading to his death. The legal question of the case centered upon whether *Hustler* Magazine could be held liable for civil damages; the decision hinged upon whether the article *actually incited*: "Whether the *Hustler* article, therefore, placed a dangerous idea into Troy's head is but one factor in determining whether the state may impose damages for that consequence."[10]

The court found in favor of *Hustler* Magazine, and determined that holding them civilly liable would violate freedom of speech and the press under the First Amendment. Further, *Hustler* was not liable because the article did *not* incite Troy to perform the autoerotic act; it repeatedly advised readers *not* to attempt it because of the inherent danger of death. In the decision, the court established four elements that the plaintiff had

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[9] *Herceg v. Hustler Magazine*, 814 F. 2d 1017 (5th Cir. 1987).

[10] 814 F. 2d 1017, 1020 (5th Cir. 1987).

to prove in order to meet the burden of incitement: (1) autoerotic asphyxiation is a lawless action, (2) *Hustler* advocated this act, (3) *Hustler's* publication went beyond "mere advocacy" and amounted to incitement, and (4) the incitement was directed towards imminent action. Using these criteria, the court determined that no valid reading of the case could make the contents of *Orgasm of Death* even advocacy, let alone incitement.[11] The critical portion of the case decision relates to the boundaries between abstract advocacy and actual incitement, and in the creation of four criteria, the court made a clear distinction between a lawless act advocated, and an act that qualifies as incitement.

Both *Hess* and *Herceg* offer guidance pertaining to the application of *incitement*, which is the first prong of *Brandenburg*, and the case of *People v. Rubin* provides explanation regarding the meaning of *imminence,* the second prong of *Brandenburg*. Irving Rubin, director of the Jewish Defense League, offered five hundred dollars during a press conference to any individual who maimed, killed, or seriously injured a member of the American Nazi Party. The conference during which he spoke was planned with the intention of protesting a planned demonstration and march by the American Nazi Party in Skokie, Illinois.[12]

The case progressed both through the trial court and Court of Appeals in its legal history. The trial court found Rubin's words protected under the First Amendment, because although they solicited murder, their form and content indicated a desire to attract national media exposure and evidenced a serious lack of *intent* to solicit the *actual*

[11] 814 F. 2d 1017 (5th Cir. 1987).

[12] *People v. Rubin*, 96 Cal. App. 3d 968 (Cal. Ct. Appl. 1979).

commission of the crime. The trial court placed more emphasis on the fact that his words appeared to be spoken with the intention of gaining publicity, rather than actually encouraging a listener to follow his instructions and offer.

A key question of the case centered upon whether a summons to crime can be distinguished as speech protected under the First Amendment; *Brandenburg* and *Hess* attempted to provide guidelines to classify speech as either abstract advocacy or concrete solicitation of actual acts, and the judges in *People v. Rubin* sought to determine whether Rubin's monetary offer represented constitutionally protected advocacy of crime in general, or whether it incited listeners to commit a specific crime. The consideration of this question caused the Court of Appeals to reverse the decision of the trial court; it was determined that Rubin's statements were *not* constitutionally protected speech, and further, his advocacy of crime *was* an incitement to imminent lawless action and *was likely* to produce such action: "His solicitation is likely to be interpreted as a call to arms rather than a communication of ideas through reasoned public discussion."[13] In addition, the Court determined that his statements were not made in a jesting or conditional manner, but instead, were made in a tone that suggested they might incite the violence they sought to produce.

The critical point of the Court of Appeals' decision, however, relates to the role of imminence, and the court established a relationship between the *seriousness* of the crime and the *time span* of imminence. Judge Fleming writes:

> Since murder is lawless action and an offer of reward for murder is, assuredly, an incitement, imminence is the critical element here in the factor of proximity.

[13] 96 Cal. App. 3d 968, 972 (Cal. Ct. Appl. 1979).

> Imminence, a function of time, refers to an event which threatens to happen momentarily, is about to happen, or is at the point of happening. But time is a relative dimension and imminence a relative term, and the imminence of an event is related to its nature… Additionally, the seriousness of the threatened crime, i.e. the nature of the lawless action solicited, bears some relationship to its imminence. Generally speaking, the more serious the crime, the greater its time span.[14]

In this context, the Court considers murder the most serious of all crimes, and thus, determines that it carries with it the longest time span of any crime. In *Rubin*, the lack of time limitation when prosecuting murder was offered as evidence.

A final case in the imminent lawless action line occurred in Mississippi and arose as a result of a boycott. *NAACP v. Claiborne Hardware* centered upon the Black citizens of a Port Gibson group who presented Caucasian elected officials with a list of complaints and demands for racial equality and integration. The group did not receive a satisfactory reply to the complaints; in response, several hundred Black individuals voted to place a boycott on Caucasian merchants in the area at an NAACP meeting at the First Baptist Church.[15]

The case, as had *People v. Rubin*, progressed through several courts. The Supreme Court of Mississippi held the boycotters liable for damages arising from the boycott, pointing to the fact that several participants used physical force, violence, and intimidation to achieve their illegal goals. Due to the presence of force and violence, the

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[14] 96 Cal. App. 3d 968, 978 (Cal. Ct. Appl. 1979).

[15] *NAACP v. Claiborne Hardware,* 458 U.S. 886 (1982).

court claimed that the *entire* boycott was illegal, because any legitimate political or social value was undermined by the aspect of physical violence.

The Supreme Court, however, reversed the lower court judgment, and found that the boycott did not amount to incitement of imminent lawless action, because the majority of the boycotters' activities were nonviolent in nature and entitled to protection of the First Amendment. Their behavior was protected under the freedom of speech qualifications because the boycotters sought to exercise their right to speech, assembly, association, and petition with the intention of producing political, social, and economic change.[16] Further, the Supreme Court determined that an individual's *mere association* with the boycotters was not enough to legally establish liability:

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[17]

Thus, the court further explored the idea of incitement of imminent lawless action by determining that peaceable assembly for lawful discussion cannot be made a crime; only those who had *actually taken part in* the unlawful activity could be held liable, and only losses *directly caused* by the illegal behavior could be subject to recovery.

When considered as a whole, the line of incitement cases, including cases such as *Brandenburg v. Ohio, Hess v. Indiana, Herceg v. Hustler, People v. Rubin,* and *NAACP*

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[16] 458 U.S. 886 (1982).

[17] 458 U.S. 886 (1982).

v. Claiborne Hardware, demonstrates the progression of legal reasoning and evolving nature of the two distinct legal ideas of incitement and imminence. While *Brandenburg* provided the framework for incitement analysis, the first legal element, *Hess v. Indiana* expanded incitement to include communication of a face-to-face nature, and the *Herceg* case served to clarify the meaning and scope of *actual* incitement. Imminence, a second legal idea, was also explored in case law, and *People v. Rubin* created a ratio between the seriousness of the crime and the time span of imminence; *NAACP v. Claiborne*, further, examined liability by association and determined that incitement is premised on those individuals who had *actually participated in* illegal behavior. Thus, the case law illustrates a logical development of ideas that has expanded and clarified the court's ruling in *Brandenburg v. Ohio.*

Critique

A critique is warranted, following this progression of the legal history of the imminent lawless action line of case law, to assess whether the standards established in these decisions could apply to harm-facilitating websites. Three specific reasons demonstrate why the incitement approach, as a vein of case law, cannot be applied to web communications, and the critique is supported by legal literature. The critique will have its foundation rooted in these elements: (1) imminence, (2) face-to-face communication and/or direct address to a specific individual or group, and (3) association and subsequent

intent.[18] The critique of each element will be both conceptual and applied in nature, as the *theoretical* reasons regarding incitement's inapplicability to websites will be discussed in conjunction with the *application* of the theory to the "Methods File."

The first characteristic emerging from cases concerning imminent lawless action is the notion that the action encouraged must be *imminent*, or immediate.[19] This element proves inapplicable to cyberspace, since traditional standards of time do not conform to the web. Conceptually, the nature of the Internet precludes expression on harm-facilitating websites from being imminent, since a method does not currently exist to measure the time elapsed between the mere viewing of harmful material and the consequent actions by individuals as a result of the viewing. *Applying* this theory, for example, a depressed teenager may view a pro-suicide site such as "The "Methods File," and act accordingly within an hour, a day, or even a week. Another teenager may view the site, process its contents and instructions, and slowly prepare for the act of suicide in a year. Yet another teenager may read the suicide instructions, but instead decide to receive medical treatment for depression and *never* act on the website content. Determining whether the instructions advocate *imminent* behavior is impossible, because

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[18] The elements of the incitement critique are supported in the work of Theresa J. Pulley Radwan and John F. Wirenius. See: Theresa J. Pulley Radwan, "How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals," *Seton Hall Constitutional Law Journal* 8 (1997): 47- 73, and John F. Wirenius, "Brigaded with Action: Undirected Advocacy and the First Amendment," *Seton Hall Law Review* 32 (2002): 299-365.

[19] 395 U.S. 444 (1969).

every individual viewing a harm-inducing website may react to the instructions in a different fashion and time frame. In addition, the Internet remains an impersonal mode of communication, so the determination of whether the action is *merely advocated* or *actually encouraged* is impractical, where a tone of voice, validity of the material, and authorship is either questionable, or noticeably absent.

People v. Rubin further clarified this meaning of *imminence* by creating a ratio between the gravity of the act advocated and the subsequent time span of imminence. A theoretical assessment of this criterion demonstrates its ultimate inapplicability to web communications. Inherent difficulties are found in *dual-use* websites, which may possess instructions that may be used both legally and illegally. A website instructing viewers on the best methods to pick a lock, for example, would be considered a dual-use site: law enforcement officials may legally utilize the information for legitimate tasks as part of the job, but an individual seeking instructions on lock-picking to facilitate robbery would employ the website's instructions for illegal purposes. Attempting to establish a time span linked to the seriousness of the act, suggested by *People v. Rubin*, is not possible in cyberspace, since instructions on a website may be either very *serious* and result in fatal consequences when used illegally, or *benign* when utilized legally. Applying the imminence standard of *People v. Rubin* is thus infeasible when dealing with Internet communications.

The second reason supporting the critique that the incitement approach is inapplicable to harm-facilitating website is that the speech must be directed towards a specific individual or group, or must be of a face-to-face nature, which is established

from case law concerning imminent lawless action.[20] Assessing this element on a conceptual level reveals that this requirement, like imminence, can never be fulfilled in cyberspace, particularly because of the properties of the medium of the Internet itself. A creator of a website will never view an audience face-to-face; further, the site creator has no means of knowing *who* will ever view the site. Applying this reasoning to "Methods File," the argument is further supported. The custodian or creator of the website will never be able to discern the types of visitors who viewed the contents of the site; nor will the custodian ever be able to communicate in a face-to-face manner with site users regarding suicide information and methods. The interface of cyberspace is inherently related to technology, and as such, can never possess the personal contact required by the face-to-face characteristic. In addition, case law has also established the idea that communication of an imminent nature must be directed to a specific group or individual. In cyberspace, the audience of a certain website is not determined, and communication through a website can therefore never be directed towards a *specific* group, since anyone with Internet access may view such material. Thus, this element of the imminent lawless action theory cannot be applied to harm-inducing or harm-facilitating websites.

The final reason demonstrating the inapplicability of the incitement approach to harm-inducing websites pertains to the element of liability by association, and subsequent intent. This third characteristic subject to critique was established in *NAACP v. Claiborne Hardware*, in which the United States Supreme Court determined that only those individuals who had actually participated in the unlawful activity could be held liable for incitement to lawless action. Questions and difficulties arise, however, when

[20] 414 U.S. 105 (1973).

one attempts to apply this standard to Internet communications, particularly to harm-inducing websites, or sites that contain interactive group blogs. The original version of "Methods File" utilized by Suzanne Gonzales, for example, contained a group blog in which any viewer of the site could post comments, and engage in dialogue with other individuals. Suzanne posted her intentions on the website, and many users replied with words of suicide encouragement, spurring Suzanne to ultimately commit suicide. The "Methods File" serves as an example demonstrating the difficulties of the application of the liability by association to cyberspace. If an individual who posted suicide encouragement blogs was found liable, would all bloggers be responsible? Would the courts be able to distinguish between bloggers who *actually advocated* and encouraged suicide and those who merely advocated in an *abstract* sense? Further, would there be a method to determine whether a specific blogger's words, over another's, were *the* catalyst that resulted in illegal or harmful consequences? Would judges be able to determine whether one blogger over others, had the *specific intent* to further an illegal goal? Would courts be able to distinguish between those individuals who merely belonged to the blog, and those who actually *used* the blog to further a lawless act? Assessment of the nature of communications in cyberspace would suggest that the answers to the inquiries regarding the applicability of liability by association would be a resounding "*no.*" Lines and demarcations necessary to apply the law become murky and blurred, and applicability of the group association aspect of imminent lawless action proves impossible in cyberspace. Ellen Luu summarizes the inherent difficulties in applying the incitement approach to cyberspace communications, particularly to sites such as "Methods File:"

> The broader "incitement" category of unprotected speech seems the most applicable to cyber-speech for suicide promotion, but still presents a difficult hurdle. For example, the "incitement" test would not apply to users who participate in the promotion of suicide by posting general instructions on methods. This speech does not produce "imminent" action and can easily be characterized as mere advocacy. There is a difference, however, between posting general information and responding to a request for information as assistance to the commission of suicide.[21]

Thus, applying the legal theory of imminent lawless action case law to cases arising as a result of harm-facilitating websites proves impossible, because of questions pertaining to imminence, face-to-face and direct address communication, as well as issues of association ad subsequent intent. Assessment, therefore, indicates inapplicability on both the *conceptual* and *applied* levels.

Copycat Theory

Case Law

Copycat cases provide another potential approach for regulation of harm-facilitating websites, but it is important to distinguish the copycat approach from the incitement approach before progressing with legal history. Like incitement, copycat behavior is *instructional*, but differs with regard to *response*. Incitement includes both

[21] Ellen Luu, "Web-Assisted Suicide and the First Amendment," *Hastings Constitutional Law Quarterly* 36 (2009): 314.

instructions *and* encouragement on the part of the speaker for the listener to act upon the advocated behavior. Copycat behavior, however, leaves the response and choice to engage in the behavior with the *listener*, or receiver of the message; copycat actions involve mimicking instead of following instructions and endorsement. Within case law, copycat behavior relates to acts modeled on previous crimes reported in the media, either through print, song, television, or film. Many of the suits brought to court are linked to negligence claims: some of the central questions within case law relate to whether a producer or distributor of music, movies, or magazines is responsible or negligent if an individual imitates the behavior shown to their detriment. The general trend suggested by case decisions is that media defendants are *not* liable for copycat crimes since courts have determined that they do not owe a duty of care to the plaintiffs.

The case of *McCollum v. CBS, Inc.* established the framework for copycat cases, and focused upon the duty of care notion, an idea central to negligence claims. The 1998 case arose after John Daniel McCollum shot himself in bed while listening to Ozzy Osbourne's "Suicide Solution" song. His family subsequently sued the composer, performer, producer, and distributor of the music for negligence and intentional tort by encouraging suicide through the music. McCollum's family argued that Ozzy Osbourne furthered the ideas of hopelessness, despair, and the acceptability of suicide; additionally, they argued, the producers and distributors sought to further this image because of the profits obtained. "Suicide Solution" was characterized by a "special relationship of kinship"[22] between the singer and the audience, because Osbourne utilized the first person and addressed his audience as "you." McCollum's family made the claim that

[22] *McCollum v. CBS, Inc.,* 249 Cal. Rptr. 187, 190 (Cal. Ct. App. 1988).

Osbourne's music caused a cumulative impact upon the vulnerable listener, and that the music industry *knew* the music could be potentially destructive.

The court ruled in favor of the music industry, holding that the suit was barred by the First Amendment, and further, that the song did *not* incite John to commit suicide. In order to determine whether speech incites, the court established a two-pronged test: first, the expression must be *directed* and *intended* to cause the act ostensibly encouraged. "Suicide Solution" did not have the requisite "call to action" because the lyrics were not meant to be read literally. According to the court, no "rational person would mistake musical lyrics and poetry for literal commands or directives to immediate action,"[23] which the First Amendment would bar. Second, the speech must be *likely* to produce such a result. The court determined that there are no elements in Osbourne's songs that could be considered a command to an immediate suicidal action at *any* specific time, much less *immediately*.[24] Further, subjecting the music industry to such a liability would result in self-censorship by media defendants, which would stifle creativity and dampen artistic expression.

The most important portion of the decision, however, centers upon the notion of a duty of care by the music industry. The court assessed several factors to determine whether the creators and producers of Osbourne's music could be held liable for John's copycat behavior, resulting in his death. The first factor of duty of care relates to *foreseeability*: could the producers have predicted that someone would follow the behavior as discussed in the song lyrics? The court determined that John's suicide could

[23] 249 Cal. Rptr. 187, 194 (Cal. Ct. App. 1988).

[24] 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

not have been reasonably foreseen by the defendants. The second factor in the assessment of the duty of care notion pertains to a close time connection between the creation of the material and the end result; in this case, the legal question was whether John's death occurred shortly after the song was produced. The court found that no such close connection existed. The third and final factor to assess in duty of care claims centers upon the idea of moral blame. Could moral blame be placed upon the music industry for John's behavior? The court deemed John's act an irrational response; this classification absolved the music industry from moral blame. The producers, distributors, and creators of the music did not have any reason to anticipate or prevent behavior such as John's.

The court struck down the plaintiff's argument that the music industry assisted John's suicide, and reached their ruling by referring to a specific California Penal Code. Under Cal. Penal Code §401, a defendant must have: (1) specifically intended the victim's suicide and (2) had a direct participation in causing it. The court applied the standards of Penal Code §401 and determined that the argument of McCollum's family did not withstand its standards; the allegations that the defendants intentionally produced and distributed the music do not indicate that the music industry *intentionally aided and abetted* the suicide. The plaintiff's claim that the music industry *should* have known that emotionally fragile listeners could have an adverse reaction was struck down, since the media defendants ultimately owe no care of duty.[25]

The notion of the duty of care is further examined in the case of *Way v. Boy Scouts of America,* and the ruling narrowed the scope of analysis and focused on

[25] 249 Cal. Rptr. 187 (Cal. Ct. App. 1988).

foreseeability, a specific element within the duty of care claim. The case origins pertained to Rocky Way, a young boy, who obtained a copy of *Boys' Life Magazine*, in which a supplement appeared regarding safe shooting sports and gun advertisements. After reading the materials, Rocky and several friends searched for and subsequently found an old rifle; Rocky was killed when the rifle accidently discharged in his face. Rocky's mother filed a negligence and strict liability in tort action against the publisher and advertiser of the magazine, alleging that the publication caused her son's death since the references to safe shooting were minimal, while the overall message was one glorifying guns and shooting. Further, she contended that the publishers were negligent because they failed to take steps to reduce or mitigate this danger by printing clear, explicit warnings about the danger of guns.[26] The magazine publishers countered by arguing that they simply did not owe a duty to Rocky Way or any other readers of the publication.

The court found in favor of the magazine publishers; the ruling focused on *foreseeability* as the most important element regarding duty of care. Foreseeability functions as the main determinant for analysis, and this analysis relates to whether there is cause to believe that someone will repeat or mimic the behavior displayed. Applying foreseeability to Way's case, the court found that his death was *not* a foreseeable risk for publishers and advertisers; therefore, the *Boys' Life* publishers were not negligent in publishing the ad, since they had no reason to believe that average audience members would react as Rocky Way did. Not only do the publishers *not* owe a duty of care, their work has *value*: "Given the pervasiveness of firearms in society, we conclude that

[26] *Way v. Boy Scouts of America,* 856 S.W. 2d 230 (Tex. Ct. App. 1993).

encouragement of safe and responsible use of firearms by minors in conjunction with Boy Scouts and other supervised activities is of significant social utility.'[27] Thus, *Way v. Boy Scouts of America* serves as a critical case demonstrating the role of foreseeability in conjunction with a duty of care analysis.

The consideration of the case law pertaining to copycat behavior *as a whole* indicates that not only do the creators of violent or harmful messages *not* owe a duty of care to their audience, but also that their work is protected under free speech qualifications since the expression possesses inherent artistic value. *Yakubowicz v. Paramount Pictures* is a case capitalizing upon the protection of the First Amendment as barring liability for negligence. The case arose after Michael Barrett and two friends viewed the movie "The Warriors" at the Saxon Theater in Massachusetts. They smuggled alcohol into the movie, and after viewing the film, boarded a subway, encountering a rival gang in the subway car. Barrett, in an imitation of the warriors in the film, yelled, pulled a knife, and stabbed Martin Yakubowicz, killing him.[28]

The case was brought to courts as Yakubowicz's father filed a wrongful death action, and argued that the film company was negligent in the way that it produced, distributed, advertised, and exhibited the film. Their negligence, he further asserted, caused the death of his son. A negligence claim was also brought against the movie theater, alleging negligence on their part for failing to exercise control over their patrons, since Barrett was able to smuggle and consume alcohol on their premises without

[27] 856 S.W. 2d 230, 236 (Tex. Ct. App. 1993).

[28] *Yakubowicz v. Paramount Pictures Corp.,* 536 N.E. 2d 1067 (Mass. 1989).

consequence.[29] Paramount Pictures countered, arguing that they owed no duty to viewers of the film, and that the First Amendment prevented the finding of liability.

The court ruled that the film company and movie theater *did* owe a duty of care to the public, but that they *did not* violate their duty. Content in the film could not be deemed unprotected speech inciting imminent lawless action; most importantly, the film company exercised free speech. In the court's opinion, the work was merely fiction, portraying the imaginary adventures of a gang to an audience. Although violence is prevalent, the film did not at any point "exhort, urge, entreat, solicit, or overly advocate or encourage"[30] illegal behavior for the audience. The movie theater, in showing the film, did not act unreasonably or negligently, since the movie did not contain a command to anyone at any specific time, much less immediately. The court determined that the killing of Yakubowicz, which occurred several miles away from the theater, was *not* a result of the failure of the movie theater to protect its patrons, but instead, was an irrational, unforeseeable response by a viewer of the movie. Further, a theater that did not supply alcohol *itself* but whose *premises* were used for the illegal consumption of alcohol by a patron did *not* owe a duty to the members of the general public who may be several miles away from the theater when an incident occurs.

The critical portion of the case decision relates to "The Warriors" as possessing characteristics of artistic expression protected under the First Amendment; this notion is further expanded by *Bill v. Superior Court*, another copycat case stemming from a violent film. Jocelyn Vargas attended the movie "Boulevard Nights," a film depicting gang

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[29] 536 N.E. 2d 1067 (Mass. 1989).

[30] 536 N.E. 2d 1067, 1071 (Mass. 1989).

violence, marketed with the tagline "Everything happens on the boulevard - and the boulevard happens at night."[31] After leaving the theater, Vargas was shot by another patron of the movie. Vargas' mother, as plaintiff, sued the movie company, producers, and director, arguing that they acted negligently by failing to warn the public of the inherent dangers in the violent movie and by failing to take the necessary precautions to protect members of the general audience from other individuals prone to violence after viewing the film. According to the allegations of the plaintiff, Jocelyn relied on the fact that movie could be watched safely, to her detriment. Further, the movie producers were negligent because they knew that their film was a violent movie and would attract violence-prone individuals who were likely to cause harm to other individuals near the movie.[32]

The court found in favor of the movie company, producers, and director since they owed no duty to patrons to provide security protection on streets outside the theater; Jocelyn's injuries were sustained as a result of her *location,* not due to someone having viewed the film. The production of the film was "socially unobjectionable,"[33] especially when considered within the context of the First Amendment, for it deserves protection "even if it had the tendency to attract violence-prone individuals to the vicinity of the theaters at which it was exhibited."[34]

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[31] "Boulevard Nights," http://boulevardnights.com/ (accessed November, 2009).

[32] *Bill v. Superior Court*, 187 Cal. Rptr. 625 (Cal. Ct. App. 1982).

[33] 187 Cal. Rptr. 625, 631 (Cal. Ct. App. 1982).

[34] 187 Cal. Rptr. 625, 631 (Cal. Ct. App. 1982).

The critical portion of the case decision, however, focused upon the *value* of the work, and the presence of the First Amendment as a bar to finding the movie company liable. *Yakubowicz* established the idea that works of fiction within the film industry are afforded protection of the First Amendment, and *Bill v. Superior Court* suggested the principle that imposing liability on producers for copycat behavior would allow them to dictate the movies shown across the United States; further, the crucial notion emphasized was that the government cannot silence the speaker, but should instead act to maintain the peace:

> Instructive also, in this context, is the general First Amendment principle that when speech is of such a nature as to arouse violent reaction on the part of the lawless, the first obligation of the government is to maintain the peace and enforce the law, and not to silence or punish the speaker.[35]

Thus, as a culmination of case law, *Bill v. Superior* suggests a key characteristic of copycat cases: The creators of the message do *not* owe a duty of care to their audience. Further, their work possesses value that affords it First Amendment protection, and the duty of the government is not to silence the creator of the message, but to effectively manage any results occurring from the expression.

Assessing the body of case law pertaining to the copycat theory as a whole indicates that the unfolding progression of legal ideas is again apparent. Each case decision, particularly those of *McCollum v. CBS*, *Way v. Boy Scouts of America, Yakubowicz v. Paramount Pictures,* and *Bill v. Superior Court*, has added further nuance to the idea of copycat behavior. *McCollum,* exploring the notion of duty of care, was

[35] 187 Cal. Rptr. 625, 629 (Cal. Ct. App. 1982).

further narrowed in scope by *Way v. Boy Scouts*, which assessed the factor of *foreseeability*, a specific element within the duty of care claim. *Yakubowicz* provided additional guidance pertaining to duty of care by establishing the principle that not only do media defendants *not* owe a duty to their audience, but also that their work is protected under free speech qualifications because of the value contained within the expression. *Bill v. Superior Court*, finally, culminates with the idea that the duty of the government is to control the results of a message, not silence the speaker. The case law, thus, has progressed in a manner similar to an unfolding story, with each case decision providing further detail, guidance, and nuance.

Critique

A critique of the case law concerning copycat behavior demonstrates inherent difficulties in attempting to apply the legal line of reasoning to harm-inducing websites. Tracing the ideas developed through case law serves as an effective method of analysis. A framework to assess whether a duty of care is owed is best viewed as containing several prongs, and these elements serve as reasons demonstrating the inapplicability of the copycat line of reasoning to harm-facilitating websites: (1) foreseeability, (2) close connection between copycat behavior and creation of a message, and (3) the value of the speech.

Before one can critique each of the three elements, it is important to note first that inherent difficulties relate to the application of copycat case law to cyberspace, for the legal reasoning in copycat case law has proved unsuccessful in *real world*, actual litigation; copycat suits brought against music or film producers has yet to ever yield a

favorable result in the courts. Underlying the theory of copycat cases is the faulty assumption that the media is the sole agent to blame for violence:

> As we enter the next century, the Natural Born Killers case makes it clear that, as a society, we are still all too eager to blame the media and the messages they disseminate for the violent actions of individual human beings. This case…also suggests that the law has not adopted procedural safeguards sufficient to dismiss or to prohibit such cases based on imitation of media content. In the twenty-first century, we must recognize that media messages do not control or cause human actions…The Natural Born Killers motion picture is not a weapon. Each, instead, simply is a media product, created for a profit, and each can be read or viewed as entertainment fare. That a few audience members who read or watch such media content also commit violent acts does not mean that the book or movie in question cause the violence in question. The individuals were predisposed to engage in violent behavior. That a book or movie may have given an individual ideas does not mean that those ideas controlled the individual.[36]

The idea that an individual who commits violence did so as a *copycat* action solely because of a movie, film, or magazine undermines the fact that most individuals *already* possess the temperament to engage in violence behavior. Examining the applicability of copycat theory to the real world reveals obstacles to overcome, so application to *cyberspace* would prove even more difficult.

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[36] Clay Calvert, "New Millennium, Same Old Speech: Technology Changes, but the First Amendment Issues Don't," *Boston University Law Review* 79 (1999): 982.

Attention can now be turned towards a critique of each of the three factors demonstrating the copycat theory to harm-inducing websites. The first element to be examined pertains to *foreseeability*, a specific legal element. Foreseeability cannot be assessed in cyberspace, since most speech is anonymous and cannot be linked to a specific creator. If the courts *were* able to identify and target a site that produced quantifiable copycat behavior, who would be responsible for foreseeability? In the case of *McCollum*, it was the music industry who was the subject of litigation, and the question related to whether *those individuals* within the industry were able to foresee the results that occurred. In cyberspace, many sites are anonymous, and present the problem of assigning foreseeability: who, then, would be responsible for answering the summons of the court? Who could testify as to whether or not the results were reasonably foreseen if there is no specific, identifiable creator?

Way v. Boy Scouts of America furthered narrowed the scope of foreseeability, and additional difficulties arise as a result of the medium itself of cyberspace. The Internet can reach millions of people and serves as a platform for anyone with an idea. The task by the courts in determining foreseeability is infeasible, for one cannot predict how any one, individual person will react upon viewing website content, if *millions* of individuals have access to the information. For example, no means exist to predict how *every* viewer of "Methods File" will respond, and whether a certain viewer, over another, will engage in copycat behavior and end his or her own life. Predictability is thus uncertain and impossible to determine due to the nature of the web, as well as the broad audience a message reaches. In attempting to assign moral blame to a website creator for foreseeability, difficulties arise in litigation concerning a harm-inducing website, for two

reasons. In addition to the anonymous nature of websites, many websites are ambiguous in tone and purpose. Attempting to determine whether a command for an immediate action was acted upon by a viewer of the site is difficult, so one cannot apply the legal idea that website creators *had a reason* to prevent a consequence.

The second prong demonstrating the inapplicability of the copycat theory to potentially harmful websites relates to the *close connection between the copycat behavior and the creation of the message*. Time is indeterminate in cyberspace, so this second element cannot be fulfilled. A method does not exist to determine *when* a specific person viewed a site and *when* subsequent action occurred. After viewing a harm-facilitating site such as "Methods File," a depressed individual could choose to end his life in a week, two weeks, five months, or a year. The nature of cyberspace prevents triers of fact from determining the appropriate and necessary time frame.

The final point to be critiqued pertains to the value of the expression, which was established in case law and suggested by *Yakubowicz v. Paramount Pictures* and *Bill v. Superior Court*. In addition to the issues of foreseeability and time connections, an additional concern to consider is the idea of the SLAPS test. The 1973 *Miller v. California* obscenity case outlined the SLAPS test: In order to determine whether a work is obscene, the court must assess whether it has serious literary, artistic, political, or scientific value.[37] Application of the SLAPS test to cyberspace may be a viable option, but difficulties arise when one considers *mirror sites*, in which copies or portions of a certain site are replicated and reproduced at a different URL. A site may initially be afforded protection, but in reproducing portions of the website, the new creator might

[37] *Miller v. California*, 413 U.S. 15 (1973).

make modifications that deprive it of value, or might delete the parts that *afforded* the site value in the first place. Users of the Internet may imagine *positive* uses for potentially harm-facilitating websites; for this reason, a SLAPS test *alone* remains difficult to apply. Without consideration of other factors, such as the characteristics, context, or specific market of the speech, application of the SLAPS test is not feasible. Mere consideration of the intention of the speaker as a determining factor of assigning value is not possible in cyberspace, since it is an impersonal mode of expression. Thus, a SLAPS test alone will not suffice; a SLAPS test can only be successfully utilized *in conjunction with* other considerations. Analysis thus indicates that the courts have never determined the appropriate course of action if an individual copies a work of value. No consistent answer has been provided, nor has a conceptual framework been offered.

In sum, assessment of the applicability of copycat theory to *cyberspace* reveals similar obstacles as those found in the real world, and application of the three factors to harm-facilitating websites such as "Methods File" proves infeasible. If this legal framework were adopted, courts would be unable to determine whether website creators owe a duty of care to the individuals who view the sites, and the copycat line of legal reasoning thus proves an ineffective legal remedy for the problem of harm-inducing websites.

Thus, the Incitement Approach, concerning case law centering upon both Imminent Lawless Action and Copycat theories, proves inapplicable on both the conceptual and applied levels; extension of the legal framework provided by these approaches to cyberspace communications remains difficult. An alternative legal framework is the Instructional Approach, which concerns aiding and abetting and

instructional guide case law. The instructional approach, particularly the case decisions pertaining to *printed instruction manuals*, offers hope for application and serves as a *new* framework and solution to target problems raised by harm-facilitating websites.

Instructional Approach

Aiding and Abetting Theory

Case Law

Aiding and abetting case law provides an additional framework through which harm-facilitating websites may be legally assessed. However, this conceptual approach must be differentiated from the Incitement Approach. Unlike the incitement and copycat lines of cases, under the Incitement Approach, cases concerning aiding and abetting relate to the *actual assistance* by a speaker, instead of merely instructing, encouraging, or leaving the choice to act with the listener. Cases regarding aiding and abetting pertain to defendants accused of tax fraud and conspiracy to defraud the United States, and suggest a general trend of guilt if a defendant's actions extend beyond mere advocacy of tax evasion. Tax evasion cases represent the most clearly defined area of aiding and abetting; further, tax evasion is an easily instructible area, especially since tax payment is an action many individuals dislike performing. The notion of tax evasion thus lends itself to aiding and abetting, and the choice of cases in this legal line most clearly illustrates the concept of *actual assistance* since they function as the most cited and highest percentage of aiding and abetting case law.

The case of *United States v. Schiff* is an example within this realm suitable for the assessment of aiding and abetting case law. Partners Schiff, Neun, and Cohen established a business for the purpose of providing assistance to customers in filing false tax returns to avoid tax liability. The enterprise included consulting services, websites, tax-scam packages, as well as a book authored by Schiff entitled *The Federal Mafia.* The book contained specific instructions to facilitate an elimination of with-holding taxes by employers, such as submitting "exempt" W-4 forms, or filing "zero–income" tax returns. Over three thousand individuals followed their step-by-step instructions, resulting in an estimated fifty-six million dollars in attempted tax evasion.[38] A preliminary injunction was issued against them, which prevented Schiff, Neun, and Cohen from organizing, assisting, or promoting methods to customers to violate internal revenue laws.

The court found that the defendants' speech relating to tax advice did incite imminent lawless action, and aided and assisted individuals in criminal transactions. In its assessment of the element of incitement, the court determined that First Amendment protection is not afforded to expression that goes beyond permissible advocacy; in this instance, the partners' tax evasion scheme *actually encouraged* others to stop paying taxes. Judge Lloyd George, author of the case decision, emphasized this idea: "The use of his program, in combination with the direct facilitation of filing false returns and exempt withholding forms, moves Schiff's form of advocacy into the realm of incitement."[39] Further, the *Federal Mafia* "does not provide information or advocacy on

[38] *United States v. Schiff,* 269 F. Supp. 2d 1262 (D. Nev. 2003).

[39] 269 F. Supp. 2d 1262, 1280 (D. Nev. 2003).

tax reform in general, and then leave the reader to act on his own judgment,"[40] but rather, offers actual encouragement and incitement of lawless conduct.

The aiding and abetting aspect of the expression was also emphasized in the case decision. The Court determined that the First Amendment does not protect conduct which utilizes speech to further illegal behavior, and does not provide a defense to the use of printed speech counseling others in tax evasion. The most important portion of the decision, however, relates to the idea of *actual use* of the defendants' instructions by their audience. The court emphasized that the scheme's purpose was to *assist others in the commission of a crime*, and reached individuals who *actually employed it*: "In this case, the government has presented evidence showing that the scheme's stated purpose was, in part, to assist in the commission of a crime… The government has also shown that the scheme was targeted toward, and reached, individuals who actually employed it…."[41] Thus, the critical legal notion that *United States v. Schiff* provides is that aiding and abetting is premised on whether instructions were actually followed.

United States v. Schiff established the foundational principle that aiding and abetting hinges upon whether instructions were *actually* employed; *United States v. Damon* expounds upon the meaning of actual assistance by incorporating the element of *willfulness* on the part of the defendant. In *Damon,* the defendants were convicted of knowingly and willingly assisting in the preparation of fraudulent tax returns; twenty-five taxpayers used the defendants' tax return preparation service. The court affirmed their

[40] 269 F. Supp. 2d 1262, 1279 (D. Nev. 2003).

[41] 269 F. Supp. 2d 1262, 1284 (D. Nev. 2003).

convictions, finding that Damon manufactured various deductions to evade the payment of taxes, and that his expression constituted imminent lawless activity.[42]

Most importantly, the court added the element of willfulness in determining whether a defendant was guilty of aiding and abetting. The court focused on the fact that twenty-five taxpayers used the services; the quantifiable number proved beyond a doubt that Damon had indeed aided and abetted, and this willfulness behind Damon's actions rendered his expression unprotected under the Constitution: "The type of incitive speech with which we are here concerned is surely not constitutionally protected speech… Defendants' conduct falls squarely within the precise language of the statute's proscriptions."[43] *United States v. Damon,* therefore, adds the element of willfulness to the legal idea of aiding and abetting.

United States v. Bell contributed additional characteristics of behavior that aids and abets; the information conveyed proves to be the *missing piece* for the individual utilizing the instructions in illegal behavior. The defendant, Bell, ran a business and website selling fraudulent strategies to assist clients in the avoidance of tax payments. Through his websites, he drafted letters and pleadings to the Internal Revenue Service on behalf of his clients, as well as providing income tax assistance, solutions, and mechanisms to evade taxes.[44]

An injunction was issued against him, but Bell countered that his speech was protected under the First Amendment because it did not incite imminent lawless action.

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[42] *United States v. Damon*, 676 F. 2d 1060 (5th Cir. 1982).

[43] 676 F. 2d 1060, 1062 (5th Cir. 1982).

[44] *United States v. Bell*, 414 F. 3d 474 (3rd Cir. 2005).

The court, however, ruled that *Brandenburg* was the incorrect and improper precedent to tailor the injunction; his expression could be restricted effectively on other grounds, including false commercial speech and aiding and abetting violations of the tax laws. If *Brandenburg* had been utilized, its meaning would have been distorted; aiding and abetting functioned as a more applicable framework to apply to Bell's injunction. The court determined that Bell could only be found in contempt for violating the order where the evidence demonstrated that he aided and abetted others, either directly or indirectly, to violate laws regulating tax payments.

The court ruled against Bell, and found that his speech was both misleading and promoted unlawful activity, since "Bell's materials were used to *assist* tax violations, not *merely advocate* them."[45] Further, his website invited visitors to violate the tax codes, and offered materials for sale which contained instructions for the best mechanisms to achieve the goal of fraudulent tax avoidance. Aiding and abetting was, therefore, the best means to target Bell's expression, since he provided detailed and explicit instructions to users through his website. Similarly, promoters of tax fraud, like Bell, who have conveyed information to be utilized illegally, have been prosecuted on the grounds of aiding and abetting. The court thus appealed to past precedent to prosecute Bell of tax fraud through aiding and assisting others.

The critical portion of the case decision, however, centers upon the idea that Bell's instructions were the "missing piece" of illegal information for his users; his website not only invited visitors to violate the tax code, but also *sold materials* on how to do so. These materials were essential in that they were the "missing piece," because they

[45] 414 F. 3d 474, 484 (3rd Cir. 2005).

represented the completion of the cycle of first viewing the website, subsequently planning to evade the law, *obtaining the materials*, and then finally acting to *actually* violate the law. Bell's instructions were not only detailed, but also provided tax scam packages for sale. *United States v. Bell* thus represents a logical progression from *United States v. Schiff*, which established the legal idea of *actually assisting* an individual, and *United States v. Damon,* which attributed *willfulness* on the part of the defendant. *Bell*, then, supplements the aiding and abetting line of cases by incorporating the idea of information functioning as the "missing piece."[46]

The final characteristic inherent in all aiding and abetting line of cases is that illegality is part of the aiding and assisting aspect. This feature, therefore, serves as the culmination and *common* trait within all aiding and abetting cases. *United States v. Freeman* functions as the case that establishes the link between the design and purpose of the expression and the illegal nature of the crime itself. The case arose following Freeman's conviction of fourteen counts of aiding and abetting violations of the tax laws; each count recited another individual that had filed a false tax return under the instruction of Freeman's counsel and aid.[47] Freeman hosted seminars in which he taught methods of

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[46] Many cases, further, have considered the role of seminars and forums in providing the "missing piece" in aiding and abetting claims, and these seminars counseling individuals in the commission of illegal acts may also be deemed the last step of the cycle to violate the law. See: *United States v. Dahlstrom*, 713 F. 2d 1423 (9th Cir. 1983)*, United States v. Solomon*, 825 F. 2d 1292 (9th Cir. 1987), and *United States v. Crum*, 529 F. 2d 1380 (9th Cir. 1976).

[47] *United States v. Freeman,* 761 F. 2d 549 (9th Cir. 1985).

falsely reporting taxable income, and several of his audience members acted upon his instructions and violated the tax codes. Freeman, in response to his convictions, argued that he did nothing more than advocate tax evasion as an *abstract* idea, a remote act to be performed sometime in the indeterminate future; the First Amendment, therefore, should bar his protection, since he claimed that he did not concretely encourage his audience members to evade the law.

The court rejected his argument, and did not consider a First Amendment defense in their ruling, because

> counseling crimes of the tax laws is but a variant of the crime of solicitation, and the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, the First Amendment defense is foreclosed even if the prosecution rests on words alone.[48]

The court found substantial evidence to indicate that Freeman's use of words of incitement were proximate to the crime of filing false returns, and his words, further, were both *intended* and *likely* to produce an imminent criminal act. In Freeman's case, the falsity of the returns prepared with Freeman's guidance and assistance was unambiguous, and the resulting illegality even more unmistakable.

The important portion of the ruling, however, relates to the illegality aspect; the case decision created a link between the design and/or intent of the speech and the crime/illegal act itself. With regard to Freeman, his speech counseling others in tax

[48] 761 F. 2d 549, 552 (9th Cir. 1985).

evasion became an *integral* part of the crime, and his expression was indistinguishable from the illegal acts committed by his audience. In other words, his words were so close to the illegal act of tax evasion that they became *inextricably bound* to the crime itself. This notion thus functions as a culmination of case law concerning aiding and abetting, since all of the cases heard in the courts centered upon acts against the law, and for the defendants in those cases, their expression was bound to the crime and became tantamount.

Progressing through legal ideas in a similar fashion as the case law inherent within the Incitement Approach, the vein of cases included in the aiding and abetting theory have each expanded and included the basic notions of aiding and assisting as first outlined in *United States v. Schiff*. While *Schiff* provided the basis for aiding and abetting analysis by outlining the notion that liability must include *actual employment* by an audience, *United States v. Damon* further expounds upon the meaning of actual assistance by incorporating the element of *willfulness* on the part of the defendant. *United States v. Bell*, the next case of assessment in the legal progression, contributed additional traits of behavior that aids and abets by adding the stipulation that the information conveyed to an audience must be the "missing piece" within a quest for instruction. *United States v. Freeman,* as the final case in the legal line, provided the theory that illegality must be part of the aiding and abetting aspect. Thus, the case law within the aiding and abetting branch has progressed in a logical fashion by developing a more comprehensive view of the meaning of aiding and abetting.

Critique

Critique of the aiding and abetting case law demonstrates its ultimate inapplicability to lawsuits that may arise from harm-facilitating websites. The critique will be structured around three factors, which serve as reasons demonstrating that application of the aiding and abetting framework to potentially harmful websites is problematic: (1) *actual* assistance, (2) acting knowingly, and (3) information serving as the "missing piece."[49]

The first factor to critique relates to the notion of *actual* assistance, and *United States v. Schiff* established the framework that the purpose of the information provided must relate to *actually* or *materially* assisting others in the commission of a crime. This idea, however, cannot be applied in cyberspace, especially because the purpose of many websites cannot be explicitly determined. Certain websites may contain dual-uses, and include both legal and illegal instructions; websites that may be used either to achieve positive results *or* harmful acts bar the argument that the *intent* of the creator was to solely assist others in harm-facilitating behavior. If the instructions contained in a website may be used for legitimate, legal, or safe purposes, courts cannot apply the idea of "actual" assistance, since the intent or purpose of the website creator was *not* to further

[49] Discussion of the aiding and abetting theory of law is found in legal analysis. See: Monica Lyn Schroth, "Reckless Aiding and Abetting: Sealing the Cracks that Publishers or Instructional Materials Fall Through," *Southwestern University Law Review* 29 (2000): 567-616, and Leslie Kendrick, "A Test For Criminally Instructional Speech," *Virginia Law Review* 91 (December 2005): 1973-2021.

harmful consequences. A further difficulty in applying the "actually assists" standard to the Internet relates to the response of the audience to viewing the instructions in cyberspace. For example, the creators of the "Methods File" have no way of ascertaining which viewers might read the content and dismiss it, or which viewers might read the content and *actually act* upon it. Viewers may read the suicide instructions and choose to seek help, or others may, tragically, follow the instructions and end their lives. Predicting the behavior of every viewer of the material proves impossible, and applying the notion of actual assistance proves infeasible in cyberspace, in which instructions may prompt a diverse variety of responses amongst viewers. An aiding and abetting lawsuit in cyberspace would not be possible, since many of the factors, especially the primary and foremost standard, cannot be determined.

The second problematic aspect of application of aiding and abetting theory to website content relates to the idea of "willfulness," which is a concept introduced by *United States v. Damon*; the term served as a characteristic that further explains the actual assistance standard. Acting willfully, according to the courts, was counseling or advising others and *knowing* that a quantifiable number of those individuals would follow the instructions. The determination of willfulness in cyberspace, however, raises difficulties, because the willfulness of a creator is inherently linked to the *purpose* of the site, which often cannot be determined. In a case concerning a site such as the "Methods File," questions arise as to its purpose. For some, it clearly was created with the intention of providing instructions for those individuals who, in despair, have decided to end their lives. While the creator of the site, Andrew Beals, argues that "the purpose of the site is rational, open discussion about suicide, with emphasis on individual liberty and

autonomy,"[50] many argue that the design of the site, solely consisting of lists of methods in which one can end his life (with no discussion of liberty, autonomy, or even other *options)*, precludes any such argument from being made. In the case of "Methods File," assessing the purpose or intent of the site and consequently attributing *willfulness*, or the knowledge by the creator that users will use the information solely to their detriment, may raise ambiguous questions. In addition, the court upheld Damon's convictions because a quantifiable number of people actually followed his instructions in evading tax laws, but this act of quantification cannot be applied in cyberspace. Determining whether a *specific* site *alone* was the catalyst that resulted in harm-facilitating behavior is near impossible; viewers may have obtained some of the information utilized from another site or source. Viewers of "Methods File" may have obtained suicide instructions from other sites as well.

The final factor to critique regards the principle of the "missing piece;" the case of *United States v. Bell* established the principle that the information or instructions prove to be the missing piece in assisting others. As with the notion of willfulness, the "missing link" theory cannot be applied to websites, because there exists no means to determine whether the website *alone* was the "missing piece," or whether the site acted as a *culmination* of research. Assessing how many individuals committed suicide as a result of viewing "Methods File" *alone*, for example, is infeasible both because *willfulness* by the creator and the *raw numbers* cannot be determined. Further, assessing whether sites function as the "missing piece" in providing information is difficult due to consideration of the *means* in which some websites instruct users. Some websites containing harm-

[50] Luu, 310.

facilitating behavior do not actually assist users through the site itself, or provide links or methods for site viewers to access further harm-facilitating behavior. For these types of websites, no *added* step exists; the sites are merely providing information, and it remains up to the individual viewing the material to act on it. Questions arise, particularly as a result of information-providing sites. Would websites that leave it up to the individual to act be considered the "missing piece" if no added, final step exists? How would liability be premised, if courts cannot establish whether a site *alone* was the factor or "missing piece" that resulted in harmful behavior?

Thus, consideration of the factors of *actual* assistance, acting knowingly, as well as the notion of the "missing piece," indicates the problematic aspects of the aiding and abetting framework and its ultimate inapplicability to potentially harm-inducing websites in cyberspace. Assessment of the aiding and abetting theory suggests that an aiding and abetting lawsuit would not be appropriate or possible for websites containing harmful material.

Instruction Manual Theory

Case Law

Case law exists regarding print instructional manuals that counsel in criminal or dangerous behavior, but a distinction must be made between the prior aiding and abetting cases and legal cases concerning instructional manuals. The instruction manual line is a subset of the aiding and abetting approach, and functions as a *specific category* of cases under the aiding and assisting branch of case law. The characteristic that distinguishes

the instruction manual cases pertains to the idea that speakers of a message may take *even further* action to actually assist listeners on a course of action; speakers within the instruction manual cases make *comprehensive*, *printed* guides to aid the receivers of the message. Thus, a schematic organization of all the legal approaches considered may best be viewed as increasing levels of speaker involvement – while incitement concerns encouragement and the option of action is on the part of the speaker, the copycat approach involves the response on the part of the *listener*. The aiding and abetting approach concerns more action, as the speaker is playing a material role in actually assisting the receiver of the message, while the instruction manual approach represents the highest level of speaker involvement, as printed manuals with detailed instructions are created with the goal of facilitating behavior on the part of the audience or listener.

An assessment of current case law will determine whether the legal treatment of instruction manuals should be extended to instructional, dangerous websites in cyberspace. One relevant case concerns the counsel of murder as found in the book entitled *Hit Man: A Technical Manual for Independent Contractors*, and the book was critical to the *Rice v. Paladin Enterprises* case, decided in 1997, which evaluated the scope of protection afforded to instructional manuals.[51] The case arose from three violent murders that occurred on March 3, 1993 in Silver Springs, Maryland after investigators discovered that James Perry not only utilized *Hit Man* in the murder of a child and two adults, but also followed twenty-two steps outlined in the book in the execution of the murders. Family of the victims brought suit against Paladin Press, the book's publisher,

[51] *Rice v. Paladin Enterprises,* 940 F. Supp. 836 (D Md. 1996); 128 F. 3d 233 (4th Cir. 1997).

on the basis that the book content counseled murder. The case, heard by the Maryland District Court, was decided in favor of Paladin Press, and the opinion, authored by Judge Alexander Williams Jr., focused on the idea of incitement under the 1969 *Brandenburg v. Ohio* standard. *Brandenburg* states that abstract advocacy of an idea, however distasteful or repugnant it may be, is protected speech, but once the advocacy changes into actual incitement of lawless action, or concrete encouragement, it loses the protection of the First Amendment.[52] Williams deemed *Hit Man* protected speech, since the content disseminates information in the abstract sense.[53]

The decision reached by the Fourth Circuit Court of Appeals in *Rice v. Paladin Enterprises,* however, utilized different reasoning. The Court of Appeals ended Paladin's short-lived success and reversed the District Court decision, finding in favor of the Rice sisters by ruling the manual unprotected speech. The decision, written by Judge Luttig, concluded that the instructional nature of *Hit Man* precludes it from First Amendment protection:

> *Hit Man* is, pure and simple, a step-by-step murder manual, a training book for assassins…The book directly and unmistakably urges concrete violations of the laws against murder and murder for hire and coldly instructs on the commission of these crimes. The Supreme Court has never protected as abstract advocacy speech so explicit in its palpable entreaties to violent crime.[54]

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[52] 395 U.S. 444 (1969).

[53] 940 F. Supp. 836 (D Md. 1996).

[54] 128 F. 3d 233, 263 (4th Cir. 1997).

Luttig, in the decision, emphasized that the explicit instructions contained in *Hit Man*, such as passages regarding body disposal, shooting techniques to minimize blood spatter, and best methods for murder, provide clear, persuasive counseling for readers to commit an illegal act. The notion of encouraging and providing instructions is closely linked to the idea of "aiding and abetting," which has always been punished in the court of law. Hence, the instructional manual *Hit Man* is not protected under the basis of freedom of speech, and the First Amendment did not pose a bar to finding Paladin Press liable.

Another legal case exists which demonstrates that instructional manuals do not receive First amendment protection, and *United States v. Barnett* pertains to a manual containing instructions on the manufacture of phencyclidine, or PCP.[55] The manual was found to be unprotected expression, and the decision of Judge Alarcon stresses the nature of the expression, a manual, as the catalyst of aiding and abetting. Alarcon distinguishes between advocacy and aiding and abetting as he writes,

> Encouraging and counseling another by providing specific information as to how to commit a complex crime does not alone constitute aiding and abetting. If, however, the person so assisted or incited commits the crime he was encouraged to perpetrate, his counselor is guilty of aiding and abetting.[56]

The critical concept his words emphasize is that the mere *instructions* do not constitute aiding and abetting, but rather, aiding and abetting is decided based upon whether or not the person who was encouraged to commit an illegal or harmful act *actually committed it*.

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

[56] 667 F. 2d 835, 841 (9th Cir. 1982).

Legal direction is also found in the cases of *United States v. Buttorff*, *United States v. Rowlee,* and *United States v. Moss*. All three cases contain similar circumstances, and include verbal speeches about tax evasion, as well as the formation of tax evasion societies with the intention of aiding and assisting the submission of false tax documents. These cases, though concerning tax evasion, contain differences that distinguish them from the tax evasion cases of the aiding and abetting line, since the instructions given in these cases more closely resemble instruction manuals. The first of these cases, *United States v. Buttorff,* relates to instructions regarding tax evasion, and these instructions took the forms of manuals, since the defendants provided users with packets containing methods to violate the tax code. The decision reached in the case emphasizes that the First Amendment cannot protect instructional manuals.[57] Judge Ross, author of the case decision, cites the incitement aspect of *Brandenburg* and labels the tax evasion speech as expression that is instructional in nature and contributory to aiding and abetting, stating, "This speech is not entitled to First Amendment protection and, as discussed above, the filing of false or fraudulent withholding forms was sufficient action to constitute aiding and abetting."[58]

Speech counseling tax evasion was also the focus of the 1990 case of *United States v. Rowlee*. The defendants created a tax evasion society, complete with lectures including tax evasion theories, submission of false W-4 forms, and fraudulent tax returns. These lectures included resources distributed which closely resembled instruction manuals. The court rejected the argument that the speech was entitled to First

[57] *United States v. Buttorff,* 572 F.2d 619 (8th Cir. 1978).

[58] 572 F.2d 619, (8th Cir. 1978).

Amendment protection and that the defendants were exercising their right of free expression. The case decision again emphasized *Brandenburg,* and found that the tax evasion speeches were not subject to *Brandenburg* requirements because, although they did not incite the type of "imminent lawless activity" referred to in criminal syndicalism cases, they *did* go beyond mere advocacy of tax reform. Further, the First Amendment did not provide a defense to the charge of filing false tax returns, and the speech was unprotected under freedom of speech.[59]

United States v. Moss reached a nearly identical conclusion as *Rowlee*. The defendant was convicted of violating the fraudulent withholding exemption certificate law. Moss' speech, counseling others on tax evasion, was not entitled to First Amendment protection because he instructed in behavior violating federal law; further, the expression went beyond mere advocacy of tax reform, but incited others to engage in acts that had the potential of substantially hindering the administration of the revenue.[60]

United States v. Mendelsohn is a final case concerning instructional materials, and serves as an example of case law that focuses upon speech that assists readers in the recording and analysis of bets placed on sporting events. The defendants created a computer program entitled Sports Office Accounting Program (SOAP) for the purpose of aiding in bookmaking during gambling activities, and subsequently mailed the program out of state. The defendants were convicted of violating an interstate transportation of wagering paraphernalia law, but appealed their conviction, arguing that their bookmaking program was entitled to the First Amendment's freedom of speech protection. The court

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[59] *United States v. Rowlee,* 899 F. 2d 1275 (2nd Cir. 1990).

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

rejected their defense, and found that the *Brandenburg* standards were inapplicable because the defendants disseminated a computer program that assisted in betting, an illegal activity. The program was "too instrumental in and intertwined with the performance of criminal activity to retain First Amendment protection."[61] Essentially, the speech in question went beyond the mere advocacy aspect of *Brandenburg,* and instead actually incited the recipients of the program to engage in criminal behavior.

In sum, these cases, viewed within the First Amendment perspective, all reached the same conclusion, ruling that aiding and abetting is unprotected speech. Aiding and abetting a criminal or illegal act contains no redeeming value, whether it is political, societal, artistic, or scientific. All decisions focused on the *outcome* of the aiding and abetting/encouraging offered by the instruction manuals, and found that the successful efforts of the counseling aspect trumps the imminent lawless action test from *Brandenburg v. Ohio.*

Critique

An analysis and critique of the current body of law governing instruction manuals reveals inherent difficulties with the approach as it is *currently* conceptualized. While the other legal approaches are flawed in application to harmful websites, the instruction manual approach offers hope for application, but requires legal revision and direction to correct certain problems. The critique will focus upon two problematic aspects of the instructional manual line of cases: (1) underdevelopment and (2) questions of ambiguity

[61] *United States v. Mendelsohn,* 896 F. 2d 1183, 1186 (9th Cir. 1989).

and definition.[62] The solution to the legal problem of harm-facilitating websites includes the correction of these factors, which will allow for subsequent application to cyberspace content, a step that no other legal approach provides.

The first problematic aspect of the instruction manual case law to consider pertains to its *underdevelopment. Rice v. Paladin Enterprises* concerns a guide on the methods for the execution of a perfect murder, without moral or legal repercussions. Within its chapters, author Rex Feral provides the specific steps regarding the completion of a flawless murder, an activity which he counsels as illegal and criminal. Consideration of the *Hit Man* case offers an obvious solution, since murder is undoubtedly against the law, and lacks redeeming social value, so the text providing instructions on a criminal act contains no value either. The manual was clearly classified as an instruction manual because the aiding and abetting aspect of the text was emphasized as a critical feature of the guide, as the overall success the words have in encouraging others to commit crimes

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[62] See commentary relating to the theory of both instruction manuals and *Rice v. Paladin* in legal analysis*:* Gregory Akselrud, "*Hit Man*: The Fourth Circuit's Mistake in *Rice v. Paladin Enters., Inc*," *Loyola of Los Angeles Entertainment Law Journal* 19 (1999): 375-411, Avital T Zer-Ilan, "The First Amendment and Murder Manuals," *Yale Law Journal* 106 (June 1997): 2697-2702, Andrianna D Kastanek, "From *Hit Man* to a Military Takeover of New York City: The Evolving Effects of *Rice v. Paladin Enterprises* on Internet Censorship," *Northwestern University Law Review* 99 (Fall 2004): 383-435, and Robin R. McGraw, "*Rice v. Paladin:* Freedom of Speech Takes a Hit With 'Deep Pocket' Censorship," *Northern Kentucky Law Review* 27 (2000): 128-162.

trumps other concerns, but the ruling of the case did not provide a *concise definition* of exactly what elements comprise an instructional guide.

The notion of underdevelopment is also seen in the case of *United States v. Barnett*, which emphasizes that mere *instructions* do not constitute aiding and abetting, but rather, aiding and abetting is decided based upon whether or not the person who was encouraged to commit an illegal or harmful act *actually commits it*. The conclusion, as also found in *Rice v. Paladin Enterprises*, was the same: speech that aids and abets criminal behavior is precluded from the shelter of freedom of speech contained in the First Amendment. Again, it is important to note that while Judge Alarcon provides guidance as to what comprises aiding and abetting, he does not, in his decision, *define* an instructional manual. Although the decision establishes that the PCP manual is unprotected, what *specific elements,* besides the fact that it aids and abets, render the First Amendment inapplicable? The case decision does not provide an answer.

United States v. Mendelsohn also represents a case illustrating the underdevelopment of the instruction manual line. The case focused upon a Sports Office Accounting Program, which assisted readers in the recording and analysis of bets placed on sporting events. The court found that the *Brandenburg* standards were inapplicable because the defendants disseminated a computer program that assisted in betting, an illegal activity, and the speech in question went beyond the mere advocacy aspect of *Brandenburg* by actually inciting the recipients of the program to engage in criminal behavior. Reaching similar rulings as in *Rice* and *Barnett*, the ruling in *Mendelsohn* found the speech unprotected under the First Amendment, but *failed to define* the elements comprising this instructional manual.

The tax evasion cases of *United States v. Buttorff, United States v. Moss,* and *United States v. Rowlee* serve as examples demonstrating the second problematic aspect of the instruction manual line as it is currently formulated: the law is *ambiguous*, and often characterizes instruction manuals merely by traits they do *not* possess. In all three cases pertaining to speech relating to tax evasion as instruction manuals, the courts reached the same conclusion, applied Brandenburg, and found that the expression went beyond mere advocacy by aiding and assisting others. However, none of the three case decisions outlined the definition of speech that aided and abetted. By classifying the speech as expression that was not mere advocacy, the case law only defined what it was *not*. No guidance or definitions were provided concerning the components of instruction manuals, nor were any potential characteristics for a legal definition described.

The instruction manual approach offers hope for future application to website content because instructional guides, as a genre of expression, have never been sheltered under the First Amendment, and this standard from case law should be extended to dangerous Internet websites, which share many of the same qualities as the instructional manuals in *Rice v. Paladin Enterprises, United States v. Barnett, United States v. Buttorff*, *United States v. Rowlee, United States v. Moss*, and *United States v. Mendelsohn*. Further, common elements amongst the decisions are revealed, which offer the viability of application to website content. Each case classified speech containing explicit details and counseling as *instructional manuals*. As instruction manuals, these types of expression are not entitled to First Amendment protection, since they constitute aiding and abetting. The similarities in the case law among instructional manuals may be applied to websites such as the "Methods File" because the content nature is nearly

identical. The hopeful aspect of this legal approach as a remedy to the problem of harmful websites is underscored when one considers that the legal logic suggests that websites such as "Methods File" should, likewise, not be entitled to the shelter of the First Amendment.

Although the case law pertaining to print instructional manuals established that First Amendment protection does not apply to speech that aids and abets criminal behavior, the courts have failed to explicitly define the content that comprises an instructional manual. Consideration of the *Rice, Barnett, Mendelsohn*, *Buttorff, Rowlee,* and *Moss* cases reveals flaws in the instruction manual approach as it is currently formulated, and the issues of underdevelopment and ambiguity still exist. Before application is possible, a clarification and subsequent synthesis of this body of law is a warranted and necessary step in the application and extension of the legal treatment of instructional guides to dangerous Internet websites. The solution, therefore, must include development of the definition of the characteristics comprising an instruction manual, and clearly delineate between an instructional guide that is harmful and one that is protected under the First Amendment.

CHAPTER THREE:

THE INFLUENCE OF INSTRUCTION MANUALS – A NEW SOLUTION TO HARM-FACILITATING WEBSITES

Implications of Case Law

The case law relating to instruction manuals as a whole demonstrates inherent difficulties: the law is ambiguous in dealing with expression counseling in dangerous or harmful activities. While the law is clear in labeling defamatory,[1] obscene,[2] commercial,[3] or speech that incites[4] as expression unprotected under the First Amendment, speech that instructs in dangerous behavior does not have a clearly defined place in the free speech spectrum.

In recognition of the fact that Internet communications do not fit into any pre-existing category of speech, different frameworks have been suggested. One manner of addressing harm-facilitating websites offers an *Incitement Approach*, which likens certain websites to incitement, or encouragement of lawless action; this framework emphasizes the concern that Internet communications cannot be neatly characterized as either high-value speech or low-value speech, and underscores the difficulties in resolving questions of the First Amendment as they pertain to the medium of cyberspace. Application of the legal theory of Imminent Lawless Action, however, to cases arising as a result of harm-

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[1] *New York Times v. Sullivan*, 376 U.S. 254 (1964).

[2] *Miller v. California*, 413 U.S. 15 (1973).

[3] *Virginia State Board of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748 (1976).

[4] *Brandenburg v. Ohio,* 395 U.S. 444 (1969).

facilitating websites proves impossible, because of questions pertaining to *imminence*, *face-to-face* and *direct address communication*, as well as issues of *association* and *subsequent intent*. These requisite legal elements of incitement remain difficult to address within Internet communications due to the fact that many of these factors may be lacking within cyberspace.[5] Assessment of this particular theory, therefore, indicates inapplicability on both the *conceptual* and *applied* levels.

Case law pertaining to print instructional manuals, however, remains a viable legal remedy and offers hope for application to harm-facilitating websites because of the many shared characteristics between the instructional guides at the heart of each case and dangerous Internet sites. The body of law pertaining to print instructional manuals, however, is vague, particularly when one considers that the courts have failed to explicitly define the content that comprises an instructional manual. Despite the fact that the justices reached the same conclusion and ruled that speech that "aids and abets" is unprotected under freedom of speech provisions,[6] the courts have not provided clear guidelines within this body of law. As demonstrated in the consideration of several

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[5] See: Theresa J. Pulley Radwan, "How Imminent is Imminent?: The Imminent Danger Test Applied to Murder Manuals," *Seton Hall Constitutional Law Journal* 8 (1997): 47-73, and John F. Wirenius, "Brigaded with Action: Undirected Advocacy and the First Amendment," *Seton Hall Law Review* 32 (2002): 299-365.

[6] *Rice v. Paladin Enterprises*, 128 F. 3d 233 (4th Cir. 1997), *United States v. Barnett*, 667 F. 2d 835 (9th Cir. 1982), *United States v. Buttorff,* 572 F.2d 619 (8th Cir. 1978), *United States v. Rowlee,* 899 F. 2d 1275 (2nd Cir. 1990), *United States v. Moss,* 604 F. 2d 569 (8th Cir. 1979), *United States v. Mendelsohn,* 896 F. 2d 1183 (9th Cir. 1989).

instructional manual cases, a further complication inherent in the case law is the fact that the courts have not distinguished between speech that *actually* aids and abets an individual in committing an illegal or harmful act, and expression that may only advocate criminal behavior in an *abstract sense*.[7]

A clarification and subsequent synthesis of this body of law is a warranted and necessary step in the application and extension of the legal treatment of instructional guides to dangerous Internet websites. The need exists, as demonstrated by its absence in case law, for the development of the definition of the elements comprising instructional manuals. The existence and unrestricted accessibility of dangerous websites represents a tangible, relevant problem, and the framework for the solution should be developed within two main areas: A clear *legal definition* of an instruction manual would provide a conceptual framework in which to place speech that essentially transmits instructions in criminal behavior, and in turn, this legal definition would provide *application* to harm-facilitating websites by expanding the narrow view of what constitutes instruction manuals.

Certain characteristics of instruction manuals are revealed when one considers the instruction manuals within existing case law. *Rice, Barnett,* and *Mendelsohn*, coupled with the tax evasion cases of the aiding and abetting line, suggest that an important characteristic of an unprotected instruction manual is that the action discussed is against

[7] 128 F. 3d 233 (4th Cir. 1997), 667 F. 2d 835 (9th Cir. 1982), 572 F.2d 619 (8th Cir. 1978), 899 F. 2d 1275 (2nd Cir. 1990), 604 F. 2d 569 (8th Cir. 1979), 896 F. 2d 1183 (9th Cir. 1989).

the law.[8] *Buttorff, Moss,* and *Rowlee*, further, imply that the chronology of steps is important in assessing whether speech is within the bounds of the First Amendment.[9] Aiding and abetting cases, in addition to those found within the instruction manual line, all concerned expression lacking in value when considered from the perspective of a SLAPS test, and the cases propose that *redeeming value* may afford an instruction manual the shelter of free expression qualifications.

Additionally, the tax evasion cases found within the aiding and abetting branch of cases encourage participants to complete the act by glorifying the end rewards or benefits, such as promoting the money saved by avoiding tax payments, and *Buttorff, Moss,* and *Rowlee*, as particular cases, imply that the target audience and *foreseeability* is an important consideration, especially since those cases concerned an intended audience of a club formed for the sole purpose of avoiding payment of taxes.[10] Consideration of case law leads to the recognition of the need to formulate a clear, legal definition of an instruction manual.

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[8] 128 F. 3d 233 (4th Cir. 1997), 667 F. 2d 835 (9th Cir. 1982), 896 F. 2d. 1183 (9th Cir. 1989).

[9] 572 F. 2d 619 (8th Cir. 1978), 604 F. 2d 569 (8th Cir. 1979), 899 F. 2d 1275 (2nd Cir. 1990).

[10] 572 F. 2d 619 (8th Cir. 1978), 604 F. 2d 569 (8th Cir. 1979), 899 F. 2d 1275 (2nd Cir. 1990).

The Instruction Manual Scheme: A New Definition

Case law regarding aiding and abetting historically has never been extended to the Internet.[11] The narrow view of what constitutes instruction manuals must be broadened; in order to extend the legal treatment of instructional guides to the appropriate websites, a necessary component of the solution must be a new legal definition, *drawing from the implications of case law*, which states the elements constituting an instructional manual. The solution is comprised of a three-tiered scheme, taking the form of a legal test, which demarcates varying levels to separate a harmful instruction manual from an instructional guide protected under the First Amendment. The three-tiered approach provides varying criteria within each level to determine whether the speech in question is afforded First Amendment protection. Each level outlines the traits of an *unprotected* instruction manual, not a legal or lawful guide.

The first level of the three-tiered approach raises the question of whether the expression constitutes an instruction manual in terms of the *basic characteristics* of an instructional guide. The evaluation process thus begins by assessing certain basic guidelines pertaining to the content of the expression:

- Contains *specific instructions* about a generally harm-inducing activity,
- Organized into a *chronological sequence of steps* to be followed, and
- *Encourages completion* of the act by promoting the end goal.

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[11] Bryan J. Yeazel, "Bomb-Making Manuals on the Internet: Maneuvering a Solution through First Amendment Jurisprudence," *Notre Dame Journal of Law, Ethics & Public Policy* 16 (2002): 279-314.

If evaluation of these factors indicates that the expression *meets* the criteria of the first level, the expression thus far is qualified as an unprotected instruction manual.

Determining whether the instruction manual is *harmful* is the next step of the evaluative process, and if the expression passes the first level, the speech in question advances to the second tier of the test, which assesses the *circumstantial* and *external* factors surrounding the speech. The second level of evaluation includes consideration of the *results* and *foreseeability of harm* of the expression, and further determines whether the speech is unprotected:

- *Results* of utilizing speech: If the site is used as an informational source with resources for help, it is afforded protection of the First Amendment. Conversely, if it is purely instructional with regard to *harmful* behavior, the shelter of free speech would not apply.
- *Foreseeability:* Examination of the expression suggests that the individuals utilizing the information would be likely to act upon the instructions with harmful results.

If the speech is found to meet the second level's criteria of an unprotected, harmful instructional manual, it progresses to the third tier of the scheme, which evaluates the *mitigating value* the expression might contain. This final level of review assesses two specific criteria, and an unprotected instructional manual meets the following characteristics:

- The work, when taken as a whole, contains no *redeeming value*, when considered from the SLAPS perspective (serious literary, artistic, political, or scientific value).

- Assessment of *dual-use uses* indicates that the negative, harm-inducing uses will outweigh the positive ones.

Nicholas Wolfson emphasizes the notion of the protective value of speech, which is provided the shelter of the First Amendment, when he writes: "If the speech can be shown to have some 'serious' purpose, that is, one 'worthy' of continued debate, then it is protected."[12] The third tier thus offers speech the opportunity for First Amendment *protection*, not *restriction*, which accounts for the inclusion of the SLAPS consideration.

The three-tiered scheme postulates that if the speech *meets* the criteria of the first two levels, it is unprotected, and advances to the third tier, which is the only level of the assessment scheme that provides a chance to consider *redeeming, mitigating* factors. Each of the three tiers contain characteristics of an *unprotected* instruction manual; if, therefore, the speech *does not* match the unprotected characteristics outlined in the third level, the speech is found to be worthy of First Amendment protection. If, however, speech *meets* all three levels of an unprotected manual, it is denied the shelter of the First Amendment.

The seven elements discussed within the three-tiered approach demonstrate similarities between instruction manuals and dangerous websites. As instruction manuals, these types of expression are not entitled to First Amendment protection, since they constitute aiding and abetting. Although it must be acknowledged that the Internet is a different medium of communication, the narrow view of what constitutes instruction manuals *may be and should be expanded to include* dangerous, instructional websites in

[12] Nicholas Wolfson, *Hate Speech, Sex Speech, Free Speech* (Westport, Conn.: Praeger, 1997), 33.

cyberspace because the websites can be found to *share qualities* of an instructional guide. Further, the similarities in the case law among instructional manuals may be applied to websites such as the "Methods File" because the content nature is nearly identical. The logic implies and underscores that websites such as "Methods File" should, likewise, not be entitled to the shelter of the First Amendment. It is important to note that the application of a clear, legal definition of an instruction manual to dangerous websites allows for consideration on a *case-by-case basis* and would *avoid making overbroad, sweeping laws* that may unnecessarily censor websites that deserve First Amendment protection.

The First Level: A Characteristic Consideration

The first level relating to the instruction manual scheme pertains to an evaluation of the basic characteristics inherent within questionable websites. Factors to consider include whether the content contains *specific instructions* regarding the behavior discussed, whether the website contains a logical, chronological *sequence of steps*, or whether the site *encourages completion* of the act. These three evaluative factors on the first level relate purely to content, and do not require consideration of any external influences or factors, such as predictability of behavior or intended audience. In order to assess whether a website such as "Methods File" or "Terrorist's Handbook" is protected under the First Amendment, these criteria relating to content must be considered in conjunction.

The traits outlined in the first level of the evaluative process are supported by case law, and many legal decisions pertaining to aiding and abetting and instructional manuals

cases have utilized the consideration of content in establishing their rulings. The factor of specific instructions was addressed in *United States v. Schiff*, a tax evasion case concerning the book entitled *The Federal Mafia*, and the case was decided on the basis of content, as the court decided that the specific, training-manual characteristics barred it from First Amendment protection.[13]

The second criteria under the characteristic consideration relates to the whether the speech in question contains a chronological sequence of steps, and several instruction manual cases, including *Rice v. Paladin Enterprises* and *United States v. Buttorff* reached a ruling based upon the presence of step-by-step instructions. *Rice* centered upon *Hit Man,* a book counseling readers on the perfect murder without moral and legal consequences, and Judge Luttig's decision revolved around the logical organization of steps, many of which were sequential in order and instructed on the best methods pertaining to shooting to minimize blood spatter or body disposal. The manual was found unprotected under the First Amendment, and was classified as *a step-by-step* murder manual.[14] *United States v. Buttorff*, a tax evasion case, concerned informational packets distributed to users containing methods to best violate the tax code. The speech was deemed unprotected under free speech qualifications, because it clearly aided and abetted others in criminal behavior; the role of the expression as *instructional* was emphasized in the decision as the level of detail and organization of the steps within the packets assisted users in the filing of false or fraudulent tax returns.[15] Thus, *Rice* and

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[13] *United States v. Schiff,* 269 F. Supp. 2d 1262 (D. Nev. 2003).

[14] 128 F. 3d 233 (4th Cir. 1997).

[15] 572 F. 2d 619 (8th Cir. 1978).

Buttorff both represent legal decisions employing consideration of the *characteristics* of the speech, specifically the logical, chronological sequence of steps.

The final factor to be assessed under the characteristic consideration relates to whether the expression in question encourages or glorifies the completion of the end goal; this criterion can be supported in the case decisions of *Rice v. Paladin Enterprises* and *United States v. Rowlee*, both of which considered this characteristic. The *Hit Man* book of the *Rice* case glorified murder for hire, and the corresponding individuals who best utilize cunning, daring, and immorality to break the law, while *Rowlee* concerned a tax evasion *society*, through which lectures were given pertaining to tax evasion theories, submission of fraudulent W-4 forms, and false tax returns.[16] The lectures, while providing the *theoretical* guidance necessary to avoid tax payments, also contained *psychological* guidance and support by conveying to those in attendance the ease with which one can evade tax payment. The expression in both cases was ruled unprotected, and the reasoning in the decisions thus supports consideration of the third characteristic factor of encouragement.

Thus, the first level of evaluation, the characteristic consideration, is supported by case law and requires assessment of all three content factors in conjunction. If evaluation of the characteristic traits indicates that the expression *meets* the criteria of the first level, the speech is thus far deemed an unprotected instruction manual under the First Amendment, and progresses to the second level of evaluation, which evaluates the *circumstantial* and *external* factors relating to the expression.

[16] 899 F. 2d 1275 (2nd Cir. 1990).

The Second Level: A Circumstantial Consideration and External Evaluation

The second level of evaluation under the instruction manual scheme explores the contextual factors, or the *circumstances* and external influences surrounding the speech in question. Varying circumstances pose more of a danger in terms of harm-inducing behavior than others, and the courts have acknowledged the role of circumstantial factors in their decisions. This second level of assessment provides more interpretation and nuance than the first level, which merely evaluates the *characteristics* of the speech. Factors considered within the second level of the instruction manual scheme consist of the *results* of utilizing the speech, including the nature of the expression, as well as the *foreseeability* of harm.

These two circumstantial considerations of the second tier are reinforced by case law, and the decisions of several tax evasion cases utilize the assessment of external factors in the rulings. The first circumstantial factor of the second level pertains to the evaluation of the *results*, or harmful outcomes, achieved if the instructions are utilized; legal cases have recognized the nature of the speech and the environment in which the expression appears, and offered protection to potentially harmful speech *if* it appears as an informational source with resources for help. If, however, the speech is purely instructional with regard to action resulting solely in *harm*, the shelter of the First Amendment does not apply. The corresponding results relate to the nature of the speech, and this circumstantial factor is explored in *United States v. Bell,* a tax evasion case concerning a business and website assisting clients in the avoidance of tax payments. The *results* of the expression, and corresponding potential of harmful outcomes, were considered in the case decision, in which the court ruled that the selling of tax evasion

materials invited visitors to violate the tax codes, and the purely instructional nature of the website and expression barred the speech from First Amendment protection.[17] Obtaining the materials through the website, further, represented the completion of the cycle of *deciding* to evade the law, *acquiring* the materials necessary to break the law, and deciding to *actually violate* the law; engaging in behavior to break the law, further, emphasizes the consideration of harmful outcomes that may result from certain instructional speech. The nature of the expression was the purely instructional "missing piece" information, and *United States v. Bell* thus supports the idea of circumstantial consideration under the second level of the instruction manual scheme.

The second factor to assess under the circumstantial consideration and external evaluation tier of the instruction manual approach pertains to the *foreseeability of harm*, and *United States v. Moss* supports the evaluation of this trait. *Moss* concerned a defendant convicted of violating the fraudulent withholding exemption certificate law, and Moss verbally counseled others through a club formed with the sole purpose of evading tax payment. The court directly considered the *foreseeability* of harm, and evaluated whether the individuals utilizing the information had a need for, and would be likely to consequently act upon, the instructions given by Moss.[18] Thus, assessment of the target audience implied that the individuals employing the information would most likely engage in harmful behavior by substantially hindering the administration of the revenue because the audience was comprised of a club with the single aim of collectively learning the best methods to avoid taxes.

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[17] *United States v. Bell,* 414 F. 3d 474 (3rd Cir. 2005).

[18] 604 F. 2d 569 (8th Cir. 1979).

The two factors of the circumstantial consideration and external evaluation of the second tier thus center upon results and foreseeability, and these two traits have their basis in case law, which has recognized the importance of considering contextual factors in the determination of whether First Amendment protection applies. If the speech in question meets the criteria found within the first level of the scheme and progresses to the second level, in which it *also* matches the traits of an unprotected, harmful instruction manual, the expression progresses to the third tier of the instruction manual scheme, which assesses the mitigating value the speech might possess.

The Third Level: The Measurement of Mitigating Value

Speech meeting the criteria of the first two levels of the instruction manual scheme is thus far deemed unprotected, and carries the possibility of being completely denied First Amendment protection, but one final evaluation remains, which assesses the redeeming value the expression might contain. If the speech *does not match* the criteria in the third level, then the expression is found to be worthy of First Amendment. It is important to note that each level of the three-tiered scheme outlines criteria of *unprotected* instruction manuals, so if expression *meets* the factors of the first two levels but does *not* meet the factors of the third level, it is found to have mitigating value and is afforded the protection of free expression qualifications. If the speech, however, *matches all three levels* of an unprotected manual, it is not given First Amendment protection.

The third level, as a final evaluative step in the instruction manual scheme, is the only level of the assessment process that provides a chance to assess redeeming factors, and focuses specifically on two traits including the greater value under *Miller's* SLAPS

test, and the dual-uses of the speech. When assessing the value contained within certain expression, the work *in its entirety* must be considered, for websites may simply circumvent the greater value requirement by adding content that is ostensibly legitimate in terms of societal discourse. In order for a website to be found protected under the First Amendment, the material *as a whole* must further the values fostered by debate, or discussion.

Miller v. California, a 1973 obscenity case, outlined the SLAPS test to determine whether a work is obscene, and stipulated that the court must assess whether a work has serious literary, artistic, political, or scientific value.[19] If the work, taken as a whole, contains redeeming value, it is provided First Amendment protection, *even if* portions are considered by some to be obscene. The implications of the SLAPS test suggest that speech may be protected or unprotected under free speech qualifications depending upon some inherent element of artistic, literary, or societal value, and a legitimate function of the speech precludes restriction even if segments of the expression may be considered obscene or offensive. Meaningful material is protected, but problems arise when the expression solely discusses the commission of a crime, such as speech found within certain harm-facilitating websites.

The evaluation of the SLAPS test, under the measurement of mitigating value tier, is supported by case law, and the instructional manuals in *Rice v. Paladin Enterprises*, *United States v. Barnett*, and *United States v. Mendelsohn* did not possess any inherent social value, nor did the ideas and actions promoted in these guides possess the necessary value to be included in the exchange of ideas protected under the freedom of expression.

[19] 413 U.S. 15 (1973).

The focus, in these guides, was on criminal or illegal acts, and as such, precluded any such possibility.

An additional factor to consider under the measurement of mitigating value tier pertains to the evaluation of the dual-uses of the speech. The idea of dual-uses hinges upon a balancing act between the positive and negative results of the employment of speech, since certain speech may be used to achieve both legal and illegal outcomes. Under the third tier, if the negative, harm-inducing uses outweigh the positive, legal uses, the speech meets the criteria of an unprotected manual and is *not* afforded the shelter of the First Amendment.

Application of the Solution to Websites

The application of the definition of an instruction manual to a variety of websites found in cyberspace suggests the clarification of boundaries and scope of the definition. The six specific sites selected as case studies represent the three varying types of websites found in cyberspace; under the qualifications of the First Amendment, expression may be protected, unprotected, or ambiguous. The characteristics of the sites allow for placement along the free speech spectrum, and the categories of websites coincide with the law, as demarcations can be made between websites *deserving* First Amendment protection, sites that are *unsheltered* under the First Amendment, and sites that are *ambiguous* and offer dual-use uses. The test will, therefore, be applied to a variety of speech. The six sites to which the solution will be applied can best be categorized by the notion of a continuum, ranging from sites that *should not* be protected under the First Amendment, to websites

that *should* be offered the shelter of free speech qualifications, with ambiguous sites falling in between.

"Methods File" and the "Terrorist's Handbook" contain expression without value, and are, from all angles of analysis, negative, harm-facilitating sites. "Methods File" and the "Terrorist's Handbook," thus, fall at the end of the spectrum as illegal instructions that result in harm.

Websites such as "House of Thin" and "Word Press/Blog about: Deviant Sex" serve as examples of sites containing expression that may be characterized as tasteless but within the bounds of the First Amendment, and extending the discussion of an applied solution represents examination of the other end of the free speech spectrum, as pro-anorexic or pro-deviant sex blogs do not counsel users in *illegal* behavior.

A final exploration pertains to sites raising questions of ambiguity under First Amendment protections and restrictions; "Anarchist's Cookbook" and "Homemade Drugs Library," as websites containing dual-use expression that is *not solely* illegal, function as the middle of the spectrum of analysis. Dual-use sites represent the most difficult cases to resolve in terms of free speech questions, especially because within these sites, users may find instructions not only pertaining to illegal behavior, but for legal activities as well. Difficulties often arise in applying a solution that would target the harmful aspects of the content, without unnecessarily censoring the positive, beneficial aspects of the expression.

Thus, applying the three-tiered solution to the six varying websites is critical in assessing the boundaries and scope of the legal remedy, and exploration of the solution suggests that while Internet communications do not neatly fit into any categories of high-

value or low value-speech, a framework modeled from the theories outlined in instruction manual case law would prove most applicable.

Harm-Facilitating Websites

"The Methods File"

Application of the instruction manual scheme to the "Methods File" as a case study demonstrates the similarities between traditional instruction manuals at the heart of case law and dangerous websites available in cyberspace, and assessment of the three tiers of analysis indicates that the "Methods File" would be a website unprotected under the First Amendment. The first level of evaluation, relating to the *basic characteristics* of the speech, concerns analysis of factors including specific instructions, chronological sequence of steps, and encouragement of completion. Under the first factor, "Methods File" *does* contain specific instructions about a harm-inducing activity, for "Methods File" provides explicit instructions to end one's life and contains information about an act that has been typically treated as a criminal manner in many parts of the world. Further, it may be argued that the instructions provided by "Methods File" clearly assist an individual in ending his or her own life. The exact fatal dosage of potassium cyanide was the information utilized by Suzanne Gonzales in her suicide, and "Methods File" aided

her in obtaining information necessary to end her life.[20] The first prong of the definition of instructional manuals thus applies to "Methods File," since assisted suicide is a criminal act. In addition, the common law codes in the United States support the idea that suicide is a criminal act. Common law refers to the traditions of law established through decisions of courts, rather than through legislative action. Due to its classification as a common law crime, an act of suicide can prevent money damages to the family of the victim unless it can be proved that the suicide victim was of an unsound mental state. This status of suicide is critical, since the "Methods File" provides instructions on an act that is considered criminal under common law in the United States in addition to the traditional legal view.

An additional factor to consider under the first tier includes the sequencing of information contained in the expression. "Methods File" fits this description, since the instructions are presented in a step-by-step fashion. The entry in the Poisons sections regarding cyanide emphasizes the instructional nature of the site (Complete entry for Cyanide may be found in Appendix A). The steps presented by "Methods File" are in

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[20] CNN, "Parents: Online Newsgroup Helped Daughter Commit Suicide," http://www.cnn.worldnews.printhtis.clickability.com/pt/cpt?action=cpt&title…%2F2005%2FUS%F11%2FO4%2Fsuicide.internet%2Findex.html&partnerID=2006 (accessed November 9, 2008). See also: San Francisco Gate, "A Virtual Path to Suicide: Depressed student killed herself with help from online discussion group," http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/06/08/MN114902.DTL&type=printable (accessed November 9, 2008).

chronological order and are to be followed in succession, from the first step to the last; if followed as directed, the progression through the steps will ultimately end in death. The similarity in the definition of instructional manuals and "Methods File" regarding the chronological organization of steps demonstrates that the narrow legal view of instruction manuals should be extended to dangerous websites, and that sites such as "Methods File" should not protected under the First Amendment. The power and influence of words and their potential effect on action is perhaps best summarized by Raphael Cohen-Almagor, writing in the text *Speech, Media, and Ethics: The Limits of Free Expression*: "We have to be aware of the dangers of words, and restrict certain forms of expression when designated as levers to harmful, discriminatory actions; for words, to a great extent, are prescriptions for actions."[21]

Further, the "Methods File" arguably encourages users to complete the act by promoting the end goal, consistent with the third factor under the first tier. The site, in addition to its "Poisons" and "Non-Poisons" sections, contains a "Frequently Asked Questions" section, and this section contains lyrics to the song "Suicide is Painless," sung by Johnny Mandel, imploring in the oft-repeated chorus the message of the song's title, that "suicide is painless" and, "the game of life is hard to play; I'm going to lose anyway." The inclusion of this song, coupled with the authoritative, explicit instructions, can certainly be interpreted to suggest that "Methods File" advocates and encourages the irreversible act of suicide. The lyrics suggest that life is analogous to a card game, and if dealt what is perceived to be a losing hand, "the only way to win is to cheat, and lay it

[21] Raphael Cohen-Almagor, *Speech, Media and Ethics: The Limits of Free Expression* (New York: Palgrave, 2001), 23.

down before I'm beat," a non-obscure reference to the early end of life. Moreover, the last line, "*And you can do the same thing if you please,*"[22] appeals to readers that suicide is an option available to all, and the instructions provided on the site, without question, provide the methods that will enable individuals to carry out the option.

The discussion of the influence of speech is further refined, as Franklin S. Haiman explains: "The most fundamental of the preconditions for meaningful communication is, of course, the possibility that speech can influence the beliefs or behavior of those to whom it is addressed."[23] While Haiman argues the ultimate responsibility of speech that incites or encourages is found within the audience, his words, nonetheless, emphasize the *influencing* nature of speech and the role certain expression may play in creating a desired outcome in an audience. The "Methods File" does influence behavior, as evidenced in the case of Suzanne Gonzales, who utilized the site to execute her suicide. The intent of the site, a permanent solution (death) to what is a temporary problem (depression), is reinforced by users who post "hopeless rants about life's miseries, advertisements for suicide partners, and requests for feedback on self-murder plans,"[24] prompting Mike Gonzales to comment, "She went to that group, and it was like throwing

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[22] "The Methods File," http://www.depressed.net/suicide/suicidefaq/index.html (accessed May, 2009).

[23] Franklyn S. Haiman, *Freedom, Democracy and Responsibility* (Cresskill, N.J.: Hampton, 2000), 238.

[24] San Francisco Gate.

gasoline on a fire. I'm all for free speech, but once you start telling young impressionable kids how to kill themselves, that's crossing the line."[25]

Mary Gonzales also believes that the encouragement Suzanne received from the "Methods File" website patrons was a critical factor leading to her death, as she reflected, "They never told her that people do work through depression and get better and go on to live happy lives. They never gave her hope."[26] The role of "Methods File" in *promoting the end goal* of Suzanne Gonzales' suicide (consistent with this prong of the definition), bars the site from receiving the shelter of the First Amendment.

Considering all three factors of the first level of the instruction manual scheme would indicate that the "Methods File" website *meets* the criteria of an unprotected manual, since it contains specific instructions about a harmful activity, chronological steps, and encourages completion of suicide. Since it meets the traits of an unprotected manual on the basis of basic characteristics, it progresses to the second tier of evaluation, which assesses the results and foreseeability of the speech.

Analysis pertaining to the *results* and nature of the speech (the first factor under the second tier) reveals "Methods File" is also unprotected on the basis of circumstantial factors. Although, arguably, the site contains scientific information, such as exact dosages of fatal poisons, the audience to whom it is directed, and its context as a suicide methods website, negates any value it may contain. The explicit instructions offered by "Methods File," and its *purpose*, are vastly different from a website offering legal solutions or sources of aid to individuals contemplating suicide (so that they do not

[25] San Francisco Gate.

[26] San Francisco Gate.

commit suicide); no inherent value is present in the expression of "Methods File." The custodian of the site states in the Introduction to the site that certain comments are a waste of her time, and names an example of a comment she dismisses as "You shouldn't help people kill themselves, you should help them towards a better life instead."[27] The lack of redeeming value within the "Methods File" resembles the instructional manuals at the heart of traditional case law, and for these reasons, the legal standard of instructional manuals should be applied to dangerous websites such as "Methods File" as well.

Further, in terms of the *foreseeability* within the second tier of the scheme, analysis suggests that the intended audience is those individuals who are seriously contemplating suicide; harm can thus reasonably be foreseen. The site custodian does not think death is a "Bad Thing," and will not offer information to assist users with other options *besides* suicide. The nature of the site implies that intended audience is those who will *actually use* the instructions, rather than seeking help. Thus, a reasonable person could infer that suicide *can* be foreseen, especially when "Methods File" is frequented by individuals who are suffering from severe depression. Thus, the "Methods File" meets both the results and foreseeability standards outlined within the second external factor tier, and has the potential to be considered outside the realm of First Amendment protection.

The "Methods File" has *met* the criteria of unprotected manuals contained within the first two levels pertaining to characteristic and circumstantial consideration, and progresses to the third level of analysis, which assesses any redeeming or mitigating value it may contain. As its name suggests and the preamble by the site custodian

[27] "The Methods File," Introduction.

supports, the purpose of the site is to "contain information on the many different ways to end your life."[28] "*Methods* File," aptly titled, provides clear instructions on numerous *methods* in ending one's life. The ways to commit suicide number approximately one hundred and ten methods in total. No social value is inherent in providing information of this nature – nor is there any literary, political, scientific or artistic value in the pure, explicit instructions contained in "Methods File." "Methods File," as a site designed to assist others in the commission of suicide, does not contain any redeeming value that would afford it the protection of the First Amendment.

Further, evaluation of the dual-uses of the website, the second factor under the mitigating value tier, demonstrates that the "Methods File" is unprotected under the First Amendment, since it meets the criteria of a harmful, illegal instruction manual. The dual-use outlook underscores that speech resulting in criminal or harmful actions should be unprotected under the First Amendment, and this idea is emphasized by Kenneth Lasson, who writes, "The proper measure by which any personal liberty must be gauged, particularly freedom of speech, is the degree to which it allows an individual to impose his utterance or action on someone else, and the deleterious effect his conduct might have on others. If either the imposition or the effect is excessive, the liberty must be restrained."[29] The speech, if it results in an excessive harmful effect, cannot be afforded

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[28] "The Methods File," Preamble.

[29] Kenneth Lasson, "To Stimulate, Provoke, or Incite? Hate Speech and the First Amendment," in *Group Defamation and Freedom of Speech: The Relationship between Language and Violence*, ed. Monroe H. Freedman and Eric M. Freedman (Westport, Conn.: Greenwood, 1995), 286.

the protection of the First Amendment, and "Methods File," with fourteen individuals who have committed suicide associated with its content, has *already* resulted in harmful effects and will only continue to do so in the future if left unchecked.

In sum, consideration of all three tiers of the instruction manual scheme as applied to "Methods File" indicates that the website is *unprotected*, since it met all three levels of an unprotected, illegal instruction manual. "Methods File," as an instructional guide to suicide, aids and abets individuals by providing the knowledge necessary in order to complete the act of suicide; evaluation of all three tiers supports the idea of a legal definition of instruction manuals, and illustrates that the proposed legal solution would extend the narrow view of what constitutes instruction manuals.

"The Terrorist's Handbook"

Websites in cyberspace containing explicit instructions pertaining to bomb-making, projectile weapons, cannons, or rockets serve as other examples of harm-facilitating speech existing in the World Wide Web. The "Terrorist's Handbook" represents a specific website concerning dangerous expression, and may be evaluated under the three-tiered scheme in the same manner as "Methods File" to determine whether it is an unprotected manual under freedom of speech qualifications.

Under the first tier, factors such as specific instructions, sequencing of steps, and encouragement of completion must be considered. The "Terrorist's Handbook," as "Methods File" did, provides information about activity that is not only extremely harmful, but also *illegal*, consistent with the first element of the first tier. Viewing the Table of Contents indicates that *every* entry, if the instructions are followed correctly,

will result in harmful activity, such as explosions or death. Instructions contained within the site pertain to the best methods to engage in terrorist-like acts, rather than instructions on how to best receive help if one recognizes tendencies to engage in risky behavior. Further, in terms of sequencing (the second factor under the first tier), the steps are numbered, in chronological order, and leave little room for mistakes regarding following the correct *ordering* of the instructions. The progression through the steps will most likely ultimately end in death or destruction, because the numbered sequences, by their clarity and overall organization, imply that successful completion of the instructions will produce the desired result.

Finally, consider the third factor of the first tier, which relates to the encouragement of completion by promotion of the end goal. Imperative verbs are found in most entries in the "Terrorist's Handbook," and a tone of nonchalance pertaining to the dangerous behavior is adopted, suggesting to users that the behaviors described are not as egregious as initially perceived. The site, however, does contain a few alleviating factors relating to the encouragement of completion, and includes warnings such as: "Let me say right now that I have not, nor would I ever actually perform any of the procedures outlined in this document. I think it is fascinating information and all, but folks get a grip! If you want to go out and blow up the Oklahoma City Federal Building nearest you then have yourselves a grand old time, and I hope the FBI comes banging on your door within an hour."[30] Further, the site, in the introduction, states that the instructions provided are not for actual use; this warning, however, does not appear throughout the *entire* site, and

[30] "The Terrorist's Handbook," http://www.capricorn.org/~akira/home/terror.html (accessed August, 2009).

if a user skims the introduction or proceeds directly to the entries, he or she will miss the cautionary notes. The site, therefore, when taken as a whole, arguably encourages or glorifies illegal or harm-facilitating behavior. Thus, the "Terrorist's Handbook" *meets* all three factors on the first level of analysis, and is thus far classified as an unprotected instruction manual.

Consideration of the second level of assessment, specifically the elements of results and foreseeability, indicates that the "Terrorist's Handbook" also meets those factors and remains unprotected under the First Amendment. Contextual analysis focusing on the *results* of the instruction suggests that the "Terrorist's Handbook," while containing words of caution, has more dangerous uses than positive ones. Arguably, the "Terrorist's Handbook" is a complex work within cyberspace, composed of multiple, differing parts, and its context implies that while it can be perceived as a site demonstrating how easy certain terrorist behaviors are, the overall ease with which individuals can *actually follow* the instructions to their detriment precludes it from being afforded First Amendment protection. Thus, the results are most likely to be negative in nature, due to the site's context and instructional nature.

With regard to the *foreseeability* of harm, the second factor of the second tier, an examination of the individuals utilizing the site demonstrates that a reasonable person could predict harm ensuing from proper following of steps. The multi-faceted, complex nature of "Terrorist's Handbook" is furthered supported when one considers that the site contains information not only useful to individuals who are both curious or information-seeking, but content also helpful to those interested in obtaining the information to *follow* and *enact* the steps. Arguably, a strong possibility exists that the site will be utilized to

achieve harmful results, and *can be foreseen to do so*, since no other positive resources or benefits are found on the "Terrorist's Handbook."

Having met the criteria of both levels of an unprotected instruction manual, the "Terrorist's Handbook" site advances to the third tier of analysis, focusing on redeeming value and dual-uses. Many instructions relate to explosive recipes, impact explosives, high order explosives, ignition devices, projectile weapons, or rockets and cannons, which *never* have any positive, beneficial results. The site, though arguably containing scientific value, is precluded protection of the First Amendment, because the overall context and specific *nature* of the information implies that the site's purpose is to cause the results discussed. Further, the dual-use prong of the definition of an instruction manual would suggest that if the harm resulting from the speech (criminal or detrimental activity) outweighs the harm from censorship, the speech may be censored. The necessity for regulation is argued by Wojciech Sadurski, stating: "The government would be obliged to prohibit a speech act whenever it would be reasonable to expect that any resulting harm outweighed the harm of restraining people from speaking."[31] Use of the term "obliged" in Sadurski's statement is indicative of the need for and level of responsibility pertaining to freedom of speech as it relates to harmful activity. In the case of the "Terrorist's Handbook," the harm resulting from the instructions outweighs the benefits of allowing the expression, since the information is so detailed and specific.

The "Terrorist's Handbook" then, when evaluated on all three levels of the instruction manual scheme, meets all three tiers of an unprotected instruction manual, and

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[31] Wojciech Sadurski, *Freedom of Speech and its Limits* (Norwell, Mass.: Kluwer, 1999), 38.

serves as an example of a site that is not afforded the protection of the First Amendment due to its nature as expression that aids and abets users in criminal activity. "Methods File" and "Terrorist's Handbook," as two examples of sites containing egregious content, fall at the end of the free speech spectrum and represent expression not sheltered under the First Amendment.

Tasteless or Offensive Websites

"House of Thin"

"Methods File" and the "Terrorist's Handbook" serve as examples of cyber-expression that are so egregious as to deem First Amendment protection unwarranted. A broad range of content may found in cyberspace, however, and pro-anorexic websites are examples of expression found on the Internet that lie on the *opposite end* of the free speech spectrum, and a site such as "House of Thin"[32] is an interesting source of analysis for the application of the definition of instructional manuals. While the site may be tasteless to some, the shelter of the First Amendment still applies. "House of Thin," on its homepage, explains to viewers that

> "House Of Thin" does not feature any tips, tricks or thinspiration. If you are looking to become anorexic or bulimic by being here, it's not going to happen. You cannot just wake up and become anorexic or bulimic, and joining a pro ana mia community will not give you anorexia or bulimia. Instead we offer information on various eating disorders, plus BMI, BMR and metric calculators

[32] "House of Thin," http://www.houseofthin.com (accessed November 9, 2008).

> and news articles (written by Mandi, owner of the "House of Thin") about issues surrounding the eating disordered world. We have links to other pro-anorexic sites and forums categorized into a mini pro-ana directory.[33]

The opening message appearing on its homepage indicates that "House of Thin" does not contain specific instructions about a harm-inducing activity. Although "House of Thin" may discuss topics that are controversial and offensive, eating disorders are not classified as harm-facilitating behavior, as suicide would be. The effects of an eating disorder manifest themselves more slowly, and once an eating disorder is acquired, steps can be taken to reverse the harm. Suicide, in contrast, is final and immediate, and the harm is irreversible. As stated in its disclaimer, "House of Thin" does not contain *specific instructions* (the first prong of the first tier) and thus the content cannot be considered as material that aids and abets, since it lacks specific counseling.

Assessment of the second and third factors of the first tier of analysis relate to the sequencing of steps and encouragement of completion, and further support the idea that "House of Thin" does not aid and abet users as an illegal instruction manual would. Information on various eating disorders and consequent issues is offered, but, unlike "Methods File," no step-by-step formula exists, as the information appearing on the site is primarily in discussion format. As in the manner of the sequencing prong, the third element of the first tier supports the idea that "House of Thin" is within the shelter of the First Amendment, because encouragement of the act's completion by promotion of the end goal is also not applicable to "House of Thin." The website states that it does not contain "thinspiration," or incentives for the acquisition and maintenance of eating

[33] "House of Thin."

disorders. Rather than encouraging and supporting the acquisition of an eating disorder, "House of Thin" presents objective sections that contain information detailing the harms of such illness.

"House of Thin," therefore, fails to meet all three factors of an unprotected instruction manual on the first tier, and is protected under the First Amendment. It is important to note that the site, while lacking the step-by-step instructions as found within the "Methods File" or "Terrorist's Handbook," is, nonetheless an important inclusion in the discussion of harm-facilitating websites because the focus of scope of the legal problem is upon websites that possess the *potential* to facilitate harmful behavior. The possibility is still present, although the site is more oriented to discussion, that an individual could employ the content provided to her detriment. Further, the notion of a continuum of free speech within cyberspace is underscored by expanding the application of the solution to a site such as "House of Thin," which provides further assessment grounds for the limits of a legal definition.

Assessment of circumstantial factors or mitigating value is not warranted, as the site clearly did not meet the first content-related status of a harmful instruction manual. The site, in fact, arguably contains redeeming value that prevents it from being suppressed. The opening words appearing on "House of Thin" appear to define its purpose by what it does *not* provide. "House of Thin" is not a site containing counsel on the acquisition of an eating disorder, or how to succeed as an anorexic or bulimic; rather, it proclaims to be a web community for individuals already suffering from an eating disorder. The website arguably does contain social value, as it contains information on eating disorders and consequences, as well as links to external sites that are not

dangerous. Information pertaining to anorexia nervosa and bulimia nervosa is factual, and the site contains sections on the dangers of both eating disorders.

In actuality, as Susan Balter-Reitz and Susan Keller argue, pro-anorexic websites containing information such as "House of Thin" may be considered

> model[s] for effective Internet communication. Pro-ana sites are rich in graphics and interactivity. Networks of users actively participate in daily discussion forums, often exploring the causes of their disorder. The sites feature discussion boards and chat rooms, where viewers can exchange information and diary entries; picture galleries that exhibit stick thin models or individuals in late stages of anorexia as beauty ideals; and exchanges on topics such as: how to hide uneaten food, how to use laxatives or other products to promote weight loss; how to deny hunger; and how to cope with social isolation. Anorexics, bulimics, and others prone to eating disorders receive emotional contact, psychological support and persuasive messages on how, why, and whether to continue their pursuit of thinness.[34]

The characteristics discussed by Balter-Reitz and Keller provide social value that affords pro-anorexic websites such as "House of Thin" protection under the First Amendment, particularly since the primary use of the site is to obtain assistance or help, or to engage in group blog discussions. Although harmful results may ensue if the information is *misused*, the chances of an individual learning more about how to *acquire* an eating

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[34] Susan Balter-Reitz and Susan Keller, "Censoring Thinspiration: The Debate Over Pro-Anorexic Websites" in *Free Speech Yearbook, Volume 42,* ed. James Arnt-Aune (Annandale, VA: National Communication Association, 2005), 79.

disorder is contingent upon the small possibility that the information will be used *incorrectly*. As presented, the information has a positive use that outweighs the small chance of harm, and "House of Thin" functions as a website that would remain protected under the First Amendment if the instruction manual scheme were to be utilized. "House of Thin," therefore, serves as an apt example of expression that is still deserving of the shelter of the First Amendment, even if the speech is deemed tasteless or offensive to certain viewers.

"Word Press/Blog about: Deviant Sex"

Websites containing deviant sexual material are not uncommon on the Internet, and while clearly tasteless or repugnant to some, these sites are protected under the First Amendment. Offensive websites function as examples of cyber-expression falling at the opposite end of the free speech spectrum from sites such as "Methods File" or "Terrorist's Handbook." Addressing the existence of these sites raises the question: How does the definition of instructional manuals fit this type of speech, if analyzed within the three-tiered scheme of the new legal definition? One website, "Word Press/Blog about: Deviant Sex,"[35] representative of sites containing deviant sexual material, may be used to examine each of the characteristics of an instructional manual and the applicability of the definition.

[35] "Word Press/Blog about: Deviant Sex," http://wordpress.com/tag/deviant-sex/ (accessed November 9, 2008).

The first element of the first tier, the requirement that the expression contain specific instructions about an illegal or criminal activity, cannot apply to a site such as "Word Press," even though it contains blogs on deviant sexual practices, such as intercourse with sheep. Unusual sexual practices, though often considered taboo and repulsive by many members of society, are not criminal activity, unless they constitute rape, so this element of an instructional manual cannot be applied to blogs of this nature. The second element of the first tier, pertaining to the existence of logical, chronological steps, also cannot apply to the "Word Press" site. Presented in a blog format, the "Word Press" website does not possess step-by-step instructions such as those contained in "Methods File." Although the information is controversial, it is not presented in a logical sequence with progressive steps, and thus cannot be considered a dangerous instructional manual without protection under the First Amendment. The third element of the first characteristic tier pertains to the encouragement of completion, and the "Word Press" site also lacks this trait. Lacking in imperative verbs or clear endorsement of deviant sexual practices, this site does not promote an end goal; rather, it contains discussion, albeit controversial and distasteful, which, nonetheless, is still protected under the First Amendment.

The "Word Press" website regarding deviant sexual practices thus fails to meet the criteria of an unprotected instruction manual on the first level, which considers basic characteristics of instructional guides. Again, as was the case with "House of Thin," the "Word Press" website is necessary for inclusion with regard to discussion of harm-facilitating websites because the site, while information and discussion oriented, offers a means to potential harmful behavior, such as rape. Despite the fact that it lacks

characteristics of an instruction manual in the traditional sense, it is important to note that the starting point for application is upon sites possessing the *possibility* to induce harm, not upon sites that resemble instruction manuals. Characteristics of an instruction manual represent part of the *solution*, not necessarily the basis for application, as many websites might become involved in cases concerning destructive behavior, *even if* they lack step-by-step instructions. Thus, applying the three-tiered scheme to a site such as "Word Press" is important because it clearly demonstrates the *bounds* of the definition, which accounts for a consideration of basic characteristics within the first level; such a site would be eliminated if it does *not* meet the criteria, as was the case with the "Word Press" site. Thus, no further analysis on the second or third tiers is necessary, since the manual was found to be protected under the First Amendment because it lacked many of the elements of an illegal or harmful instruction manual.

Sites such as "House of Thin" or "Word Press," hence, suggest the notion of a continuum of speech in cyberspace, as they remain protected by the First Amendment; their placement at the end of the spectrum contrasts egregious sites such as "Methods File," and emphasizes that a three-tiered legal solution would *recognize* the varying levels of content found on the Internet.

Dual-Use Websites

The new legal definition of an instruction manual was applied to two particularly egregious, harm-facilitating websites, as well as to two tasteless or offensive websites, but assessing websites that fall in the middle of the free speech spectrum is useful in determining the bounds of the definition. Dual-use sites falling between the two

extremes illustrate the difficult First Amendment problem posed by such speech; further, analyzing websites on a case-by-case basis using the multi-tiered approach also illustrates the nature of the solution as one that does *not* unnecessarily censor speech, since different outcomes may result each time the scheme is used. The bounds of the legal solution are thus tested, and application illustrates that the three-tiered framework provides a mechanism for evaluating and balancing particularly difficult free expression cases, such as those arising from dual-use website content.

"The Anarchist's Cookbook"

The "Anarchist's Cookbook," widely recognized as a harmful or shocking website in cyberspace, is also appropriate for application of the three-tiered solution to determine the limits of the legal definition of an instruction manual. As a dual-use site, the "Anarchist's Cookbook" contains portions instructing users on both legal and illegal activities, and for ease in applying the three-tiered solution, the site may best be characterized, as "Terrorist's Handbook" was, as a complex work possessing both benign and dangerous aspects.

Assessing the "Anarchist's Cookbook" under the first tier's guidelines of specific instructions, logical sequencing of steps, and encouragement of completion indicates that the site *meets* the first level of evaluation, and is classified as an unprotected manual. With regard to the instructions contained within the site, the nature of the entries and the content contain both legal and illegal information. Several entries, while containing instructions that may be utilized for underhanded or deceptive purposes, counsel in activity that is not *actually* against the law, such as "How to Get a New Identity," or

"How to Pick Locks." These portions, thus, function as the positive, or benign, aspects of the website, which would afford it First Amendment protection. However, harmful content comprises the rest of the website, since some information on the site can be deemed harm-inducing. The harmful or illegal aspects of the website contain information pertaining to the means to best avoid the consequences of breaking the law, and the harm-facilitating portions of "Anarchist's Cookbook" thus *meet* the criteria of the first tier of the legal solution, which stipulates that the content must contain instructions about an illegal or harmful act.

Further supporting the idea that the "Anarchist's Cookbook" is a site unprotected by the First Amendment is the consideration of the format and sequencing of information, the second factor under the first tier. As was the case with "Methods File" and the "Terrorist's Handbook," the "Anarchist's Cookbook" contains entries that are numbered in sequential order, since specific facts are provided within the numbered steps; these steps include both *general details* regarding necessary supplies, required tools or equipment, as well as *precise steps* pertaining to best carrying out the action with minimal mistakes.

Weighing the encouragement of completion factor (the third prong under the first tier) also indicates the "Anarchist's Cookbook" is unprotected. While the site does contain a warning that the instructions provided should not be acted upon by any users (an additional benign aspect of the dual-nature characterization of the site), the words of caution are often undermined by the extolling of individuals possessing a lack of moral compass, or someone with a "second identity," as discussed within the Computer Hacking entry. The glorification of certain behaviors, particularly those that require

shedding any qualms regarding breaking the law, is present in many of the imperative verbs used, as well as the direct address to the audience as "you," which may further user involvement and lead to a higher sense of participation in the activities described. Consideration of all three characteristic criteria of the first level suggest that the "Anarchist's Cookbook" is thus far an unprotected manual; it will then progress to the second level of assessment.

The second level of analysis evaluates external factors, such as results and foreseeability, and contextual analysis suggests that the "Anarchist's Cookbook" contains content that can reasonably be foreseen to cause harmful results. Consideration of the complex nature of the site suggests that the harm-facilitating portions of the website would not be afforded protection. Further, the widespread reputation of the site may lead to increased viewership, and its context as a fixture in contemporary society's knowledge of controversial sites may hinder the argument that it deserves protection. In terms of negative, harmful results achieved, the argument against the "Anarchist's Cookbook" pertains to pure numbers and probability: *Because* so many individuals may view the site out of curiosity, the likelihood of the information being misused *increases* as well. While the argument may be made that the site's role in influencing societal discourse warrants it First Amendment protection, the *specific details* and overall glorification of harmful or illegal behavior denies it such shelter, as it may be foreseen that the site would result in harmful acts. A site containing *general* information, without such specifics, may still achieve the same result in societal discourse regarding the ease with which one may break the law; therefore, the nature and context of the site prevent its protection.

The measurement of mitigating value is the next step in the evaluation process, for the "Anarchist's Cookbook" met the criteria of an unprotected instruction manual on the first two levels. The site arguably contains redeeming value in that it presents a great deal of information to prove the ease with which one may break the law and engage in such behavior (an additional factor demonstrating the complex, multi-compositional nature of the website). However, disclaimers stating those sentiments are not readily apparent within many entries, and instead, the instructions are presented as displays of information to be followed to further certain types of illegal or harmful behavior. Again, these harm-facilitating portions of the website would deem First Amendment protection *unwarranted*, since the "Anarchist's Cookbook" does not possess the necessary redeeming value to be afforded the protection of the First Amendment. The dual-use factor suggests a similar trend. While some information presented within the "Anarchist's Cookbook" may be deemed beneficial or even legal, and the characterization of the site suggests divisions into positive/legal uses and negative/illegal aspects, the harm-facilitating portions of the site focus upon illegal or harmful behavior. The *breadth* of entries, which number approximately one hundred and forty, further suggests that the harm-facilitating aspects of the site would render the "Anarchist's Cookbook" unworthy of First Amendment protection.

Taken together, the three levels of analysis suggest that the "Anarchist's Cookbook" is unprotected under the First Amendment, since it meets all the criteria of an unprotected instruction manual under the law.

"Homemade Drugs"

Websites counseling users on the manufacture of drugs are also common, and like the "Anarchist's Cookbook," represent dual-use sites falling in the middle range of the free speech spectrum; the "Homemade Drugs Library" website, counseling users on the manufacture of both legal and illegal drugs, functions as an example of such expression. Assessment of the three-tiered instruction manual scheme indicates that this site is *protected* under the First Amendment, for it does not meet the criteria of an unprotected manual within the first *or* second tier of analysis. Under the first tier, the site meets two out of the three characteristics of an unprotected instruction manual, for it contains specific instructions and a logical sequence of steps, but does not contain encouragement of completion, as does the "Anarchist's Cookbook."

Assessment of the first factor is warranted, to determine whether the site contains specific instructions about a harm-inducing behavior. "Homemade Drugs Library," as a dual-use site, centers upon a topic that may result in legal or illegal results, and the site emphasizes that proper use of simple household items allows for drug manufacturing. While excessive drug use may result in harm, the effects of drug use are seen over a longer period of time, and once drug use is initiated, steps can be taken to reverse or minimize the harm, such as counseling or rehabilitation programs. Suicide (a result of the "Methods File"), in contrast, is final and immediate, and the harm is irreversible. Thus, the site *does* contain specific instructions about a harm-inducing activity, though it differs in form from the behavior advocated in "Methods File" or "Terrorist's Handbook."

In terms of sequencing of steps, the second factor under the first tier, the site *does* contain step-by-step instructions, which is consistent with the site's purpose of allowing simple household items to be converted into drugs for personal use. The "Homemade Drugs Library," for example, contains step-by-step instructions counseling users on the conversions of materials such as poppy seeds into opiates. The "Homemade Drugs Library" thus resembles the "Anarchist's Cookbook" because it contains step-by-step instructions about both legal and illegal behavior. The "Homemade Drugs Library" contains entries with instructions regarding drugs that are both allowed *and* proscribed under the law.

Further, little encouragement of completion is present, which is the third factor under the first tier. Drug use is not glorified; the site adopts a neutral, conversational tone, and does not instill certain values or attitudes in its audience pertaining to the merits of utilizing drugs for recreation. Unlike the "Anarchist's Cookbook," which glorifies illegal activity by utilizing powerful language with strong adjectives and direct address to the audience, the "Homemade Drugs Library" employs neutral, noninflammatory language that does not depict breaking the law as an ideal towards which a site frequenter should strive. Unlike the description of an ideal computer hacker within "Anarchist's Cookbook," the "Homemade Drugs Library" does not describe the valued characteristics of an individual suited to break the law, but instead adopts a stance that neither advocates nor opposes criminal behavior.

The "Homemade Drugs Library" thus meets two of the three factors necessary under the first tier to be deemed unprotected, and since it fails one of the criteria, it does not need to progress to the second or third level of analysis, as it is *protected* on the basis

of characteristic consideration alone. Had the website progressed to the second level of evaluation, it would have also been found protected, because its context and a circumstantial consideration prohibits it from being censored. The site's name, a *Library*, is indicative of its context and purpose: similar to an encyclopedia, "Homemade Drugs" contains a variety of entries pertaining to the personal manufacture of drugs. Its context is best understood as a site with dual-uses, and frequenting the site does not present danger to as high of a degree as viewing a site such as "Methods File" or "Terrorist's Handbook" would.

The redeeming value and dual-use measurements of the third tier would have also supported the protection of the "Homemade Drugs" website, for multiple outcomes may be achieved by frequenting the "Homemade Drugs Library," and the site arguably contains scientific or medicinal value, for the instructions detailed are rooted in chemistry. While harm may be caused by excessive drug use, the site maintains a neutral stance, and offers many positive outcomes as well as negative ones. Further, the dual-use examination supports this idea, since the site states:

> This website is a library of information related to homemade recreational drugs. We maintain a *neutral approach* with regards to the legalities surrounding the many drugs discussed within the Homemade Drugs Library, and include literature *supporting arguments both for, and against their use*" (Italics added for emphasis).[36]

[36] "Homemade Drugs," http://www.linkbase.org/articles/Homemade-Drugs.htm (accessed November, 2009).

While arguably, the "Anarchist's Cookbook" serves constructive purposes also, its *tone* in glorifying breaking the law supersedes any mitigating value it may contain, since the harm-facilitating portions of the site hinder it from receiving First Amendment protection. The "Homemade Drugs Library," in contrast, is afforded mitigating value because of its context as a mere library or encyclopedia of *neutral, impartial* information regarding both legal and illegal drug use.

The "Homemade Drugs Library" thus serves as an example of a website that is a *legal* instruction manual, as it failed to meet the criteria of an unprotected instruction manual on the first and second levels of analysis; evaluation of the factors and their application to a site such as the "Homemade Drugs Library" demonstrates the boundaries of the legal definition and supports the idea that the instruction manual scheme allows for consideration on a case-by-case basis.

Consideration of all six websites through the three-tiered instruction manual approach illustrates the bounds of the definition; particularly egregious websites were found to be unprotected under free speech qualifications, while many other legal sites, while offensive to some, were deemed protected under the First Amendment. Assessment of the dual-use websites falling in the middle of the free speech spectrum, such as the "Anarchist's Cookbook" and the "Homemade Drugs Library," supports the idea that various outcomes will be achieved through consideration of the multiple tiers as they apply to a specific website. While both are dual-use in nature and arguably share many similarities, the "Anarchist's Cookbook" would be deemed unprotected under the scheme, while the "Homemade Drugs Library" would be found to be protected under the process because of nuanced differences in contextual or circumstantial factors.

In sum, similarities are found between many of the websites and the instruction manuals found in case law, which additionally support the use and application of the three-tiered instruction manual scheme to dangerous or harmful Internet websites. Case law pertaining to print instructional manuals, therefore, serves as a viable legal remedy and offers hope for application to harm-facilitating websites. The unrestricted accessibility of dangerous websites such as "Methods File," the "Terrorist's Handbook," and the "Anarchist's Cookbook," represents a crucial legal problem in contemporary society, and the three-tiered legal scheme, grounded in case law, offers a workable, *applied* solution.

In Defense of the Instruction Manual Scheme

Concerns may arise pertaining to the applicability of the instruction manual scheme to Internet websites, since regulation of content is often a sensitive or delicate issue within First Amendment jurisprudence. These inquires most often relate to fears of *violation of First Amendment*, in which free speech rights are curtailed, a *chilling effect*, in which certain speech or expression is silenced for fear of penalty, or a *snowball effect,* a situation under which expression is suppressed initially in a state of small significance, but the suppression is extended further and further beyond just the initial speech as to pose a dangerous or disastrous consequence. Final concerns relate to the *workability* of the scheme, and its applicability to website content.

However, careful review of the instruction manual scheme illustrates that these concerns are addressed within the three-tiered process. Questions of free speech violations are best answered when one considers the presence of the *third tier* of the

framework, which assesses the mitigating value expression might contain. To be protected, speech must possess a legitimate purpose, with societal value; speech that would be censored under the three-tiered scheme, to be found unprotected, would *lack* this requisite value. It may be argued that concerns of censoring speech are thus without merit, for any speech possessing value would not be curtailed. The idea of considering high-value and low-value speech, further, is not new, and concerns with First Amendment rights do not arise solely with the suggestion of a three-tiered legal solution, as a balancing of high-value and low-value expression, or protected and unprotected speech, respectively, has been undertaken by the courts for many years.

With regard to the chilling or snowball effect, many safeguards exist. First, application of the definition of an instruction manual to the six selected websites indicates that different outcomes were produced: some websites were found to be protected under the First Amendment, while others were denied the shelter of the freedom of expression qualifications. Thus, the multi-prong aspect of the definition allows for consideration of the sites on *a case-by-case basis*, and the extensive number of characteristics within the definition allows for a *multi-tiered* analysis of any example of harm-facilitating speech. The instruction manual scheme must be evaluated as a *collective entirety*, and no one tier or criteria can be used *solely* as a measurement to assess websites perceived as harmful or dangerous.

Further, the *structure* of the instruction manual scheme, as a three-tiered process, provides checks and safeguards against speech being unnecessarily censored, for expression may pass through the first two levels and possess the potential to be considered unprotected, but it must also pass the test of the third tier to be definitively

ruled unprotected under the First Amendment. The third tier, by considering both the SLAPS test and dual-uses of the speech, is the broadest of the three tiers within the instruction manual scheme and links the expression to the overall societal benefit achieved from allowing the speech to circulate. By nature of the third tier being a *mitigating* factor measurement, this final level of the instruction manual approach provides protection against sweeping generalizations that may unnecessarily censor speech, and also offers a defense against concerns relating to First Amendment violations, or a chilling/snowball effect.

Thus, the nature of the scheme as a multi-tiered analysis allows for instances concerning potentially harm-facilitating speech to be considered on a *case-by-case* basis, and the incorporation of the third tier as a mitigating value measurement safeguards against avoidable or excessive censoring, consistent with the constitutional rights guaranteed by the First Amendment.

The instruction manual scheme, as a clear legal definition, would target harm-inducing websites, and represents a solution to the problem. By expanding the narrow view of what constitutes instruction manuals, the legal treatment of speech that aids and abets can be extended to the appropriate websites, many of which share nearly identical content and characteristics. This legal definition provides a clear conceptual framework through which courts can analyze harm-facilitating speech, and solves the absence of synthesis or direction within the body of case law pertaining to instruction manuals. The conceptual framework can thus be *applied* to dangerous websites, and the problem of unrestricted circulation and access can be remedied with a solution that is not only

supported by case law and legal theory, but also safeguards against chilling and snowball effects.

Extension of the Influence: Beyond Specific Harm-Inducing Websites

The development of the Internet has produced a valuable resource in the attainment of information, but it has also created an unrestricted and unregulated platform for anyone with an idea, no matter how dangerous the concept may be. The case of Suzanne Gonzales and the "Methods File" website, along with other websites filled with harm-facilitating speech, demonstrates that the medium of cyberspace poses unique legal challenges within the realm of the protections and restrictions afforded by First Amendment freedom of speech standards. Examination of sites such as "Methods File" that advocate and provide instruction for illegal and dangerous activity illustrates the potential impact of the website content. Despite prior attempts, regulation of the Internet has not been established, and access to harmful information is free and unrestricted. Although case law does not exist for the medium of the Internet, it *does* exist for print instructional manuals that advocate and instruct in dangerous behavior and unlawful activity.

The study of case law pertaining to print instructional manuals, and its applicability to the Internet, is warranted, with emphasis placed upon defining the elements that would comprise an instructional manual. A new, explicit definition is critical in broadening the narrow scope of legal treatment pertaining to print instruction manuals and in extending the treatment to dangerous websites. In similar manner,

concise language should be developed to address the distinction between speech that actually aids and abets, and speech that merely advocates criminal activity.

The prominence of the Internet in contemporary society, and the platform available to the casual blogger as well as the distinguished scholar, coupled with the potential impact when harmful information reaches the inappropriate audience, all serve to illustrate the classic First Amendment dilemma: *when* and *should* certain forms of speech lose First Amendment protection, and how should one establish the criteria for this action? This question *transcends* merely one specific suicide website, and arguably extends *beyond the bounds* of the Internet, as the problems concerning instructive speech that aids and abets exist in *real-world* litigation.

The solution offered by the three-tiered legal framework provides a remedy not only for harmful Internet speech, but also for all other types of instructive expression. The solution is one afforded by no other suggested legal approach: A clear *legal definition* of an instruction manual provides a conceptual framework in which to place speech that transmits instructions in harm-facilitating behavior, and consequently, this legal definition offers *application* to harm-facilitating websites by expanding the narrow view of what constitutes instruction manuals, an approach not considered by other suggested legal remedies.

The existence of the vast number of crime-facilitating websites demonstrates that the problem extends beyond merely suicide sites such as the "Methods File;" the varied nature of the activities promoted within the diverse harm-facilitating sites underscores the need for the consideration and subsequent adoption of the three-tiered instruction manual framework for the medium of the Internet. Sadly, for Suzanne Gonzales, and the thirteen

other “success stories” attributable to the “Methods File” website, the timing of the solution fails. For individuals like Suzanne, cloaked in hopelessness, and desperately clawing at a computer keyboard in search of the information for the “final solution,” regulation of dangerous website content is not only advised, but necessary.

APPENDIX A

Cyanide (HCN, KCN)
Dosage: 50 mg Hydrogen Cyanide gas, 200-300 mg Cyanide salts
Time: seconds for HC, minutes Cs (empty stomach) hours (full s)
Available: very difficult to get hold of
Certainty: very certain
Notes:
It helps to have an empty stomach (since the salts react with the stomach acids to form H.C.). A full stomach can delay death for up to four hours with the salts. Antidotes to cyanide poisoning exist, but they have serious side effects. What you can do, is instead of taking the salts directly, drop 500mg or so into a strong acid, and inhale the fumes. This will be pure Hydrogen Cyanide, and you should die in 10 to 20 seconds.

Hydrocyanic acid is one of the most poisonous substances known; the inhalation of its fumes in high concentration will cause almost immediate death. Hydrogen cyanide acts by preventing the normal process of tissue oxidation and paralyzing the respiratory center in the brain. Most of the accidental cases are due to inhaling the fumes during a fumigating process. In the pure state it kills with great rapidity. Crystalline cyanides, such as potassium or sodium cyanide are equally poisonous, since they interact with the hydrochloric acid in the stomach to liberate hydrocyanic acid. This poison has been used for both homicide and suicide; in recent history, a number of European political figures carried vials of cyanide salt for emergency self-destruction and some used them.

Death resulted from amounts of only a fraction of a gram. A concentration of 1 part in 500 of hydrogen cyanide gas is fatal. Allowable working concentration in most of the United States is 20 ppm. Two and one-half grains of liquid acid has killed. The acid acts fatally in about 15 minutes. The cyanide salts kill in several hours. The average dose of solution is 0.1 cc. [1, DGHS talking about KCN]: on an empty stomach, take a small glass of cold tap water. (Not mineral water nor any sort of juice or soda water because of its acidity). Stir 1 →1.5 grammes of KCN into the water. More than that causes irritation to the throat. Wait 5 minutes to dissolve. It should be drunk within several hours. Consciousness will be lost in about a minute. Death will follow 15 → 45 minutes later.[1]

[1] "The Methods File."

APPENDIX B

The Terrorist's Handbook: Table of Contents

[2] "The Terrorist's Handbook."

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