THE POWER OF THE PYRAMID:

A FRAMEWORK FOR REGULATING CRIME-FACILITAING WEB SITES

by

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CHAPTER ONE: CRIME-FACILITATING SPEECH AND THE FIRST AMENDMENT

"One last note" was the subject title of the last email Mike and Mary Gonzales would ever receive from their 19-year-old daughter, Suzy Gonzales.[1] The email revealed a time-delayed suicide note that Suzy had sent to her parents, her sister, her best friend and the police before she tragically ended her life. Suzy, who had been struggling with depression, learned how to time-delay her email through the pro-suicide Web site Alt.Suicide.Holiday.[2] In engaging with the site, Suzy found suggestions for using the time-delay feature to prevent interruptions during her suicide. In addition to email advice, the site provided Suzy with instructions explaining how to lie to receive a lethal dose of potassium cyanide and how to use the cyanide in creating the deadly poison that ended her life.[3] In the weeks preceding her suicide, Suzy had also visited and participated in the Web site's discussion forum. The online forum consisted of anonymous group members posting messages and information supporting suicide and encouraging others to embrace the site's "pro-choice" suicide philosophy. Suzy's final

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[1] Julia Scheeres, "Virtual Path to Suicide," *The San Francisco Chronicle*, June 8, 2003, section A.

[2] Ellen Luu, "Web-Assisted Suicide and the First Amendment," *Hastings Constirutional Law Quarterly* 36 (2009), 307.

[3] Sheeres, 2003.

posting to the Web site's community ended with, "Bye everyone, see you on the other side."[4]

The suicide Web site facilitating Suzy Gonzales' death has been associated with 14 confirmed suicides, which the site refers to as "success stories."[5] The actual death toll linked to the site is unknown and is potentially much higher. Further contributing to suicide statistics are similar Web sites containing testimonials, pictures, downloadable method guides, links to resources and outlets for site visitors to communicate messages that reinforce depression and suicidal thoughts.[6] Unusual and lethal methods for committing suicide are often the central facet to these sites and present explicit instructions on everything from asphyxiation to rat poisoning.[7] There is limited data in

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[4] Erin Anderssen, "Depressed? Maybe You'd Better Stay Off the Web; In the Wake of This Week's Disclosure That a Young Carleton University Student May Have Been Taught Online How to Commit Suicide," *The Global ad Mail (Canada),* February 28, 2009, section F.

[5] Sheeres, 2003.

[6] Geo Stone, (n.d.), "Suicide and Attempted Suicide: Methods and Consequences," http://www.suicidemethods.net/ (accessed April 12, 2009); Alternative Suicide Methods, "Alternate Suicide Methods Reference File" http://asm-ref-editor.angelfire.com/#I.D/ (accessed April 12, 2009); Church of Euthanasia, "How to Kill Yourself," http://www.churchofeuthanasia.org/ (accessed April 12, 2009).

[7] Sheeres, 2003.

the United States linking suicide Web site use and consequential suicide deaths; however, in 2005 and 2006 respectively, an estimated fifty-nine deaths in Japan and at least sixteen deaths in the United Kingdom were attributed to similar suicide Web sites.

A study conducted at Brown University sought to understand the frequency, content and availability of suicide Web sites. The study, published in the *Journal of Clinical Psychiatry,* examined, "the types of resources a suicidal person might find through search engines on the Internet."[8] The study used four suicide-related terms including "suicide," "how to commit suicide," "suicide methods," and "how to kill yourself" and entered these terms into five popular search engines.[9] From the resultant data, researchers concluded that pro-suicide sites occur less frequently than anti-suicide and neutral-suicide sites but are nonetheless still easily accessible. The detailed how-to instructions and suicide methods of these sites were also easily located through search engines. The researchers deduced a dangerous risk for depressed, suicidal, or potentially suicidal people engaging with suicide sites.[10]

Speech that facilitates suicide by way of the Internet falls within the broader context of crime-facilitating speech. Information detailing and instructing unlawful activity has always existed in various forms. Books, pamphlets, magazines, films and

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[8] P.R. Recupero, S.E. Harms & J.M. Noble, "Googling Suicide: Surfing For Suicide Information on the Internet," *Journal of Clinical Psychiatry* 69 (2008), 878.

[9] Recuerpo et al., 878.

[10] Recuerpo et al., 878.

seminars for example, have provided how-to formats detailing bomb making, tax evasion, acquiring an eating disorder and synthesizing drugs. With the expansion and diversification of the Internet, these and other unlawful subjects have transitioned to the cyberspace landscape. The unique features of the Internet introduce new critical issues regarding crime-facilitating speech. The Internet's power as a communication tool is unmatched; it is a medium that allows for the rapid exchange of information across all physical boundaries. The speed, breadth, accessibility, and anonymity of the Internet allow messages to reach and influence mass audiences in direct, powerful ways that no other medium promises. Among the vast number of possibilities have emerged major concerns. In the case at hand, access to a simple Internet connection and users can be bombarded with a world of crime-facilitating resources.

Since its advent, the Internet has become deeply ingrained in society. The outlook of its future growth and reach is infinite. Emerging technologies and media promise additional real-time, direct connections with Internet audiences across multiple tiers through streaming videos, blogs, RSS feeds and other interactive means. The popularity and future of the Internet therefore demand the exploration of crime-facilitating Web sites. After Suzy Gonzales' suicide, the Gonzales family faced unanswered questions regarding the law and suicide Web sites. Such questions emphasize the urgency and complexity of the issues regarding crime-facilitating speech carried across the Internet platform. Suzy's father, Mike Gonzales, believes these Web sites, "cross the line and actually help people who are depressed, providing material and

psychological support on how to commit suicide, that [speech] shouldn't be protected under freedom of speech."[11]

Suzy Gonzales' suicide begs the imperative question as to whether crime-facilitating Web sites are legal under the constitution. A case regarding crime-facilitating Web sites has yet to be addressed by the Supreme Court. The first step to obtaining answers is thus to examine how court decisions have regarded other forms of crime-facilitating speech. This initial chapter explores precedent case law that has considered a range of crime-facilitating speech in terms of First Amendment boundaries.

A Categorical Approach to Free Speech

The First Amendment ensures that, "Congress shall make no law . . . abridging the freedom of speech."[12] These words embody a most coveted and fundamental principle imperative to the free exchange of ideas in a democratic society. Supporting the free expression ideal is the concept of the marketplace of ideas, first articulated by Justice Oliver Wendell Holmes in a dissenting opinion in *Abrams v. United States*.[13] The marketplace of ideas theory rests on the notion that the ascertainment of truth is dependent on allowing ideas to compete and encouraging speech, not suppressing it. Yet even in the most valued freedom there lay exceptions. The Supreme Court has

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[11] Sheeres, 2003.

[12] U.S. Constitution, First Amendment.

[13] *Abrams v. United States*, 250 U.S. 616, 630 (1919).

established that the freedom of speech is not an absolute right. Several narrow, well-defined categories of speech have been carved out of the blanket of free speech protection.

Justice William Francis Murphy in the famed dicta of *Chaplinsky v. New Hampshire* identified specific classes of unprotected speech including fighting words, obscenity, and defamation.[14] The court justifies these categories as qualifications to the First Amendment as such categories are not an "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."[15] The exceptions to the constitution propose that speech is restricted when it is harmful and threatens public safety and the quality of life. The government's responsibility to protect citizens from harm by restricting inappropriate speech therefore speaks directly to the harmful nature of crime-facilitating Web sites.

The potential harm posed by crime-facilitating Web sites, however, does not coincide with many of the First Amendment exception categories. One exception category to the constitution recognized in *Chaplinsky v. New Hampshire* was the category of fighting words. Fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[16] Since *Chaplinsky,* the courts have narrowed the definition of fighting words to speech directed in a face-to-face manner to a

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[14] *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942).

[15] 315 U.S. 568, 572 (1942).

[16] 315 U.S. 568 (1942).

particular person that is likely to provoke a violent response.[17] Crime-facilitating speech, while concerning violent and injurious activity, does not elicit a violent response.

Obscenity is another category of speech excluded from free speech protection. The current definition of obscenity is set out in *Miller v. California*: "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex."[18] The court further held that the speech must portray sexual conduct in an offensive manner and must lack, "serious literary, artistic, political, or scientific value." [19] While it may be offensive, crime-facilitating speech is free of prurient content and does not fit into the narrow definition of obscenity set out by the Supreme Court.

Libel was also identified in the *Chaplinsky* dicta as a class of speech receiving limited First Amendment protection. In *New York Times v. Sullivan* the court held that libelous statements "can claim no talismanic immunity from constitutional limitations."[20] Libel or defamatory speech is reckless and is made with "actual malice" that directly injures an individual's reputation.[21] Such speech causes direct harm yet is unrelated to the harm caused by crime-facilitating speech. Crime-facilitating speech is not false, malicious statements aimed at directly defaming a specific individual's reputation.

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[17] *Cohen v. California*, 403 U.S. 15, 21-22 (1971).

[18] 413 U.S. 15, 24 (1973).

[19] 413 U.S. 15, 24 (1973).

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

[21] 376 U.S. 254 (1964).

The list laid out in the dicta of *Chaplinsky* is not exhaustive, as additional categories of speech have been carved out of the First Amendment protection blanket. For example, the courts have reasoned that societal concerns justify government restrictions on commercial speech. In *Ohralik v. Ohio*, the Supreme Court held that commercial speech only holds "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values."[22] A distinct category protecting societal values, yet again unrelated to crime facilitating speech. To be considered commercial speech, crime-facilitating speech would have to be driven at producing a commercial transaction or soliciting business, neither of which proves true.

Not one of the narrowly defined categories of fighting words, obscenity, libel or commercial speech directly accounts for speech found on suicide Web sites. Such speech facilitates crimes and hazardous activity in a distinctly different way from these narrowly defined First Amendment exception categories. Arguably speech that is of a crime-facilitating nature composes a separate category of speech. The scope of this category is extensive and contains a range of speech including Web sites promoting suicide, verbal communication instructing bomb making, publications detailing tax evasion methods and even films depicting a fictional attack on a building. In each of the cases above, the speech provides an audience with information that assists in the execution of specific illegal activity. The diversity of speech and the harm such speech poses to society demands review of this category alongside the consideration of First Amendment jurisprudence.

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

The crime-facilitating class of speech is unrelated to the previously established categories of fighting words, obscenity, defamation and commercial speech. Discarding these irrelevant categories reveals two categories of unprotected speech that better relate to speech of a crime-facilitating nature. Speech that incites imminent lawless activity and speech that takes the form of instruction manuals do not qualify for guaranteed First Amendment protection according to case law. Each separate category stands as possible regulatory guidelines to be applied to the class of crime-facilitating speech. The first category of incitement sources from the benchmark case *Brandenburg v. Ohio,* which recognized speech that incites imminent, lawless activity as unprotected by the First Amendment.[23] Since the Supreme Court's ruling in *Brandenburg,* numerous cases have implemented the *Brandenburg* standard in examining diverse speech traveling by way of diverse mediums. Outlining these court decisions delineates what constitutes incitement further illuminating how the category might apply to suicide Web sites and the class of crime facilitating speech.

In addition to the incitement category distinguished in *Brandenburg,* a second class of case law relates to crime-facilitating speech. The courts have recognized certain speech presented in the form of instruction manuals as unworthy of First Amendment protection. Absent from case law is a Supreme Court ruling on instruction manuals. As such the study of this category turns to the weighty Fourth Circuit decision in *Paladin v. Rice* as the standing archetype ruling on instruction manuals. *Paladin* and correlated court rulings regarding instruction manuals provide an alternative set of potential

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

guidelines for assessing suicide Web sites and other instructionally criminal Web sites. Case law revolving around the *Brandenburg* standard and instruction manuals seems to constitute a standard for judging crime-facilitating speech. Further analysis, however, is required to understand how these two categories defined by the courts can be employed in the consideration of crime-facilitating Web sites.

Speech that Incites

The Supreme Court has recognized that certain speech advocating illegal conduct is unworthy of First Amendment protection. The Supreme Court has termed this exception category "incitement to imminent lawless activity." Numerous court decisions have worked to distinguish protected speech from unprotected incitement. However, maintaining the delicate balance between societal endangerment and the speaker's right to express unfavorable views has proven a challenging task. The extensive and complex history of the incitement category within the United States court system is a testament to the unique challenge. An accurate assessment of crime-facilitating speech through the lens of incitement demands a review of the evolution of this First Amendment exception.

The history of the First Amendment and the incitement exception can be traced to the inception of Justice Oliver Wendell Holmes' clear and present danger test.[24] The clear and present danger test took form during a series of three Supreme Court free

[24] *Schenck v. United States*, 249 U.S. 47 (1919).

speech cases in 1919, the first of which was *Schenck v. United States*.[25] The case reviewed the conviction of Schenck, a socialist, who had been found guilty under the Espionage Act in distributing a leaflet that condemned the draft.[26] Although Schneck's leaflets expressed a political message, the Supreme Court held they were not protected by the First Amendment. In upholding Schneck's conviction, Justice Holmes articulated the clear and present danger test: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[27] Holmes argued the leaflets posed a clear and present danger to public safety as the impassioned language of the leaflet attempted to create resistance to the draft in the form of a proletarian uprising. Holmes equated the speech to falsely shouting fire in a crowded theatre; he explained in his famed analogy, "The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic."[28]

The clear and present danger test in *Schenck* initiated a transition away from free speech concerns towards the protection of public order and social interests. Further continuing this transitional movement were the subsequent rulings in *Frowerk v. United States* and *Debs v. United States*. The Supreme Court upheld convictions against a

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[25] 249 U.S. 47 (1919).

[26] 249 U.S. 47 (1919).

[27] 249 U.S. 47, 52 (1919).

[28] 249 U.S. 47 (1919).

publication that criticized the war in *Frowerk*[29] and a publication that advocated socialism in *Debs*.[30] Together the three cases *Schenck, Frowerk* and *Debs* are referred to as the Wartime Trilogy, all set in the tumultuous context of World War I.[31] Justice Holmes emphasized in *Shenck* that hindrances to the government effort during wartime are less tolerable than in peacetime as he conceded, "When a nation is at war many things that might be said in time of peace . . .will not be endured."[32] Regardless of this qualification, in affirming the Wartime Trilogy convictions the Supreme Court set a precedent that placed the seriousness of threats to social interests above the concerns of individual free speech.

The conservative take on the First Amendment held and the clear and present danger test would continue to be applied in different court settings. The test would receive speculative challenges and reforms throughout subsequent court rulings. Most significantly, the development of the test and challenges to the test paved the way for the current understanding of incitement. Justice Holmes shortly after establishing the clear and present danger test expressed his reservations towards its use. In expressing speculation in *Abrams v. United States*, Holmes would allude to the criteria used in the current incitement standard. Occurring shortly after the string of Wartime Trilogy

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[29] *Frowerk v. United States,* 249 U.S. 204 (1919).

[30] *Debs v. United States,* 249 U.S. 211 (1919).

[31] Robert S. Tanenbaum, "Preaching Terror: Free Speech of Wartime Incitement?" *American University Law Review* 55 (February 2006), 785.

[32] 249 U.S. 47 (1919).

decisions in 1919, *Abrams v. United States* upheld a conviction charging the defendant with publishing anti-war material under the Espionage Act.[33] Two leaflets were found to contain disloyal content that "intended to bring the form of the government of the United States into contempt," as well as, "intended to incite . . . resistance to the United States in said war."[34] Justice Holmes argued in his dissenting opinion that under the clear and present danger test the government needed to prove a highly probable threat of harm that was intended, immediate, and serious.[35] Holmes extended the First Amendment to Abrams as the requisite of the clear and present danger test, intent and danger, were not present.

Continuing to evolve throughout each successive era and context, Holmes' clear and present danger test prevailed for nearly fifty years in the U.S. court system. The refinements to Holmes' test culminated in the 1969 paradigmatic case of *Brandenburg v. Ohio.* The restatement of Holmes' words in *Brandenburg* would abandon the major faults of the speech-restrictive test in lieu of a more speech-protective standard. The *Brandenburg* case has since prevailed and currently evaluates the constitutionality of speech that advocates illegal activity.

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[33] 250 U.S. 617 (1919).

[34] 250 U.S. 617 (1919).

[35] 250 U.S. 617, 626, 627 (1919).

Brandenburg v. Ohio

Since the Supreme Court's ruling in 1969, *Brandenburg v. Ohio* has prevailed as the landmark case for evaluating the constitutionality of speech that advocates illegal activity. The Supreme Court ruling in *Brandenburg v. Ohio* would draw a distinction between the mere advocacy of violence and "incitement to imminent lawless action".[36] The case reviewed the conviction of the Klu Klux Clan leader Clarence Brandenburg who was prosecuted under Ohio's criminal syndicalism law. Brandenburg publically held a Ku Klux Klan rally to which he invited a local television station to attend. The station recorded the rally and broadcast fragments of Brandenburg's speech including references such as, "bury the nigger," "send the Jews back to Israel," and "Nigger will have to fight for every inch he gets from now on."[37] In addition, Brandenburg advocated a march on Washington if the government, "continues to suppress the white race."[38]

Brandenburg was charged under an Ohio law that made it illegal to advocate, "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."[39] He was convicted, fined $1,000, and

[36] 395 U.S. 444 (1969).

[37] 395 U.S. 444, 446 (1969).

[38] 395 U.S. 444, 446 (1969).

[39] 395 U.S. 444 (1969).

sentenced to one to 10 years of imprisonment, which the appellant court of Ohio upheld. Upon review, the Supreme Court reversed the conviction per curium declaring Ohio's criminal syndicalism statue was unconstitutional. The court declared that the state could not constitutionally prohibit advocacy of law violation "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[40]

Intent and Imminence

The Supreme Court's ruling decision in *Brandenburg* supported the protection of unfavorable political views and sought to prevent the government from restricting speech on the basis of a "tendency to lead to violence."[41] The case stands as a pivotal departure from the over breadth of Holmes' present danger test, opting for a speech-protective approach to the advocacy of illegal behavior. Incitement in terms of the *Brandenburg* test is difficult to prove. The test calls for the presence of three definitive criteria to repress speech: intent, imminence and likelihood. While Holmes recognized these elements as integral facets to the issue of incitement in *Abrams*, formal criteria were not accepted until the Supreme Court's strict application of intent, imminence, and likelihood in *Brandenburg.*

[40] 395 U.S. 444, 447 (1969).

[41] *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

The Supreme Court decision found the public speech of Clarence Brandenburg as protected by the First Amendment. Brandenburg's words had merely advocated the described actions and the court emphasized that, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[42] *Brandenburg* affirms advocacy of violence can be only be considered unlawful incitement when each of the following is verified: imminent illegal conduct is advocated; the speaker intends to incite illegal conduct; it is highly likely that the speech will produce the advocated imminent conduct.

These criteria have resurfaced across a range of Supreme Court and lower court speech cases concerning incitement and advocacy of lawless activity. These subsequent cases provide additional insight into the application of the *Brandenburg* to alternate forms of dangerous speech. The cases include speech traveling by way of public address, magazines, songs, and films. Each case adds new dimensions to how the courts have distinguished protected from unprotected speech and thus how *Brandenburg* might apply to crime-facilitating Web sites.

The Legacy of *Brandenburg*

Brandenburg v. Ohio is the basis of the court's present view on speech that concerns illegal activity. Recognizing court decisions that have applied this standard

[42] 395 U.S. 444, 448 (1969)

offers a more comprehensive understanding of the First Amendment exception. Since the establishment of *Brandenburg* the courts have extended the use of the likelihood, incitement and imminence factors to cases that reach beyond the spoken word. *Hess v. Indiana* follows *Brandenburg* in assessing the spoken word and further clarifies the components and criteria of the standard. Beyond verbal communication, *Herceg v. Hustler Magazine* extends the *Brandenburg* reach to encompass the printed word.[43] *McCollum v. CBS Inc.* uses *Brandenburg* to examine dangerous speech traveling by way of musical lyrics.[44] Finally, further defining *Brandenburg* principles are two cases involving films that suggest illegal activity, *Byers v. Edmondson* and *Yakubowicz v. Paramount Pictures Corp.*[45] Each case reemphasizes the courts adherence to the standards and refines the criteria established in *Brandenburg*.

The first extension of *Brandenburg* that clarifies the doctrine is the Supreme Court case *Hess v. Indiana.* The Supreme Court was faced with the question of whether an antiwar demonstrator could be punished under Indiana's disorderly conduct statute for loudly shouting, "We'll take the fucking street later," while police were trying to control a crowd of demonstrators.[46] While the lower courts found Hess guilty of disorderly conduct, the Supreme Court reversed this decision in a per curiam opinion. The court

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

[44] *McCollum v. CBS Inc*., 202 Cal. App. 3d 993, 996 (Cal. Ct. App. 1988).

[45] *Byers v. Edmondson,* 712 So. 2d 681 (La. Ct. App. 1998); *Yakubowicz v. Paramount Pictures Corp.,* 536 N.E.2d 1067, 1068 (Mass. 1989).

[46] 414 U.S. 105 (1973).

ruled that Hess' speech was fully protected by the constitution. The Supreme Court reasoned that, "Hess' statement was not directed to any person or group of persons . . ." and at worst, "it amounted to nothing more than advocacy of illegal action at some indefinite future time."[47] The incitement standard thus failed and the Court found that because the defendant's words were not, "intended to produce, and likely to produce, imminent disorder, those words could not be punished . . . on the ground that they had a tendency to lead to violence.'" [48]

The *Hess* decision distinguishes two dimensions of the *Brandenburg* framework, intent and imminence. *Hess* highlights the idea of intent and emphasizes the relevance of this factor to the *Brandenburg* analysis. The court links the factor of intent to the likelihood that the illegal activity will occur. The Supreme Court notes that the unlawful activity verbalized was not directed at a specific audience. Therefore the speaker did not intend the activity to occur and the activity was hence unlikely to occur. The Court does not define or establish a process for evaluating intent. Regardless, since the *Hess* decision courts have drawn upon the intent factor to different degrees in identifying speech that is likely to incite imminent lawless activity.

Additionally, the *Hess* decision emphasizes the imminence element of the *Brandenburg* test. *Hess v. Indiana* first held that proving incitement requires evidence of imminence. Secondly, the court's reasoning shows the difficulty in proving this factor. The court found that while Hess's speech may incite unlawful activity his words were

[47] 414 U.S. 105, 108 (1973).

[48] 414 U.S. 105, 109 (1973).

directed at some "indefinite future time."[49] The factor of imminence was not present and the speech therefore is protected by the First Amendment. The elements of imminence and intent have since resurfaced through a multitude of cases. *Hess v. Indiana* strongly supplements the Brandenburg understanding and is frequently revisited in evaluating speech that incites lawless activity.

Brandenburg has further been clarified in extending the standard to alternative forms of speech. For example the Fifth Circuit Court of Appeals decision in *Herceg v. Hustler Magazine* draws upon the incitement distinction when assessing the printed word of a magazine article. The case concerns an article titled "Orgasm of Death," published by *Hustler Magazine.*[50] The *Hustler* article described in explicit detail the practice of autoerotic asphyxia, an act of masturbating while hanging oneself to achieve intense pleasure.[51] A teenage boy carried out the detailed steps of the article, accidentally hung himself, and was found dead next to the open article.[52] The parents of the boy brought suit against the publishers and its "unreasonably dangerous product."[53] The district court rejected the suit on First Amendment grounds and found the publishers not liable for, "negligence and foreseeablility of harm."[54] The court noted that it did not concede that

[49] 414 U.S. 105, 108 (1973).

[50] 814 F.2d 1017 (5th Cir. 1987).

[51] 814 F.2d 1017 (5th Cir. 1987).

[52] 814 F.2d 1017, 1018 (5th Cir. 1987).

[53] *Herceg v. Hustler Magazine,* 565 F. Supp. 802, 803 (S.D. Tex. 1983).

[54] 565 F. Supp. 802, 803 (S.D. Tex. 1983).

there was no incitement involved, but rather the plaintiffs failed to allege incitement as an exception to the First Amendment.[55] This initial decision emphasizes the necessary presence of incitement for detailed dangerous speech to be considered outside First Amendment protection.

The plaintiffs refiled an amended incitement based complaint that was tried before a jury, which would award damages to the plaintiff. The trial court denied Hustler's appeal, and Hustler then appealed to the Fifth Circuit. The Fifth Circuit Court of Appeals would examine the case in terms of incitement but found that the speech of the *Hustler* article did not to fall into the category of incitement nor any of the other categories exempt from First Amendment protection. The Fifth Circuit also took into consideration the extent of the vivid descriptions, the painted pleasures and explicit detail put forth by the article.[56] The court emphasized that, "No fair reading of it can make its content advocacy, let alone incitement to engage in the practice."[57] The case concluded that the article in *Hustler Magazine* is protected under the First Amendment.

The *Hustler* case distinctly augments the *Brandenburg* understanding as it extends the standard beyond speech to include the printed word. Again the court's reasoning demonstrates the difficulty in proving the required imminence factor. The *Hustler Magazine* published piece reaches an unknown audience at an unknown point-in-time. Implementing the standard to assess a magazine article implies a protection of other

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[55] 565 F. Supp. 802, 805 (S.D. Tex. 1983).

[56] 814 F.2d 1017, 1022 (5th Cir. 1987).

[57] 814 F.2d 1017, 1022 (5th Cir. 1987).

mediums that do not act as immediate call to action nor is directed at particular audience. Another dimension the *Hustler* decision tapped into is recognizing the context of the dangerous and insightful speech. The court noted the information of autoerotic asphyxia was presented as informative as opposed to encouragement and could no way be read as advocacy. The distinction emphasizes the importance of the context of the questionable speech and presents this dimension as an influential facet in determining illegal crime-facilitating speech.

A third case that has broadened the *Brandenburg* standard is *McCollum v. CBS Inc.* The case puts to the test the suggestive speech of song lyrics up against the factors of imminence and incitement. The plaintiffs of this case, the family of John McCollum, held that their son's suicide was caused by the music and lyrics of Ozzy Osbourne's song "Suicide Solution."[58] The McCollum family sued Osbourne and CBS for, "negligence, intentional tort, and encouraging the suicide through their music."[59] The California Court of Appeals found Osboune's song to be protected by the First Amendment. Not only did the court rule that the First Amendment extends to protect entertainment but the court also found Osbourne's song was protected under the *Brandenburg* standard. The court noted, "There is nothing in any of Osbourne's songs which could be characterized as a command to an immediate suicidal act."[60] The court further applied *Brandenburg* arguing that in order to prove "culpable incitement" evidence was necessary proving Osbounre's

[58] 202 Cal. App. 3d 993 (Cal. Ct. App. 1988).

[59] 202 Cal. App. 3d 993, 1001 (Cal. Ct. App. 1988).

[60] 202 Cal. App. 3d 993, 1001 (Cal. Ct. App. 1988).

music had the goal and was directed towards bringing about imminent suicide or was likely to produce imminent suicide.[61] The case concluded as neither of the *Brandenburg* prongs withstood and the California Court of Appeals dismissed the case.

Moving *Brandenburg* to evaluate song lyrics opens its reach to the new direction of entertainment speech. The court reemphasizes the need for an immediate call to action. Introducing the terms of "purport to order" and "command," the court found that even a literal interpretation of the lyrics failed to accomplish either of these advocacy terms at any time, "much less immediately."[62] The case also revisits the idea of intent, strengthening the connection between this concept and the proof of imminence. The lyrics of the song were intended as an artistic expression. The court notes that the plaintiff failed to allege that the defendant intended to harm to the teenager and thus the plaintiff's failed in proving intended incitement. Without intended incitement, the court distinguishes that the suicide was not reasonably foreseeable by the defendants. Additional cases follow *McCollum* in using Brandenburg to review a wider variety of speech including entertainment and artistic expression and further clarify the need for intent and imminence to be present to prove incitement.

Two cases have surfaced in the medium of film and also consider incitement in conjunction with entertainment, explicit depictions and imminence issues. In *Byers v. Edmonds*, Ann Byers brought civil charges against Time Warner and Oliver Stone for inspiring the violent shooting spree of two teenagers through the movie *The Natural Born*

[61] 202 Cal. App. 3d 996, 1000 (Cal. Ct. App. 1988).

[62] 202 Cal. App. 3d 996, 1001 (Cal. Ct. App. 1988).

Killers. Ann Byers was left paraplegic by the teenagers' crime spree and alleged that Warner and Stone were liable for distributing the film, as they knew it would inspire violence through the movie's glorification and graphic nature. The court dismissed the case finding that the movie was protected by the First Amendment. The film was not obscene nor did the film fall into the exception of incitement to imminent lawless action. Judge Carter of the Louisiana Court of Appeals attested that, "We cannot say that *Natural Born Killers* exhorts, urges, entreats, solicits, or overtly advocates or encourages unlawful or violent activity on the part of viewers . . . *Natural Born Killers* does not purport to order or command anyone to perform any concrete action immediately or at any specific time."[63]

Similar to the *Natural Born Killers* case, William Yakubowicz brought before the superior court a case that charged Paramount Pictures with producing, distributing and advertising the violent film called *The Warriors* in a way that would induce viewers to commit violence and imitate the film. Michael Barrett's violent outbreak following his viewing of the film resulted in the murder of Martin Yakubowicz. The superior court determined that nothing in the film constituted incitement. Instead the film was deemed a work of fiction portraying the adventures of a New York City youth gang. The film does not, "at any point exhort, urge, entreat, solicit, or overtly advocate or encourage unlawful or violent activity on the part of viewers. It does not create the likelihood of inciting or producing imminent lawless action."[64] The court also drew upon *Hess v. Indiana*

[63] 712 So. 2d 681 (La. Ct. App. 1998).

[64] 536 N.E.2d 1067, 1068 (Mass. 1989).

supporting protection of the film despite a "tendency to lead to violence."[65] Finally, citing *McCollum v. CBS Inc.* the court sought to protect the artistic expression of the film and avoid a restriction on, "creativity in order to avoid the dissemination of ideas in artistic speech which may adversely affect emotionally troubled individuals."[66] As an artistic expression failing to constitute incitement the film "The Warriors" is an additional example of speech protected by the First Amendment.

The cases of *Byers* and *Yakubowicz* further exemplify the courts rigidity in applying the *Brandenburg* standard. While violent and illegal action took place in the wake of each film's graphic and violent portrayals, neither film rose to a level of incitement. The two distinct court decisions reaffirmed *Brandenburg* reasoning in the context of motion pictures. The Supreme Court of Massachusetts and the Louisiana Court of Appeals cited the lack of a direct "order" or "command," the missing imminence requirement, and the absence of intent. The court decisions further distinguished an abstract teaching from a direct call to action. Based in Brandenburg the courts' reasoning differentiates the teaching of the necessity or propriety to resort to violence from the direct preparation of a person to commit an illegal act.[67]

Since 1969, the *Brandenburg* standard has stood as the precedent ruling for evaluating speech that advocates illegal activity. As the culmination of the clear and present danger test's fifty-year progression, the *Brandenburg* test offers a stark contrast

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[65] 536 N.E.2d 1067 (Mass. 1989).

[66] 536 N.E.2d 1067 (Mass. 1989).

[67] 395 U.S. 444, 447-448 (1969).

to the original speech-restrictive theory presented in *Schenck v. United States*. The Supreme Court decision declared the public speech of Clarence Brandenburg as protected by the First Amendment, adhering to the constitution's protection of political speech that supports unfavorable ideas.

The Supreme Court ruling has since proven versatile and applicable to various forms of crime-facilitating speech. *Brandenburg* has been carried over to cases involving verbal outcries, magazine articles, musical song lyrics and films. Each of the cases emerging in light of *Brandenburg* demonstrates the courts resistance to condone speech censorship, as the suppression of speech is contingent upon three conditions. The speech in question must incite an illegal action; the speech must produce or be likely to produce that illegal action; lastly, the illegal action must be imminent. Other factors linked to the *Brandenburg* understanding include the context of the speech, the directness of the command, the presence of a known audience, as well as the intent of the communicator. In the evolution of the *Brandenburg* standard, varying forms of speech communicated by way of various mediums have found protection under the constitution regardless of vivid descriptions or the misuse of its content. The development of the standard has taught,

> The constitutional protection accorded to the freedom of speech and of the press is not based on the naive belief that speech can do no harm but on the confidence that the benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or dangerous ideas.[68]

The delineated court cases illustrate the difficulty that lies behind proving incitement under *Brandenburg* criteria. As such, an additional form of unprotected speech separate

[68] 814 F.2d 1017 (5th Cir. 1987)

from *Brandenburg* must be explored for a comprehensive understanding of how to accurately assess crime-facilitating speech.

Speech that Aids and Abets

Separate from incitement, a second category of unprotected speech in case law proves equally relevant to the evaluation of crime-facilitating speech. The courts have identified certain speech that takes the form of instruction manuals as unprotected by the First Amendment. The dangerous content of speech presented in a hazardous "how-to" context does not incite but nevertheless extends beyond "mere advocacy" and is not guaranteed constitutional protection.[69] A number of district and appellate court decisions have acknowledged illegal instruction manuals that drift in the middle ground between the lines of descriptive advocacy and incitement to imminent lawless action.

Cases evaluating instruction manuals have involved speech instructing tax evasion, speech detailing illegal gambling operations, speech describing how to synthesize drugs, and speech taking the form of a murder's manual. Absent from case law is a controlling Supreme Court ruling. A concrete definition of what constitutes an unprotected instruction manual is concurrently nonexistent. All that can be drawn upon are the various lower court decisions. Piecing together these decisions works towards abstracting a definition of illegal instructional manuals and understanding how this category of unprotected speech relates to crime-facilitating Web sites. At the forefront of

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

court rulings examining instruction manuals is the Fourth Circuit decision in *Rice v. Paladin Enterprises*. The unique aspects to the case of *Rice v. Paladin* presented novel challenges to the interpretation of instruction manuals and speech that aids and abets criminal activity.

Rice v. Paladin Enterprises

A vicious murder and a detailed murders' guide set the platform for the Fourth Circuit decision regarding instruction manuals in *Rice v. Paladin Enterprises*. At the center of this case was a book entitled *Hit Man: A Technical Manual for Independent Contractors*, which gave explicit instructions detailing how to prepare for, commit, and get away with murder. James Perry executed three murders by following twenty-two of the detailed instructions listed in this murderer's manual.[70] Perry was convicted and the family of the murder victim proceeded to bring a civil wrongful death action against the publisher of the manual, Paladin Enterprises.

The U.S. District Court Judge Alexander Williams Jr. dismissed the case against Paladin on First Amendment grounds under *Brandenburg v. Ohio*. Williams determined the manual did not constitute incitement stating, "Applying the standard in Brandenburg, and considering the content and the context of the speech in *Hit Man*, . . . the book does

[70] Avital T. Zer-Ilan, "The First Amendment and Murder Manuals," *Yale Law Journal* 106 (June 1997), 2698.

not constitute incitement to imminent lawless action."[71] He concluded that *Hit Man* did not fall into an established First Amendment exception category and was therefore protected by the constitution. The Fourth Circuit would reverse this order holding that the book fell outside the protection of the First Amendment and that a jury could find that Paladin's speech had aided and abetted Perry's murders. Before the case met to trial, the parties reached a settlement with Paladin Enterprises paying five million dollars in damages to the Rice Sisters. Paladin agreed to give up the copyrights of *Hit Man* and the remaining copies of the book were destroyed. Response to the controversial Fourth Circuit ruling has ranged from criticism of the alarming and overboard censorship[72] to support of the removal of a "reprehensible," criminal instruction manual.[73]

Integral and Essential Part

The Fourth Circuit's dramatic decision and the murder's manual *Hit Man* are key components to understanding instruction manuals. In reversing the district court's grant for summary judgment, the Fourth Circuit indicated that Paladin's speech was liable for civil aiding and abetting and was not protected by the First Amendment. The theory

[71] *Rice v. Paladin*, 940 F. Supp. 836, 838 (D. Md. 1996).

[72] Robin R. McGraw, "Rice v. Paladin: Freedom of Speech Takes a Hit With 'Deep Pocket' Censorship," *Northern Kentucky Law Review* 27 (2000), 128.

[73] Beth A. Fagan, "Rice v. Paladin Enterprises: Why Hit Man is Beyond the Pale," *Chicago Kent Law Review* 76 (2000), 610.

behind this decision was rooted in the integral and essential role the manual played in Perry's murders. The Fourth Circuit supported this claim with three major findings. First protection under *Brandenburg* proved inapplicable. Secondly, the intent was addressed and contributed to the court's decision. Lastly the court pointed to the evident lack of redeeming social value of the speech. Each facet reaffirmed the integral role the speech played in the criminal transaction.

The circuit court first distinguished *Brandenburg v. Ohio* as unrelated to the issue in *Rice v. Paladin. Hit Man* did not resemble "abstract advocacy," but rather was "speech brigaded with action."[74] The court cited the exhaustive detail and the powerful prose that worked to steel audiences to commit the crimes glorified in the book's instructions.[75] Further, the Fourth Circuit reasoned, "The Supreme Court has never protected as abstract advocacy speech so explicit in its palpable entreaties to violent crime."[76] In contrast to advocacy, the court recognized the speech as an "integral part of the crime," referencing a principle distinguished in *United States v. Freeman*.[77]

The Ninth Circuit in *Freeman* introduced the idea of integral and essential when reviewing an aiding and abetting conviction. The defendant in *Freeman* had counseled others in the violation of tax laws and the court distinguished, "The First Amendment is quite irrelevant if the intent of the actor and the objective meaning

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[74] *Rice v. Palain,* 128 F.3d 244 (4th Cir. 1997).

[75] 128 F.3d 233, 252 (4th Cir. 1997).

[76] 128 F.3d 233, 244 (4th Cir. 1997).

[77] 128 F.3d 233, 245 (4th Cir. 1997).

of the words used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself."[78] The Fourth Circuit in *Paladin* extended this concept by relating integral and essential speech to other integral elements of illegal activity. Specifically the court equated integral speech to extortion, blackmail, threats, perjury, criminal solicitation, conspiracy, harassment and forgery.[79] Speech is thus unprotected when it is a "vehicle for the crime itself" and when it acts as the means for the crime to be committed.[80] To further illustrate the principle, the Fourth Circuit cited an analogy comparing the means to aiding a terrorist bombing. The analogy equated the selling of explosives to terrorists to the publishing of a how-to-construct-explosives instruction manual for terrorists. The analogy equating these two forms of criminal assistance under law placed heavy liability on speech that is an integral and essential part to crimes.

In reaching their decision, the Fourth Circuit recognized and accounted for the heightened implications of a case so ingrained in the First Amendment. The court addressed the issue of intent as well as concerns of excessive censorship in light of the First Amendment. The Fourth Circuit first recognized that the First Amendment imposes a heightened intent requirement in civil liability speech act case in order to uphold the

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[78] *United States v. Freeman*, 761 F.2d 549, 552-53 (9th Cir. 1985)

[79] 128 F.3d 233, 241 (4th Cir. 1997).

[80] 128 F.3d 233, 244 (4th Cir. 1997).

free speech values of the constitution.[81] In terms of the intent requirement, the court found the stipulations and the facts of the case were sufficient in proving intent. The court looked to the marketing strategies of Paladin and reasoned the publisher provided assistance, "with both the knowledge and the intent that the book would immediately be used by criminals and would-be criminals in the solicitation, planning, and commission of murder and murder for hire."[82]

The court also countered the argument that proof of intent requires the presence of a specific audience. The mass distribution and unspecified circulation of the book *Hit Man* is dissimilar to a one-on-one counseling session instructing murder practices. Speaking to this idea that a specific audience is needed to affirm foreseeable harm and the intent the Fourth Circuit argued, "we do not believe that the First Amendment insulates the speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience."[83] The court proceeded to diminish this bar of limitation in a generalization to all speech. It argued that if the First Amendment protected speech without a specific, intended audience, "one could publish, by traditional means or even on the internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific, indeed even

[81] 128 F.3d 233, 247 (4th Cir. 1997).

[82] 128 F.3d 233, 241 (4th Cir. 1997).

[83] 128 F.3d 233, 248 (4th Cir. 1997).

the admitted, purpose of assisting such crimes-- all with impunity."[84] Such harmful and threatening danger clearly outweighs the necessity of an intended audience-based limitation.

The court further questioned the scope of any intent-based limitation on instructional speech. The Fourth Circuit believed that had evidence of intent not been present, such a limitation was not sufficient to relieve liability and protect the speech of Hit Man under the First Amendment.[85] Concluding with this viewpoint projected a larger intent generalization that minimized the requirements for all instruction manual case law.

To address concerns that condemning *Hit Man* would produce a chilling effect and inspire censorship of lawful speech, the court highlighted the manual's lack of social value. The court argued that the instructions contained in Hit Man, "not only have no, or virtually no, noninstructional communicative value, but also that their only instructional communicative "value" is the indisputably illegitimate one of training persons how to murder and to engage in the business of murder for hire."[86] *Hit Man* was found to be reprehensible, valueless, intended to be used for murder, and unworthy of protection under Brandenburg and the First Amendment. Each of these findings supported the Fourth Circuit's decision that the speech in *Hit Man* was an integral and essential

[84] 128 F.3d 233, 247 (4th Cir. 1997).

[85] 128 F.3d 233, 248 (4th Cir. 1997).

[86] 128 F.3d 233, 248 (4th Cir. 1997).

component to the murders committed by James Perry and therefore could be found liable for aiding and abetting. *Paladin* outlined a bold viewpoint on the integral and essential theory of instruction manuals. To further illustrate the meaning behind these terms, additional instruction manual cases will be delineated. Highlighting the unprotected features of speech in these cases will further illuminate the meaning of integral and essential and how these facets shape the aiding and abetting line.

The Aiding and Abetting Line

The aftermath of Paladin triggered an uproar of criticism and opposition with free speech advocates decrying "First Amendment murder" and "overboard censorship."[87] The *Rice v. Paladin* outcome, however, is not unique in condemning and instruction manual as unworthy of First Amendment protection. Rulings before the case of *Rice v. Paladin* as well as cases determined after the Fourth Circuit's decision address the same controversial aiding and abetting issues. Extending the study of instruction manuals to include the cases that Paladin drew upon, as well as the cases that formed in the wake of the Fourth Circuit decision brings a more comprehensive understanding to the emergent category of unprotected speech. Additional analysis clarifies the principles of

[87] 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.

unconstitutional instruction and how to distinguish manuals that are integral and essential and aid and abet.

Speech instructing tax evasion constitutes one type of manual the courts have repeatedly deemed unprotected by the First Amendment. The 1978 federal court of appeals decision in *United States v. Buttorff* triggered a series of cases, which would find speech that aids and abets audiences in defrauding the tax system to be unprotected by the First Amendment.[88] In *United States v. Buttorff,* 15 people were found or pleaded guilty to falsely filing income tax returns.[89] Gordon Buttorff and Charles Dodge had advised these 15 people in tax evasion through a series of public and private meetings.[90] Buttorff and Dodge were convicted of aiding and abetting, which they appealed by claiming First Amendment protection. The Eighth Circuit Court of Appeals affirmed their conviction stating that the defendant's actions were not protected under the First Amendment and the defendants "aided and abetted income tax evasion by others beyond mere advocacy in speech." [91]

The Eight Circuit's decision in *Buttorff* supplies an initial understanding of when instruction constitutes aiding and abetting. The court in *Buttorff* interpreted aiding and

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[88] Rod Smolla, *Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book* (New York: Three Rivers Press, 1999), 115.

[89] 572 F.2d 619 (8th Cir. 1978).

[90] 572 F. 2d 619 (8th Cir. 1978).

[91] 572 F.2d 619 (8th Cir. 1978).

abetting as, "some affirmative participation which at least encourages the perpetrator."[92] The court crossed a dilemma as the defendant's participation had only reached a level of discussing the ideas of the illegal activity and did not included physical participation. The court reached the conclusion that the speech was sufficient action to constitute aiding and abetting, based mainly on the fact that the criminal transaction was carried out and completed as a result of the speech. After Buttorff and Dodge and explained how to avoid withholding, several individuals acted out the activity. All of the principle individuals, "testified that they submitted false or fraudulent forms because of the defendants' recommendations, advice or suggestions."[93] The Supreme Court highlighted the sequence of events that led to the concrete crime: "action was urged; the advice was heeded, and false forms were filed."[94] The court affirmed that the First Amendment did not apply and the speech was sufficient action to constitute aiding and abetting. The Eight Circuit's core reasoning rested on a simple equation: the illegal action described was carried out and resulted in the illegal tax form submission.

An additional form of instructional speech that aids and abets and is therefore unprotected by the First Amendment is seen in the Ninth Circuit decision in *United States v. Mendelsohn.* In this case Martin Mendelsohn and Robert Bentsen published a computer disk program *SOAP,* which instructed bookmakers in ways to run illegal gambling operations. *SOAP* directed users to copy the program from the computer disk

[92] 572 F.2d 619 (8th Cir. 1978).

[93] 572 F.2d 619, 623 (8th Cir. 1978).

[94] 572 F.2d 619 (8th Cir. 1978).

to the hard drive of a computer. Users were then able to record and analyze bets on sporting events, review information, calculate changing odds and factor in a bookmaker's fee to bets.[95] Mendelsohn and Bentsen advertised *SOAP* by offering telephone customer support and recognized that most customers used the program for illegal gambling practices. The court found that the speech in *SOAP* was "too instrumental in and intertwined with the performance of criminal activity to retain first amendment protection."[96] The defendant's First Amendment claim was therefore found inapplicable in the face of what the court referenced as "more than mere advocacy."[97]

The case of *Mendelsohn* hinges on the idea that speech is not protected by the First Amendment when it plays an integral or "instrumental and intertwined" role in criminal activity. The Ninth Circuit concentrated on two factors in the support of its integral and essential ruling: the intent and the sole criminal purpose behind the *SOAP*. The defendants had claimed protection under the First Amendment emphasizing that neither had intended the computer program to produce or incite criminal activity. The court upheld the district court's rejection of this defense, which stated, "There is no evidence that any speech by Defendants was directed to ideas or consequences other than the commission of a criminal act."[98] In other words, the speech was not informative separate from its connection to the criminal activity. Thus the only interpretive value of

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[95] *United States v. Mendelsohn*, 896 F.2d 1183, 1184 (9th Cir. 1990).

[96] 896 F.2d 1183 (9th Cir. 1990).

[97] 896 F.2d 1183, 1186 (9th Cir. 1990).

[98] 896 F.2d 1183 (9th Cir. 1990).

the speech was the sole facilitation of bookmaking and illegal activity. Finally the court explained that the instruction went beyond suggestion, as the defendants knew the illegal nature of *SOAP*. This knowledge was evident in the way the defendant's, "designed it, marketed it, and instructed others on its use."[99] The knowledge of the programs use further confirmed the court's rejection of an intent defense. A program so pointedly created to assist and so closely involved in illegal activity further illustrates when speech is considered an illegal form of facilitating instruction.

In addition to tax fraud and illegal gambling practices, instructional speech describing how to manufacture illegal drugs has also been called into question. The Ninth Circuit in *United States v. Barnett* reviewed the appeal of Gary Barnett who was convicted of aiding and abetting in the publication of a manual instructing how to synthesizing Phencyclidine (PCP). The instruction manual, titled *Synthesis of PCP - Preparation of Angel Dust,* had been found in the home of a suspect charged with the possession of PCP and other drug related paraphernalia. The suspect admitted to ordering the manual through the mail after seeing it advertised in a periodical. Barnett was then charged for publishing and distributing the manual to which he claimed protection under the First Amendment. Barnett claimed that under the First Amendment he had a, "right to disseminate and exchange this information through the mails even if the recipients use the same for unlawful purposes."[100] The district court denied Barnett's manual protection under the constitution and found him guilty of aiding and abetting.

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[99] 896 F.2d 1183, 1188 (9th Cir. 1990).

[100] *United States v. Barnett,* 667 F.2d 842 (9th Cir. 1982).

The Ninth Circuit upheld the conviction stating that, "the first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose."[101]

From the Ninth Circuit's decision emerge three distinctive concepts, which each indicate when written instructions are unworthy of First Amendment protection. First, *Barnett* extends the court's view of illegal instruction beyond verbal counseling and devices to encompass the printed word. The court distinguished that the differences between written instruction and any other form of instruction is irrelevant. The factor of time suggests that published instructions doe not attract a criminal response in the same way that a verbal exchange seems to immediately assist a crime. The Ninth Circuit addressed this point and countered, "The fact that the aider and abettor's counsel and encouragement is not acted upon for long periods of time does not break the actual connection between the commission of the crime and the advice to commit it."[102] The court also recognized that printed can be sent to a wide, unknown audience through the mail, with whom the defendant does not have any personal contact. To this point the court referred to *United States v. Buttorff*, a case in which the defendant instructed tax evasion practices to large audience he did not know. As with the time factor, lack of a known audience proved extraneous to Barnett's First Amendment defense for printed speech.

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[101] 667 F.2d 835, 842 (9th Cir. 1982).

[102] 667 F.2d 835, 842 (9th Cir. 1982).

The second distinctive issue the court emphasized in Barnett was the factor of intent. The court pointed to the items seized at Barnett's home as proof of his intent to aid and abet the illegal activity of drug production. Further supporting the intent findings was the level of detail and specific information provided by the manual, which identified places to obtain the chemical resources for drug production.

The third crucial point of *Barnett* was the Ninth Circuit's distinction that the counseling in printed instructions will constitute aiding and abetting if the person who was assisted by the instructions, "commits the crime he was encouraged to perpetrate."[103] The court understanding behind the factors of time, an unknown audience and intent is secondary to this underlying hinge to the Ninth Circuit's ultimate decision. The perpetrator in the case followed the step-by-step instructions and committed the crime. The theories and reasoning behind the *Barnett* decision have resurfaced in a number of cases concerning illegal instruction. Specifically, the Fourth Circuit in *Paladin v. Rice* would later refer to and apply the *Barnett* decision in considering the civil aiding and abetting charges against Paladin's instruction manual *Hit Man*. These concepts in *Barnett* additionally complement the broader understanding of instruction manuals.

A number of lower federal and appellate court cases have ruled on "how-to" manuals that instruct illegal activity. Many of the lower court decisions suggest there is a category of unprotected speech that does not incite but is illegal in breaching the boundary of mere advocacy. In the absence of a Supreme Court ruling, the lower courts have formed varying perspectives on what constitutes an illegal manual. A recurring

[103] 667 F.2d 835, 841-842 (9th Cir. 1982).

trend is the idea that speech is not protected when it is an integral and essential component to the crime as emphasized in *Paladin v. Rice*. There is not one understanding of the terms "integral" and "essential," but key factors surface within the prominent cases of *Paladin*, *Buttorff*, *Mendelsohn* and *Barnett.* The intent of the speaker, the extent of detail and amount of assistance the speech offers has also each held weight in these court decisions. Further the courts have considered the "value" of the speech and whether the crime was carried out as described by the instructions. From these cases the unprotected factors of instruction manuals seems to strongly relate to similar forms of crime-facilitating speech. Further analysis is therefore required to view the evaluation of suicide Web sites alongside instruction manual case law.

Crime-Facilitating Web Sites

The First Amendment is the most esteemed principle protecting speech exchanged in all forms of communication including through the Internet medium. The Internet has radically transformed communication capabilities and the information exchange offers users endless possibilities. Within its expansive scope, however, exists potentially dangerous material around which formidable concerns have arisen. The Internet's rapid growth has disseminated extensive content including material deemed as dangerous such as crime-facilitating speech. Such material has always seeped through society; however, the unconstrained power of the Internet magnifies the potential hazards of such speech. The Internet lacks four critical constraints. The Internet lacks a time constraint as

information can spread instantaneously via the Web. The Internet lacks cost constraints and boundary constraints as vast audiences can access Web based content for little or no cost. Lastly, the Internet lacks organizational constraints producing a disorganized cyberspace environment devoid of social norms.[104] These unique factors heighten the need to consider the impact of crime-facilitating speech in the communicative channels of modern society.

A concrete illustration of the negative impacts of such speech presents itself in the tragic story of Suzie Gonzales. Suzie was a teenager suffering from depression. In her interaction with the Alt.Suicide.Holiday Web site she immersed into the world of a "practical user's guide to suicide."[105] Abstracting words of encouragements and countless tips and methods, the last information Suzy would take away from the site was the means to end her life. Suzy's story is not unique, as other sites have proven equally as deadly in facilitating suicide. One fifty-two-year-old woman was found dead in her home next to two rented helium tanks.[106] In surveying the scene police found near her dead body a printout instructing how to overdose on helium gas from the Church of Euthanasia's Web site "How to Kill Yourself."[107] In a third case a man found his twenty-

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[104] Bryan J. Yeazie, "Bomb-making manuals on the Internt: maneuvering a solution through first amendment jurisprudence." *Notre Dame Journal of Law, Ethics & Public Policy* 16 (2002), 279.

[105] Luu, 308.

[106] Mary Braid, "Suicide.com: click here to end it all," *The Independent*, (March 5, 2001).

[107] Briad, 2001.

one-year-old wife hanging from a dog leash in their home while the nearby computer screen flashed a Web site detailing how to commit suicide by hanging.[108] As additional tragedies surface the threat of suicide Web sites demands stricter scrutiny.

The issue further manifests itself in other forms of crime-facilitating speech that travels the Web. Consider pro-anorexic or "pro-ana" Web sites attracting adolescent girls with advice describing, "How to hide your anorexic behavior from your parents."[109] Consider the various forms of the "Anarchist Cookbook" easily found with a click of the mouse that provide instructions on how to construct explosives.[110] Consider the "Nuremburg Files" Web site listing the names, pictures, license plate numbers and home addresses of 400 physicians who performed abortions.[111] The abortionists were labeled "baby butchers" and when a doctor listed on the Web site was injured or killed a red line would be drawn through the doctor's name.[112] Where is the line drawn for crime-facilitating speech in cyber space? When does speech facilitating a crime cross the line and become unworthy of First Amendment protection?

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[108] Rebecca Sinderbrand, "Point, Click and Die," *Newsweek, (*June 30, 2003).

[109]Deirdre Dolan, "Learning to Love Anorexia? 'Pro-Ana' Web Sites Flourish," *N.Y. Observer* (Feburary 3, 2003).

[110] Volokh, 1198.

[111] John P. Cronan, "The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard," *Catholic University Law Review,* 51 (2002), 443.

[112] *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2003).

Suicide and crime-facilitating Web sites represent an intricate dilemma complicated by First Amendment freedoms and the high impact and accessibility features of the Internet. The complex issue has yet to be addressed by the Supreme Court. As crime-facilitating speech poses familiar free speech questions with heightened impact concerns of a new medium, the pre-existent laws and jurisdiction would seem suited to regulate this form of speech surfacing in a new context. Do these Web sites call for a *Brandenburg* incitement review? Should these sites follow the same regulation evaluating criminal instruction manuals? The second chapter of this work strives to apply the relevant case law presented to crime-facilitating Web sites. Analyzing the limitations of previous court decisions highlights areas demanding clarification and suggests the guidelines for a future successful framework. The third chapter of this thesis works out of the discrepancies to project a solution for evaluating crime-facilitating Web sites. The proposition outlines potential guidelines to test any speech in lines with crime-facilitating criteria for future judgment and preventative purposes.

CHAPTER TWO: INCITEMENT, AIDING AND ABETTING, AND CRIME FACILITATING SPEECH

As crime-facilitating Web sites multiply and concerns surrounding these sites heighten, an immediate question asks whether free speech jurisprudence adequately regulates this type of speech. An initial understanding suggests crime-facilitating speech might fit into one of the established categories of speech that does not qualify for constitutional protection: speech that incites or instructional speech that aids and abets. The first category is well theorized and the other proves emergent. Court cases involving incitement and court cases involving instruction that aids and abets however, fail to transfer and solve the predicament of how to judge crime-facilitating Web sites.

Incitement

The *Brandenburg v. Ohio* incitement test has stood as the paradigmatic standard for speech that advocates dangerous and illegal activity. *Brandenburg* is upheld in our court system as the reigning standard that accurately weighs the extent and likelihood of harm against the intrinsic value of free speech. Speculation regarding the test's effectiveness has developed in the wake of the Internet phenomenon. The modern communication tool offers radical changes to the way people communicate and interact. The novel features of the Web pose challenges to effectiveness of the *Brandenburg* test in regulating and assessing crime-facilitating Web sites. There are two critical issues that prevent the *Brandenburg* incitement standard from applying to such Web sites. First

there is great difficulty interpreting the intent factor described in *Brandenburg* within the context of the Internet and secondly, the factor of imminence is not transferable to the alternate space-time continuum of the Internet. The shortcomings of the two prongs intent and imminence undermine the presumptive strength and versatility of the *Brandenburg* test in modern society. The limitations emphasize the need to revisit classic questions about the scope of protection required for freedom of expression on the Internet.

Issues with Intent

The *Brandenburg* intent requirement is the first obstacle that prevents the test's application in an Internet context. The Supreme Court in B*randenburg* emphasized the dichotomy between speech resembling abstract advocacy and speech directed and intended to incite the execution of an illegal action.[1] Advocating ideas concerning dangerous activity drastically contrasts "preparing a group for violent action and steeling it to such action."[2] The court recognized intent as one criterion that clearly indicates incitement as opposed to advocacy. Proof of intent validates the likelihood that the illegal activity will occur and is a critical factor to prove that the speech was directed to incite action. The Supreme Court was able to make direct inferences about the intent and the effects of Brandenburg's speech due to the concrete and physical elements of this

[1] *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969).

[2] 395 U.S. 444, 448 (1969).

case. The physical setting, the particular audience present and the lack of a response from the audience allowed the court to conclude that intent was not present.

The Internet poses many barriers to identifying the intent behind crime-facilitating Web sites. Three features of the Web are particularly problematic. First, the Internet landscape is filled with anonymity. Secondly, Internet communications lack a specific Web audience. Lastly, the contexts of Web sites are open to wide interpretation. Combined, these factors drastically hinder any attempt to pinpoint intent and therefore do not allow for proof of incitement on the Web.

Anonymity is the first unique issue of the Internet. Anyone can post information to cyberspace and the landscape is composed of untraceable contributors. All Internet communication can be conducted anonymously and users often conceal their identity with pseudonyms or screen names. The vastness of cyberspace severely separates communication exchanges and leaves the sender and receiver of Internet messages faceless to one another. In terms of *Brandenburg* regulation purposes, the intent of an ambiguous source is often intangible and indistinguishable. Take the explicit suicide Web site Alt.Sucide.Holiday, which fails to list a source or content provider. It is impossible to trace the person or organization that created this site and it is further impossible to contact the many anonymous contributors. Therefore the Internet prohibits any chance of identifying the precise intent behind the site. Is the provider a disturbed or depressed individual who intends the speech to elicit a response from other suicidal individuals? Is the provider exhibiting the material as a shock factor for personal entertainment? Does the provider post the information with the purpose to warn people

who are depressed of the disturbing realities of suicide? Without a name or an explicit mission statement present, these questions remain unanswered and intent is indiscernible.

In addition to an unknown speaker, the intended audience of an Internet posting is also frequently ambiguous. The lack of an audience contradicts the Supreme Court's understanding of incitement in *Hess v. Indiana*. The court in *Hess* found that for intent to be directed at inciting or producing imminent lawless action, the incitement must be directed to a definable group or a recognizable individual.[3] This idea was also implemented in *Cohen v. California* when a jacket bearing the slogan "Fuck the Draft" was protected under *Brandenburg,* as it was clearly not "directed to the person or the hearer."[4] Again the physical components of these cases clearly differentiate a recognizable direct audience from an aimless public utterance.

A distinguishable audience in the geographically vague environment of the Internet is nearly impossible to define. Internet messages can be distributed to an endless number of users in an endless number of locations around the world. The audience of any one Internet message is constantly in flux. The unknown audience profile of an Internet message is drastically dissimilar from the intended audience of more traditional communication means. Films, public addresses, trade magazines, protests, rallies while reaching a range of people, are more narrowly targeted. While not always precisely definable, there is a general sense where the speech in each of these forums is directed.

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

[4] *Cohen v. California*, 403 U.S. 15, 26 (1971).

This is opposed to the Internet platform where the audience reach possibilities are endless and untraceable. The Alt.Suicide.Holiday Web site is barred from no one and can appear in endless search engine results. It attracts a wide range of audience types, which could include a researcher exploring the subject, a user looking to understand intervention methods to help a suicidal friend, or a depressed individual contemplating the act. There is not a means to determine on the Internet those who find, engage and use the information posted to Alt.Suicide.Holiday Web sites. The lack of a definite audience further hinders the court's ability to identify incitement.

It is also difficult to infer the use intended for a Web site from the context or presentation of its material. The Internet contains an extensive range of content and is used for countless purposes. Users approach the Internet with varying personal and commercial needs including research, education, shopping, business transactions, communication interactions, file sharing, media streaming, expressing a view point, entertainment downloads and software applications.[5] Anyone can approach a Web site with any of the countless Internet uses in mind. At a basic level, the context of all Web content is viewed and accessed through a computer screen in a location convenient to the Internet user. As such the purpose of posted information is open to the interpretation of the user.

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[5] Tiffany Komasara, "Planting The Seeds of Hatred: Why Imminence Should No Longer Impose Liability on Internet Communications," *Capital University Law Review* 29 (2002), 835.

In more traditional mediums, the intended purpose for the use of speech is evident in its presentation. For example, the California Court of appeals immediately recognized Ozzy Osbournes' song "Suicide Solution" in *McCollum v. CBS Inc.* as a form of artistic expression.[6] Films are understood to be produced for entertainment purposes indicated by the courts in *Byers v. Edmondson*[7] and *Yakubowicz v. Paramount Pictures Corp*.[8] Magazines circulate information within a context of the magazine's genre and readership such as in *Herceg v. Hustler Magazine*.[9] Finally a public speech is presented to an audience in a physical way that supports a purpose and provides some indication of the context, as seen in *Brandenburg v. Ohio*.[10] Web postings intended for dissimilar purposes are presented in similar ways to one another simply appearing on a computer screen. The context is largely based on the individual receiving the information and the intentions he or she brings to the interaction. Take for example a basic Web page that merely contains words that precisely detail a suicide method. Without any indication of how this site is to be read, the context is completely in the hands of those who view it. The unorthodox context and presentation of Web material further illustrates that accurately defining the intent behind a Web site is an unreachable objective. Without a

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[6] *McCollum v. CBS Inc*., 202 Cal. App. 3d 993, 999 (Cal. Ct. App. 1988).

[7] *Byers v. Edmondson,* 712 So. 2d 681 (La. Ct. App. 1998).

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

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

[10] 395 U.S. 444 (1969).

recognizable content provider, a defined present audience, and a distinct context, intent proves next to impossible to understand within the Internet realm.

Without a reliable and accurate means to assess the intent behind Internet speech, the *Brandenburg* test cannot be used in the regulation of crime-facilitating Web sites. The requirement and definition of intent should be reconsidered and constructed to fit the various types of incitement and dangerous speech. Intent proves a convoluted measurement standard for examining crime-facilitating speech found in the context of the Internet and non-Internet realms. The intent factor of the *Brandenburg* incitement test is one free speech protection standard that proves vacuous in the context of cyberspace.

Imminence Proves Not Applicable

Beyond the problems with intent, the *Brandenburg* imminence standard also proves inconsistent in assessing the lawfulness of crime-facilitating speech. The *Brandenburg* view of incitement requires that the incited action be imminent. *Hess v. Indiana* interpreted imminence as a response occurring immediately after the speech is communicated.[11] This ruling distinguished imminent action from speech directed at some "indefinite future time."[12] Due to the lack of time defining boundaries in

[11] 414 U.S. 105, 108 (1973).

[12] 414 U.S. 105, 108 (1973).

cyberspace, it is very rare that Internet communications ever reach this concrete definition of imminence.

Internet time and space is indefinite in contrast to the time and space of traditional communication mediums. The Supreme Court in *Reno v. ALCU* recognized that the Internet is uniquely located in no particular geographical location and is accessible to anyone with Internet access at any time.[13] Communication occurs instantaneously in "real-time" as well as in a non-distinguishable amount of delayed time. Many concerns emerge around imminence within this alternate space-time continuum. Such concerns ask whether imminence is to be calculated from the time the content is posted to the Web or from the time the audience engages with the material. Should the amount of time it takes to interact with the entire site be factored into the equation? What if the audience refers back to the content at a later point in time? These unanswered questions contribute to the central dilemma articulated by John Cronan in a *Catholic University Law Review* who argues, "The 'imminence requirement,' does not work with the vast majority of Internet communications, as words in cyberspace are usually 'heard' well after they are 'spoken.'" [14] Lacking key physical features of *Brandenburg,* it is difficult to see how speech on the Internet could ever be considered imminent. Therefore the Internet's unique time barrier to imminence protects all dangerous and threatening Web sites from being condemned as incitement.

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[13] *Reno v. ALCU,* 521 U.S. 844, 851 (1997).

[14] John P. Cronan, "The Next Challenge for the First Amendment: The Framework for an Incitement Standard," *Catholic University Law Review* 51 (2002), 427.

The requisite imminence factor is not a consistent measurement tool and prevents the transferability of the *Brandenburg* test to Internet communications. A more central discrepancy lies within the *Brandenburg* principle itself. Courts have not addressed whether the imminence standard should be measured from the speaker's perspective or the audience's perspective. This discrepancy produces confusion in measuring the imminence of speech that is not communicated in a face-to-face exchange. The seminal cases for the imminence standard of incitement include *Brandenburg v. Ohio, NAACP v. Claiborne Hardware Co.* and *Hess v. Indiana*. Each of these cases involved a public utterance. In *Brandenburg v. Ohio,* Clarence Brandenburg's public address advocated violent action that was not acted upon immediately and therefore his speech found protection under the First Amendment.[15] In *Claiborne* a civil rights leader expressed threatening speech that supported violence. Acts of violence occurred weeks and months after the speech and the Supreme Court ruled the defendant could only be held responsible if the acts directly followed the strong language.[16] Finally in *Hess v. Indiana,* Gregory Hess' comment, "We'll take the fucking street later," also found First Amendment protection, as it did not inspire immediate action.[17]

These cases are identical in concerning speech communicated publicly in a face-to-face manner where the words were heard immediately after they were spoken. There was no immediate reaction to the speech from any individual present, therefore each

[15] 395 U.S. 444 (1969).

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

[17] 414 U.S. 105 (1973).

statement found protection under the First Amendment. Courts have adhered to this principle of imminence, as the advocacy of imminent crime is considered particularly dangerous. In a concurring opinion in *Whitney v. California*, Justice Brandies elucidated that imminence disallows the "opportunity for full discussion," and does not afford people the time to be dissuaded by counterarguments.[18] The interpretation of imminence rooted in *Brandenburg* does not adequately address speech communicated through different mediums. Certain mediums communicate speech solely in a manner that is time-delayed and does not reach its audience immediately. The current understanding of imminence fails to encompass these alternate means of communication.

The central issue with imminence surfaces in various incitement cases concerned with mediums that channel speech in a time-delayed fashion. The printed word in *Herceg v. Hustler,* and a song in *McCollum v. CBS Inc*. characterize the imminence paradox. The teenage boy who followed *Hustler Magazine's* article describing how to commit autoerotic asphyxia was found dead next to the open article. While the scene might have suggested that he had acted immediately upon reading the article, the court declared that the magazine lacked an immediate call to action as a published piece reaches its audience at an unknown point-in-time.[19] In *McCollum,* the decedent shot himself while listening to the song "Suicide Solution."[20] He was found dead still wearing

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[18] *Whitney v. California*, 274 U.S. 357, 371 (1927)

[19] 814 F.2d 1017 (5th Cir. 1987).

[20] 202 Cal. App. 3d 1001 (Cal. Ct. App. 1988).

the headphones while the song played on repeat. The court found, "There is nothing in any of Osbourne's songs which could be characterized as a command to an immediate suicidal act."[21] Further the court argued, "Osbourne's music and lyrics had been recorded and produced years before. There was not a 'real time' urging of listeners to act in a particular manner. There was no dynamic interaction with, or live importuning of, particular listeners."[22] While the suicidal act might have taken place immediately upon hearing the song, this proved irrelevant. The speech could not be blamed as the composition, performance, production and distribution occurred years earlier.[23]

These cases represent the contradiction imminence poses to incitement cases where speech is communicated through different media forms. *Brandenburg* does not address whether imminence is measured from the time speech is communicated or from the time speech is received. The court in *Herceg v. Hustler* attributed this limitation to the fact that *Brandenburg* was a case concerned with public arousal. The court explained, "The root of incitement theory appears to have been grounded in concern over crowd behavior."[24] This lapse brings into question whether speech communicate through alternate mediums such as books, letters or recordings can ever constitute imminent

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[21] 202 Cal. App. 3d 1001 (Cal. Ct. App. 1988).

[22] 202 Cal. App. 3d 1001, 1005 (Cal. Ct. App. 1988).

[23] 202 Cal. App. 3d 1001, 1005 (Cal. Ct. App. 1988).

[24] 814 F.2d 1017, 1023 (5th Cir. 1987).

incitement. The confusion weakens the viability of imminence as prominent criteria for all incitement cases.

The imminence factor is an impossible hurdle that does not conform to Internet communications. The inapplicability to the Web and issues it poses to speech communicated through alternate mediums proves the test is not effective. Coupled with the deficiencies of the intent factor, current First Amendment protection by way of incitement does not adequately attend to Internet communication. The *Brandenburg* test is therefore unfit to judge the Alt.Suicide.Holiday Web site. A cohesive framework that complies with all speech mediums is needed. This framework cannot rely on factors of intent and imminence as the Internet poses barriers against these criteria. A standard needs to be reconsidered that can address the unique characteristics of criminally instructional speech while also protecting against the censoring of advocacy and unpopular ideas.

Aiding and Abetting

In dismissing the relevance of the *Brandenburg* standard, the judgment of the suicide Web site falls to case law concerning instruction manuals. Evolving instruction manual jurisprudence, however, proves underdeveloped and an insufficient means for regulating crime-facilitating speech. The Supreme Court has yet to address instruction manuals and lower court rulings prove disjointed. In referring to a case where instructional speech had advised others in violent gang practices, Justice Stevens of the

Supreme Court noted, "Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech."[25] The disparate lower court rulings on instruction manuals are not consistent in distinguishing what constitutes an illegal instruction manual. Much of the ambiguity sources from how different courts emphasize and understand the content, context, and outcome of instructional speech. Within these three areas there are blatant contradictions and discrepancies from signature court rulings. Focusing on court decisions in the three areas of content, context, and outcome will work to remedy the incongruities and abstract the key principles behind instruction manual law for extending its application to crime-facilitating Web sites.

Disparate Considerations of Content

Content is one component the courts have repeatedly addressed when considering an instruction manual's First Amendment protection. The only consistent trend within this area of instructional law is that the content of an illegal manual must concern illegal or criminal activity. There is not a cohesive set of guidelines for assessing content beyond this basic principle. Courts have considered a wide range of instructional content and have assessed it in dissimilar ways. Some courts have based decisions in whether the content is concrete or abstract. Other courts have looked to the general or unique quality of the instructional material. The varying weight of these factors leaves ambiguity and a

[25] *Stewart v. McCoy*, 537 U.S. 993, 995 (2002).

lasting question: to what extent should an instruction manual be evaluated on the basis of its content?

The Fourth Circuit in *Paladin v. Rice* placed a strong emphasis on content in its ruling that the manual *Hit Man* was unworthy of First Amendment protection. The court based this decision on the non-abstract nature of the content, which was evident in the book's clear instructions, excruciatingly graphic detail, and "powerful prose in the second person imperative voice."[26] The court pointed to the fact that the manual was, "so comprehensive and detailed . . . as if the instructor were literally present with the would-be murderer."[27] The content was thus the central focus of the court's ruling decision that the manual was not protected under the constitution. The manual was found to be an archetype example of unprotected speech as "it methodically and comprehensively prepares and steels its audience to specific criminal conduct through exhaustively detailed instructions on the planning, commission, and concealment of criminal conduct."[28] Other instruction manual cases have not attributed such an emphasis to the detail and content as the leading culpable characteristic. The cases of *Buttorff*, *Mendelsohn* and *Barnett* each contained explicit instructions detailing the concrete steps necessary for the commission of a crime. Yet the very content of the speech itself was not considered a central issue and alone was insufficient in condemning the instructional speech. Rather alternate aspects including the context, and outcome proved more

[26] 128 F.3d 233, 252 (4th Cir. 1997).

[27] 128 F.3d 233, 252 (4th Cir. 1997).

[28] 128 F.3d 233, 256 (4th Cir. 1997).

significant. These disparate rulings on content leave little direction for the evaluation of the Alt.Suicide.Holiday Web site. Is the site's excruciating detail enough to condemn the site as unworthy of First Amendment protection? Such a ruling could also find a suicide prevention Web site containing similar detailed content at fault. The predicament thus goes unsolved and other distinctions in content rulings must be reviewed.

Further considering content, courts have also focused on the uniqueness of the instructional information. Some courts have emphasized that unique and specific information indicates speech that is unworthy of First Amendment protection. Unique instruction is not as readily available as general instruction pertaining to knowledge that can be obtained through alternate sources. Unique content is especially instrumental to criminals, offering assistance that would otherwise not be available in the facilitation of a crime. Unique content that provides specific names or locations has been recognized as particularly dangerous and a marker of an illegal instruction manual. In *United States v. Barnett* the court highlighted that the instructional speech in question provided specific locations and sources to obtain chemical resources, supplies, and equipment for the production of PCP.[29] In *Planned Parenthood v. ACLA,* the Nuremburg Files anti-abortion Web site provided the specific names, addresses and personal information of physicians who performed abortions.[30] Such specific information in both of these cases

[29] 667 F.2d 842 (9th Cir. 1982).

[30] *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2003).

had major implications in the court's final ruling that the speech in question was not worthy of First Amendment protection.

Other cases have found the unique and specific nature of content negligible in determining the lawfulness of instruction. For example the manual *Hit Man* in *Paladin v. Rice* contained information that is generally known and can be obtained through multiple outlets. *Hit Man* described how to pick a lock, disguise oneself, select a weapon, use basic tools and dissemble a weapon.[31] Some information proved extremely general such as glove use, as the court noted, "the book teaches the need for a hit man to always wear gloves and it discusses glove choice, recommending surgical gloves."[32] Similar information is easily encountered through Web sites, crime novels, detective television shows, films and other instructional outlets. The Fourth Circuit overlooked this availability of similar content in its analysis of *Hit Man*. The contradiction between specific information providing substantial assistance and general information providing minimal assistance remains up for debate. The confusion transfers over to the review of suicide Web sites. It is unclear if the level of unique and specific details factors into the judgment process. The Alt.Suicide.Holiday Web site does not contain names or specific places and some would argue that similar suicide information is accessible from other outlets. Do these finding guarantee that its speech is protected? Courts need to distinguish how the unique and specific features of content factors into the equation of protected verses unprotected speech.

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[31] 128 F.3d 233, 259 (4th Cir. 1997).

[32] 128 F.3d 233, 259 (4th Cir. 1997).

From instruction manual case law it is evident that the content of instructional speech requires scrutiny in review. Currently, the role and illicit aspects of content are undetermined. Some courts distinguish the level of detail and the concrete nature; other courts note the uniqueness as a sign of a manual's intrinsic danger. The confusion surrounding content represents the many dilemmas within this branch of instruction manual law. Without a larger framework and specific regulative criteria for content, instruction manual regulation will remain unsound and inconsistent with First Amendment doctrine. As such any attempt to apply this branch of law to suicide Web sites will be unsuccessful.

Contextual Confusion

Moving beyond the limits of a content assessment, courts often move to examine contextual elements of instructional speech. Context extends to how the speech in question was delivered and the circumstances surrounding the speech. A context review takes into account any background, setting, or presentation factors that provide additional assistance in the facilitation of the crime. Courts have adhered to various understandings of context factors and the role they play in determining the illegal nature of an instruction manual. Decisions based in context vary in how to consider the audience of the speech as well as the intent of the speaker. Courts have attributed varying levels of emphasis in considering these factors and the precise evaluation method for a manual's context thus proves ambiguous.

Courts have turned attention to the audience when assessing the context of instruction manuals. Case law is incomplete and does not adequately explore this context feature. The main outstanding question asks whether instructional speech that reaches a defined audience is more likely to be implemented in a crime as opposed to speech reaching a widespread, general audience. The court in *Barnett* held the wide distribution of the manual to an unknown audience as a negligible factor. The court referred to the *Butorff* case where the illegal instructional speech had been made in front of a large public gathering consisting of individuals who had virtually no previous contact with the defendant. In *Mendelsohn* the court recognized that the interstate transportation of the computer program *SOAP* was to a wide audience and yet still found it to be an unprotected form of speech. Finally, the Fourth Circuit in *Paladin* referred to each of these cases and came to the conclusion, "We do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience."

The lack of a defined audience did not have a significant influence in the conclusion of these cases. However, the attention to the issue suggests that an audience can dictate the unprotected nature of an instruction manual. Incorporating the audience element to the regulation of the Alt.Solution.Holiday Web site brings additional confusion to the issue. This suicide site, along with most Web sites, reaches an indefinable and expansive audience. The application of an audience-based analysis to this communication profile seems impossible. The initial question also pertains: is an audience factor necessary for determining the unprotected value of this Web site?

Precedent case law offers an incomplete understanding of how the audience contributes to the assessment of instructional speech. The subject requires further exploration in light of these inconclusive findings and the Internet platform.

Another contextual factor considered in instructional law is the intent of the speaker. The proper assessment of intent is debated throughout numerous instruction manual cases. In many of these cases the intent of the speaker plays a critical role while in other cases intent proves minor. Intent was critical in the final decisions of *United States v. Barnett* and *United States v. Mendelsohn*. In *Barnett* the items seized in the home of Gary Barnett were proof of his criminal intent. In *Mendelsohn* the court ruled that the defendant intended the computer program *SOAP* to be used for illegal purposes. This intent was evident in the way the defendant designed, marketed, and instructed others on its use.[33] Intent formed the basic reasoning behind each court's decisions that either the PCP drug-making manual or the gambling program of *SOAP* was unworthy of free speech protection.

Intent is not always an influential factor in instruction manual cases, as demonstrated by the Fourth Circuit in *Paladin v. Rice.* The Fourth Circuit found Paladin guilty of intent, supporting this finding with the evidence of Paladin's marketing strategies and Paladin's foreseeable knowledge that criminals would implement the manual in the execution of murder. The court however qualified that intent was not a necessary criteria in instruction manual case law. The Fourth Circuit determined that had

[33] *United States v. Mendelsohn*, 896 F.2d 1183, 1188 (9th Cir. 1990).

intent not been present such a discrepancy would not relieve the defendant from liability.[34]

The weight of the intent factor is not clear from instructional speech cases. There is further confusion pertaining to how to identify the intent behind an instruction manual. Some courts have relied on the marketing and advertising strategies of the manual as a clear indicator of intent, as seen in *Mendelsohn.*[35] Other court decisions have identified the "foreseeable knowledge" of the speaker as an indicator including the Fourth Circuit in *Paladin*.[36] Forms of additional assistance accompanying the speech have also swayed the intent understanding. For example, in the tax evasion case of *United States v. Kelley*, the defendant was found guilty of intent as he supplied tax forms and additional materials as forms of assistance.[37] The disordered approaches to identifying intent further obscures its use in the protection and regulation of instruction manuals.

The confusion surrounding intent is complicated further in the review of suicide Web sites. The intent behind the Web site Alt.Suicide.Holiday seems impossible to identify. There is no way to contact the unlisted provider of the site and instruction manual case law fails to offer an approach or measurement means to assess the intent. The question also remains as to whether intent is even necessary in illustrating the site's illegal nature. Court decisions on instruction manuals provide little guidance for

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[34] 128 F.3d 233, 259 (4th Cir. 1997).

[35] 896 F.2d 1183, 1188 (9th Cir. 1990).

[36] 128 F.3d 233, 259 (4th Cir. 1997).

[37] *United States v. Kelley,* 769 F.2d 215 *(*4th Cir. 1985*).*

regulating questionable speech and the vapid nature of the Web only highlights these discrepancies.

Critics and courts continue to question whether a certain context surrounding speech is proof of an illegal instruction manual. Incongruity exists in how to consider the audience as well as the intent when evaluating instruction manuals. Until these contradictions are remedied, instructional speech doctrine will remain undependable for regulating crime-facilitating speech of the Internet. Established guidelines clearly delineating how to incorporate context into the review of questionable speech is necessary for instruction manuals and suicide Web sites alike.

Balancing Outcomes and Implications

In the review of questionable speech, courts have turned from a review based on content and context to emphasize the larger outcomes and implications of speech. In considering the broader implications of instruction manuals, courts have fixated their attention to the greater value speech offers to society as well as the extent of the harm that it threatens. This delicate balance of value and harm has always surrounded First Amendment jurisprudence. The Supreme Court has consistently attributed "value" to an expansive range of speech and recognized the greater contributions it offers to society. Valued implications of speech include satisfying a curiosity, facilitating self-expression, providing entertainment, assisting in public debate, questioning the government, or

spreading the knowledge of facts and ideas.[38] Take for example, the entertainment provided in a television crime drama, the artistic expression offered by a graphic painting or the knowledge disseminated by a scientific textbook detailing the ingredients of an explosive. Each has positive outcomes and contributes to the betterment of society. At the same time the Supreme Court has recognized speech that only threatens substantive evils that congress has every right to prevent. Courts frequently cite Justice Holmes' classic reference to the panic that would ensue from falsely shouting "fire!" in a crowded theatre.[39] Concerns of harm also surface around speech that makes crimes easier or possible to commit, or harder to detect and punish. With such weight attributed to value and harm, evaluating the larger outcomes of speech is a process that is tightly involved in the review of instruction manuals.

While courts seem to agree on the importance behind these principles, the approach to the principles is far from uniform. Balancing value and harm has proven a difficult task, as there is much to consider in thinking on this broader scale. At one end of the spectrum, the courts need to protect against unnecessary censorship impending on the freedom of speech. At the other end, courts are weary of vicious and dangerous threats to the safety of society. With much at stake, few courts have generalized the process for evaluating value and harm of instructional speech. There is little consensus

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[38] Eugene Volokh, "Crime-Facilitating Speech," *Stanford Law Review* 57 (March 2005), 1111.

[39] *Schenck v. United States*, 249 U.S. 47, 52 (1919).

on how to properly account for all issues involved. Instead individual case decisions approach potential outcomes in a way specific to the instruction manual in question.

The greater value speech offers to society is one central concern to the assessment of instruction manuals. Upholding free speech ideals means considering how to assess the "greater value" speech offers society. Courts have determined the value of speech in different ways. Some courts have considered the additional uses instructional speech offers beyond the facilitation of crime. Speech that assists some people in how to commit a crime may at the same time assist other in useful, legal activities. The court in *Mendelsohn* identified that the computer program *SOAP* had the narrow and limited use of illegal bookmaking. The court affirmed that for the manual to be protected, "there must be some evidence that the defendants' speech was informational in a manner removed from immediate connection to the commission of a specific criminal act."[40]

A similar value assessment took place in *Paladin v. Rice.* The Fourth Circuit upheld the district court's findings that *Hit Man* is "devoid of any significant redeeming social value."[41] The defendant had supplied a number of hypotheses for alternative uses of the book including for law enforcement officials, people who enjoy reading accounts of crime for entertainment, people who fantasize about crimes, and criminologists who study crimes.[42] The Fourth Circuit countered that a jury could find the hypotheses implausible as it found *Hit Man*, "so devoid . . . of any political, social, entertainment, or

[40] 896 F.2d 1183, 1185 (9th Cir. 1990).

[41] 128 F.3d 233, 241 (4th Cir. 1997).

[42] 128 F.3d 233, 241 (4th Cir. 1997).

other legitimate discourse."[43]

Widespread criticism to the *Paladin* case counters that the value the instructional speech offers in the free exchange of ideas should be the prioritized value and hence *Hit Man* demands protection under the First Amendment. Paladin purported in the case that a ruling against the publisher could cause a chilling effect. Many scholars share this concern including Beth Fagan who in a Loyola of Los Angeles Entertainment Law Review argues, "Ultimately, the *Rice* decision tilted the slippery slope against the First Amendment and against all those who disseminate precarious information and entertainment to the public."[44] Many scholars and free speech advocates agree that the greater value to recognize in instructional cases is the value of people's right to think and speak as they wish to discover and spread truth. Protection of speech even in the face of unpopular and reprehensible ideas is essential for society to the support the marketplace of ideas.

To what extent should value determine the protection that should be afforded to criminal instructional speech? While court decisions have worked to balance the apparent value of speech in the face of larger rights to freedom, these decisions fail to provide an explicit guide for the evaluation of instructional speech. The lack of guidelines poses a dilemma for the regulation of crime-facilitating Web sites. There is little indication of characteristics that set protected Web sites apart from unprotected Web

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[43] 128 F.3d 233, 244-245 (4th Cir. 1997).

[44] Gregory Akselrud, "Hit Man: The Fourth Circuit's Mistake in *Rice v. Paladin Enterprises, Inc*.," *Loyola of Los Angeles Entertainment Law Journal* 19 (1999), 375.

sites in terms of value. The content of Alt.Suicide.Holiday Web site contains instructions for committing suicide. The measurement of the site's value is not nearly as straightforward but instead is distinctly subjective. Certainly some people would attribute value to the Web site as sharing knowledge on a sensitive issue. Those opposed would argue such information does not benefit or offer any real value to society. To successfully uphold free speech ideals there needs to be a clearer guide for the assessment of value. In any speech case self-expression guarantees and self-governance principles are called to the forefront. With such principles at stake, the value of instructional and crime-facilitating speech requires structured attention.

In contrast to the value that speech often offers to society, courts have also focused on the negative implications and the intrinsic harm of speech. Different instructional speech has the potential to bring about immense harms to society. Speech detailing specific instructions for contaminating a public water supply differs from instructions concerning tax evasion. Instruction manual case law has yet to definitively address the process for assessing the harm posed by instructional speech. The question remains, when does the potential harm of an instruction manual cross a line and send speech from protected to unprotected territory?

Many instructional cases assessing harm have focused exclusively on whether the described illegal action was carried out and injury that occurred. In *Barnett* the court determined that the instruction manual was illegal as the man found in the possession of the manual stated that, "he was attempting to manufacture PCP and had been doing so for

sometime."[45] Additionally the ruling in *Buttorff* was largely based on the fact that fifteen individuals carried out the illegal action of filing illegal tax forms as a result of the speech in question. Cases have only tentatively extended their view to assessing the degree of the harm instructional speech poses against society. *Paladin v. Rice* entered this discussion finding *Hit Man* to be "beyond the pale." *Hit Man* "reprehensible" as it solely provided instruction in the methods of terror and the court reasoned, "The freedom to speak is not absolute; the teaching of methods of terror should be beyond the pale."[46] While recognizing this harm as "beyond the pale," there still lacks indication of what similar reprehensible speech looks like. The Alt.Suicide.Holiday site deals with topic of suicide. While dangerous in content does the speech truly threaten illicit harm? How is the extent of this harm assessed? Do Web sites ever threaten actual danger? In this particular case, Suzy Gonzales carried out the instructions and the consequences were tragic. Does the misinterpretation of a site or the misuse of its information by an individual mean the site is intrinsically harmful? Such are the many questions still formulating around speech and the harm it threatens.

The means to methodically and objectively compare the value of speech and the harm it threatens is difficult as demonstrated by courts in considering this issue along side instructional manual cases. Clear indication for guiding the balance process needs to be recognized to supply a framework for crime-facilitating Web sites. Until this is point is addressed, doctrine will remain incomplete and ineffective in terms of reviewing the

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[45] *United States v. Barnett,* 667 F.2d 842 (9th Cir. 1982).

[46] 128 F.3d 233, 249 (4th Cir. 1997).

outcomes and implications of questionable speech.

The content, context and outcomes of instructional speech are the major facets courts have assessed in the review of instruction manuals. Courts have reached diverse conclusions on the weight of these components and implemented diverse evaluation methods to assess them. Some components are surrounded by contradictory findings while other components are not adequately explored. Not following a coherent doctrine within each of these categories hinders the applicability of instruction manual law to suicide crime-facilitating Web sites. While lacking cohesive conclusions, this body of law does provide basic principles from which a guiding framework for these Web sites can emerge. Until instructional case law reaches a guided principle approach, it will remain unfit for the regulation of crime-facilitating Web sites.

At the conclusion of this review, the predicament surrounding the regulation of the suicide Web site Alt.Suicide.Holiday remains unsolved. Precedent case law in the category of incitement and the category of instruction manuals that aids and abets is broke. The *Brandenburg* incitement test, while traditionally applied to all illegal advocacies, fails in the context of Internet due to the factors of intent and imminence. Case law involving instruction manuals also fails to act as an evaluation standard as this branch of law is underdeveloped and contradictory in the consideration of the content, context and outcomes of questionable speech. An immediate conclusion from these failings points to the need for courts to confront the issue of crime-facilitating Web sites. Further analyzing the limitations of case law also proves beneficial in suggesting areas for clarification and possible guidelines for a future successful framework. The third

chapter of this thesis works out of the discrepancies to project a solution for evaluating crime-facilitating Web sites. The proposition outlines potential guidelines to test any speech in lines with crime-facilitating criteria for judgment and preventative purposes. While posing a challenging task, the need for formulating regulation to review the Alt.Suicide.Holiday Web site alongside the First Amendment cannot be ignored.

CHAPTER THREE: THE POWER OF THE PYRAMID: A NEW APPROACH TO CRIME-FACILITATING SPEECH

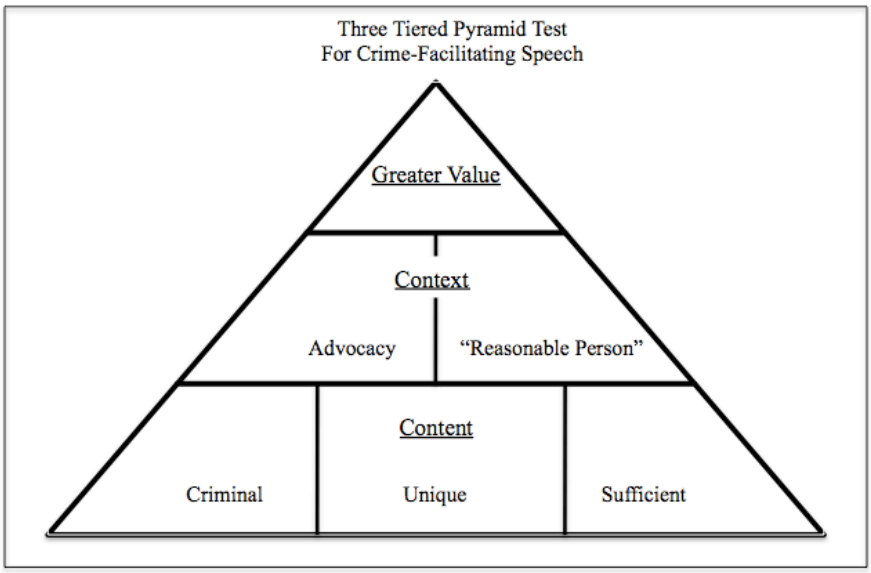
The absence of regulatory guidelines for reviewing crime-facilitating Web sites highlights a breach in First Amendment law that must be addressed. To close this gap, courts need to take a structured approach towards regulating crime-facilitating speech. The underdeveloped category of instructional speech that aids and abets can be used as the preliminary groundwork for a newly structured regulation test. Instruction manual case law recognizes key features of speech that are unworthy of First Amendment protection. Abstracting these features from aiding and abetting cases leaves a disorganized and convoluted compilation of criteria. Carefully defining, grouping, and ordering these features, however, sets up the framework for a test fit for evaluating crime-facilitating Web sites. Structured, narrowly defined and yet broadly encompassing, this test can accurately assess all crime-facilitating speech in terms of First Amendment bounds.

A Pyramid Scheme Solution

The solution for regulating crime-facilitating speech lies in a three-tiered evaluation test. The framework of this test can be visualized in the shape of a pyramid. The pyramid structure divides speech into three manageable levels for review and conceptually organizes these levels into a step-by-step process. The framework is

segmented to assess the content, the context and the greater value of the questionable speech. These three segments of speech are based on the three underdeveloped areas that instruction manual case law addresses but fails to conclusively define. There are specific criteria within each of these levels that indicate the protected or unprotected nature of crime-facilitating Web sites.

The assessment process begins at the base level reviewing the content of the questionable speech. If the content proves unworthy of protection, the questionable speech precedes to be reviewed on the basis of its context. After proving unworthy of protection at the content and context level, the final review is an assessment of the greater value of the speech. If the speech fails to meet an unprotected requirement, it falls outside of the pyramid and is a form of speech worthy of First Amendment protection. The pyramid is a segmented assessment structure that reviews each aspect of questionable speech while highlighting the interdependency between these aspects and their connection to larger free speech principles. To demonstrate the process and implementation of this evaluation test, the three assessment levels will be explored and the criteria within each individual layer will be delineated.



The Base: A Content Assessment

The first assessment level of the pyramid structure assesses the content of the questionable speech and asks if it concerns illegal criminal information. This is the base of the pyramid test as it reviews the concrete aspects of speech and requires little interpretation. The content assessment evaluates whether the questionable speech is criminal, unique and sufficient. Many court rulings in determining unprotected speech have focused on these specific content components. The following set of test questions guide the evaluation of these criteria:

1. Does the speech in question describe criminal, illegal activity?
2. Does the speech provide unique information?
3. Does the speech provide sufficient information to complete the criminal activity?

Each of these base criteria must be used in the first level judgment process. The content test first asks if the speech in question is criminal and describes an illegal activity. This is a preliminary base assessment that courts repeatedly address at the outset of the review process. For example, in *United States v. Barnett* the court immediately recognized that the questionable document entitled "Synthesis of PCP-Preparation of Angel Dust" described the illegal production process of PCP.[1] In the *United States v. Mendelsohn* it was discerned that the program *SOAP* was narrowly used for illegal bookmaking.[2] While the defendant Mendelsohn argued that the program was not designed exclusively for an illegal activity, the court reasoned that the few legal uses of the speech did not immunize its major illegal use.[3] Overall, the content concerned an illegal practice and *SOAP* was determined unprotected by the First Amendment. Recognizing whether the content of the speech concerns legal or illegal activity is the first step of the pyramid assessment process.

The next content question asks if the information provided by the speech is unique. Instruction manual case law has evaluated the uniqueness of speech in various ways. Some have assessed the level of detail and technicality the speech provides while others have reviewed the accessibility of the speech. Different court rulings have implemented these principles to different degrees. The Fourth Circuit in *Paladin v. Rice* explored the detail component in its review of the murder manual *Hit Man.* The court

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[1] *United States v. Barnett,* 667 F.2d 835, 842 (9th Cir. 1982).

[2] *United States v. Mendelsohn*, 896 F.2d 1183, 1184 (9th Cir. 1990).

[3] 896 F.2d 1183, 1184 (9th Cir. 1990).

highlighted the technical teachings and, "extraordinary comprehensiveness, detail, and clarity" of the manual."[4] An additional finding focused on the uniqueness of content surfaces in *Barnett* as the Ninth Circuit highlighted the specifically tailored information of the questionable PCP manual. The court found that Barnett's manual provided specific, reliable information as to where the audience, "could obtain the necessary chemicals, supplies and equipment to manufacture phencyclidine."[5] Detail and technicality combined with level of accessibility create a comprehensive set of criteria for understanding and testing "unique" speech. These factors are to be used together in reviewing the content of crime-facilitating Web sites and are integral components to the first pyramid layer.

The last question of the content assessment asks whether the speech provides sufficient information for the crime to be accomplished. Sufficient, or complete content has been held necessary in many court cases in instruction manual law. In *United States v. Buttorff*, the speech in question clearly provided sufficient information for the full execution of the crime. The court supported this finding with the evidence of the fifteen individuals who had used Buttorff's speech in the filing of false tax forms.[6] Additionally all of the individuals testified that they had filed the forms because of Buttorff's advice. Their ability to carry out the advice demonstrates the complete and sufficient set of

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[4] *Rice v. Palain,* 128 F.3d 244 (4th Cir. 1997).

[5] 667 F.2d 835, 841 (9th Cir. 1982).

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

instructions Buttorff supplied. Sufficiency holds serious weight and is an integral factor to the content level assessment.

All forms of crime-facilitating speech must first be evaluated as protected or unprotected in terms of a content level assessment. To be deemed unprotected based on content alone, the speech must be criminal, unique and sufficient. Testing as unprotected within the first assessment level does not necessarily guarantee that the speech in question is illegal. Once the content assessment indicates the speech in unworthy of protection, the speech proceeds to the next level to be reviewed in terms of its context.

The Second Level: A Context Review

The second level of the assessment process takes into account the context surrounding the questionable speech. This level evaluates whether the context further advocates or facilitates crime. The context assessment builds off of the first level findings to more broadly review the presentation and conditions surrounding the illegal content. Certain contexts are more threatening and more likely to facilitate a crime. Context is an element repeatedly recognized throughout precedent case law as a substantial factor in the evaluation of speech. To review the context of speech, the pyramid test looks at two components:

1. Is the speech presented in a way that explicitly advocates or encourages the crime it describes?
2. How would a "reasonable person" understand the context of the speech?

The pyramid test first takes into account advocacy or encouragement that accompanies the speech in question. Evidence of advocacy or encouragement contributes to a context that is considered unprotected. This idea of advocacy is grounded in principles presented in *Brandenburg v. Ohio.*[7] While the Supreme Court in *Brandenburg* recognized that "mere advocacy" was an insufficient indication of incitement, the basic advocacy principle is a key factor to integrate into the context evaluation of crime-facilitating speech.

Advocacy or encouragement recognized in *Brandenburg* can take a wide variety of forms. Advocacy can be traced to the presentation of the speech, to the speaker, or to the speech itself. An illustration of advocacy or encouragement in instruction manual law surfaces in *Buttorff*. The court denied the defendant's argument that he had presented the tax evasion instructions in a neutral fashion. The court recognized that the "action was urged" as fifteen individuals testified that they carried out the crime in response to Buttorff's advice and suggestions.[8] The court also recognized that Buttorff offered additional support by assisting one individual in filling out the tax form. Buttorff advocated the crime in such a manner that it went even beyond "mere advocacy."[9] Advocacy is a context directed towards encouraging the facilitation of the crime. The pyramid test requires a basic advocacy finding in conjunction with other unprotected

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

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

[9] 572 F. 2d 619 (8th Cir. 1978).

features to establish unprotected speech. Any evidence of advocacy indicates that the speech in question requires further review.

While evidence of direct advocacy is not always present on the Web, the second level assessment further looks at a more general context understanding of questionable Web sites. The second leg asks how an average person would interpret the context of the speech. An example of this nursing can be seen in *United States v. Watts.*[10] In *Watts,* the Supreme Court reviewed the speech of an 18 year-old who projected his opposition to the draft during a public rally on the Washington Monument grounds. The defendant had been convicted for knowingly and willfully making a threat against the life of the president in his proclamation: "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[11] The Supreme Court reversed the conviction and ruled that beyond a literal interpretation and taken in context, such an outcry was not a true threat but merely embodied a political hyperbole. The court introduced the idea of a "reasonable person" test, as it asked how an average person would interpret the conditional nature and context of this speech. This judgment understanding applies to the context review of crime-facilitating Web sites. The test will assess the general intent and purpose of the speech from the standpoint of a reasonable person.

Proving unprotected on the basis of content alone is not adequate for condemning speech as an illegal facilitation to a crime. Instead, the speech must also pass this second level of review that examines the context of the speech. To be deemed unprotected on the

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

[11] 394 U.S. 705 (1969).

basis of context the "reasonable person" standard and evidence of advocacy must be reviewed. Failing to conform to these second level criteria signifies that the speech in question fails the pyramid test and is a protected form of speech. Questionable speech that meets these criteria and contains an unprotected context requires further examination by the third and final level of review.

The Top Tier: Assessing the Greater Value

Speech that is unprotected on the basis of content and context has the potential to be considered unworthy of First Amendment protection but must pass a final review checkpoint. This third test considers the greater value of the speech. This final assessment takes a broader look at the overall value speech offers society and connects this value to free speech principles. To assess the broad scale value of speech one question must be addressed: does the speech have any non-criminal value? Courts have continually found value in a wide range of speech and such principles must be applied to the third pyramid test to adequately uphold free speech principles. Specifically, a test modeled off of the *Miller v. California* test regulating obscenity will be implemented.[12]

The Supreme Court in *Miller v. California* laid out a three-part test for the evaluation of obscene material. Part of the test asks whether the work in question taken as a whole offers serious literary, artistic, or scientific value.[13] This "SLAPS test"

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

[13] 413 U.S. 15 (1973).

reviews speech from a broader angle to identify the greater value it may offer society. Countless court decisions have adhered to the underlying value principle. In *McCollum v. CBS Inc.* the California Court of Appeals recognized the artistic expression of Ozzy Osbourne's song "Suicide Solution" in support of its constitutional protection.[14] The court explained, "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."[15] Further the court recognized that in condemning the speech the court would risk causing self-censorship and limit the variety and creativity of artistic expression concerning dangerous ideas.[16] This final review of the pyramid test thus safeguards against any chilling effect concerns on free speech with a protective interest in a wide range of expression.

Further the *Miller* test emphasizes the need to look at the speech as a collective whole. This principle applies at the conclusion of third assessment level as the pyramid test itself must also be viewed and used as a collective whole. There is not one level that can accurately stand alone to judge Web sites. Instead the entire test must be implemented as a complete process. To demonstrate the execution of the entire pyramid process, three case examples of suicide Web sites will be evaluated using the full review system.

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[14] *McCollum v. CBS Inc*., 202 Cal. App. 3d 187 (Cal. Ct. App. 1988).

[15] 202 Cal. App. 3d 187, 192 (Cal. Ct. App. 1988).

[16] 202 Cal. App. 3d 187, 195 (Cal. Ct. App. 1988).

Applying the Pyramid Scheme to Suicide Web Sites

The pyramid assessment test draws together criteria of unprotected speech into a unified cohesive form. These components, abstracted from case law, are now organized and compose a succession process set to evaluate crime-facilitating Web sites. With each level of the process delineated, the pyramid method must now be employed. The pyramid will be applied to the speech of suicide Web sites. To understand the full extent of the test, three Web sites will be reviewed. The selected sites represent a continuum of the ranging degrees of suicide Web sites. The first site seems blatantly dangerous, the second is based in preventative purposes and the third proves ambiguous, as it is neither pro-suicide nor anti-suicide.

The Bad

The Alt.Solution.Holiday (ASH) Web site that assisted in the suicide of Suzy Gonzales is the first site for review.[17] This site stands at one extreme of the spectrum as its dangerous and facilitative nature has drawn major concerns and criticism. The Web site will be judged alongside each of the three levels of the pyramid test to discern its protected or unprotected First Amendment position. The first assessment level reviews the Web site's content. The content test first asks if the speech in question describes

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[17] SR-71A, Where Has ASBS Gone, "Alt.Suicide.Holiday Archive," http://www.ashbusstop.org, (accessed April 20, 2009).

illegal activity. This suicide Web site passes this test as it details the illegal activity of how to commit suicide. The site provides countless instructions and advice. Under a section entitled "Poisons" a passage notes,

> Most drugs cause vomiting. To help stop this, take one or two anti-histamine tablets (travel sickness, allergy, hayfever tablets etc.) about an hour before, on a fairly empty stomach . . . Friday night is a good time if you live alone - nobody will miss you until Monday if you work. Bolt all the doors you can. Say you'll be out over the weekend visiting someone, so people don't expect a reply to telephone.[18]

The second question asks if the information is unique. In this case, the ASH site provided victim Suzy Gonzales with information on how to pose as a jeweler to obtain the exact necessary lethal amount of potassium cyanide.[19] She also obtained information on the exact quantity necessary so her poisonous concoction would not burn her throat.[20] The specific detail and rare advice proved detailed, distinct and unique, and the site passes as potentially unprotected speech. Finally, the ASH site clears the third content hurdle as it contains sufficient information for the illegal activity to be completed. Its sufficiency is evident in the fact that Suzy Gonzales successfully committed suicide by carrying out the steps described on the Web site. Based on content alone, the first level

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[18] Alt.Suicide.Holiday, "Alt.Suicide.Methods FAQ," http://www.depressed.net/suicide/suicidefaq.txt (accessed May 9, 2009).

[19] Ellen Luu, "Web-Assisted Suicide and the First Amendment," *Hastings Constitutional Law Quarterly* 36 (2009), 308.

[20] Julia Scheeres, "Virtual Path to Suicide," *The San Francisco Chronicle*, June 8, 2003, Section A.

of the pyramid test has indicated that Alt.Soultion.Holiday is not worthy of First Amendment protection. The suicide Web site proceeds to the second pyramid level for review.

At a context level, both the advocacy of the site as well as a "reasonable persons" interpretation of the site are explored. The first context test seeks evidence of encouragement or additional advocacy supplied by the speech. This particular Web site contained blog postings that explicitly supported the act of suicide and further directed words of encouragement towards Suzy Gonzales participation in her suicidal act. The Web site channeled support and assured Suzy that suicide was an acceptable way to end her life.[21] Further in terms of context, a "reasonable person" would likely find the pro-choice philosophy or the site openly accepting and encouraging suicide as a context strongly directed towards depressed and suicidal people contemplating the act. The suicide Web site therefore passes both context criteria and continues on the review path as possibly being deemed unworthy of First Amendment protection.

The last level of assessment looks to the greater value that the suicide Web site might alternately offer society. However, this site fails to offer any other value to society, as supported by the SLAPS test. The instructions to commit suicide collectively lack any serious literary, artistic, or scientific value. The value of the suicide Web site solely lies in supporting the act of suicide and thus fails the final test of the pyramid. Transcending through the pyramid test the ASH Web site is unworthy of protection on the basis of content, context, and value. Examined together as a collective whole, the

[21] Scheeres, 2003.

suicide Web site proves a form of speech that strongly facilitates crime and is unworthy of protection under the constitution.

The Good

After distinguishing a dangerous site as unworthy of protection, the next step is to examine the opposite end of the Web site continuum, specifically a site opposed to suicide. Suicide sites that seek to prevent suicide and protect people against harm are widespread on the Internet. Many of these Web sites contain suicidal material but in a format that seeks to protect against its harms. The Web site "Suicide and Suicide Preventions" embodies an anti-suicide site and will be tested by the pyramid to evaluate its level of First Amendment protection.[22]

The base test is the content test. The Prevention site fulfills the first content criterion as it is concerned with the criminal activity of suicide. The site also proves unique in its detailed descriptions of suicide methods, the steps that often lead from depression to suicidal actions, as well as reasons why people commit suicide. Finally the third criterion is also met, as the site provides sufficient material for the criminal act. The Web site contains links to testimonial accounts from individual who have attempted suicide. Some of these testimonials outline the steps that were taken in the suicide attempt and point out the reasons why the suicide failed. Through a link titled

[22] Suicide and Suicide Prevention, "Suicide and Suicide Prevention Home Page," http://www.psycom.net/depression.central.suicide.html (accessed May 9, 2009).

"Assessing suicidal risk," the site directs visitors to a page with a testimony outlining, "I took 150 valium, 50 beta blocker (Obsidan), some French prescription sleeping pills, 12 Sominex, 10 Codein, and a glass of light alcohol . . . I planned to take the boric acid after loosing sensitivity. However, I lost consciousness about 20 minutes past taking the pills while still outside of my apartment."[23] While the testimonials are posted to deter the attempts, at a strictly content level the speech is sufficient for a copycat crime. Concluding the first level content assessment the Suicide and Suicide Prevention Web site passes as detailed, unique and sufficient and therefore carries over to the second level for review.

The context of this site is next in line for evaluation. The context test first seeks any form of additional advocacy or encouragement to the criminal act. The Prevention Web site, however, provides no additional advocacy in any form. Any assistance or resources provided by this site are solely based on prevention and include the phone numbers of help lines, the locations of treatment centers, and intervention resources. Further the context test reviews how a reasonable person would view this site. There is little question that the context of the Prevention site through its words, descriptions and themes is firmly grounded in a context that seeks to prevent suicide and help those battling depression. The Suicide and Suicide Prevention Web site thus fails to meet either context requirement. Failing to prove unprotected on the context level, this

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[23] Suicide and Suicide Prevention, "Assessing Suicidal Risk," http://www.psycom.net/depression.central.suicide.html (accessed May 9, 2009).

particular suicide Web site fails the pyramid test and finds protection under the First Amendment.

While the context legitimates the Suicide Prevention Web site, had this site passed to the third level for review it would have also scored protected. In facing the third level SLAPS test, the Prevention Web site unquestionably holds significant value for society. The benefits of a site offering help through resources and support to those battling depression and suicidal thoughts cannot be countered. The site offers advice ranging from "Help if You are Suicidal Now," to the longer term, "Support Groups if You are Depressed." Numerous links directly link visitors to the "Suicide Prevention Help Line" and the overall message is one of love and support. While some suicide sites might threaten lives, this site is determined to save lives. From the second and third level findings, the pyramid test solidifies the level of protection the First Amendment offers to the Web site Suicide and Suicide Prevention.

The Ambiguous

The third site for review was selected from the intermediate region between the protected and unprotected extremes. This middle ground consists of Web sites that present information regarding suicide in a neutral or ambiguous way. The Web site Wikipedia.com represents one seemingly neutral site explaining suicide methods.[24]

[24] Wikipedia, The Free Encyclopedia, "Wikipedia Home Page," http://en.wikipedia.org/wiki/Wikipedia (accessed May 9, 2009).

Wikipedia is a free Web encyclopedia, which is easily accessible and collaboratively written by contributors from around the world.[25] The site contains a Web page titled "Suicide Methods," which contains detailed material similar to information presented by other suicide sites. Exploring the Wikipedia case reveals how the pyramid test draws a distinction between protected and unprotected speech when the material is presented from a neutral standpoint.

The first assessment reveals that Wikipedia's suicide content is comparable to the material provided by Alt.Solution.Holiday Web site and the Suicide Prevention Web site. First, Wikipedia concerns criminal material including information regarding, drowning, suffocating, electrocution, hanging, cutting, and poisoning. Secondly, the detail of the material is unique. For example, the site provides specific poisons that are "less painful" to use in suicide attempts.[26] Thirdly, the material of Wikipedia proves sufficient. The site details the full execution of basic suicide processes, such as carbon monoxide poisoning.[27] For other more complex methods the site provides links to outside sources where complete information can be obtained. Wikipedia is criminal, unique, and

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[25] Wikipedia, The Free Encyclopedia, "Wikipedia," http://en.wikipedia.org/wiki/Wikipedia (accessed May 9, 2009).

[26] Wikipedia, The Free Encyclopedia, "Suicide Methods," http://en.wikipedia.org/wiki/Suicide_methods (accessed May 7, 2009).

[27] Wikipedia, The Free Encyclopedia, "Suicide Methods," http://en.wikipedia.org/wiki/Suicide_methods (accessed May 7, 2009).

sufficient. In demonstrating each of these components the content is unprotected and calls for further review from the second pyramid level.

The second level reviews the context of the Wikipedia site. In terms of encouragement, there is evidence of advocacy through the site's links to external Web pages and resources that supply additional information and support. For example, the listed link "Poison Methods" directs visitors to a Web page that contains various poisons and lists ingredients, availability and success rates.[28] For example this page details an overdose using Aspirin. The page describes the dosage, "20-30+ grammes (too many cause vomiting)," as well as a "notes" section which explains, "Not recommended, fatal dose varies wildly, could cause liver & kidney damage instead of death. OD causes strange noises in your ears (like a video arcade) & projectile vomiting after about 10 hours."[29] These outside resources confirm that Wikipedia contains traces of advocacy and completes the first prong of the context test. The second prong to the context test, however, draws uncertainty. The way in which a "reasonable person" would interpret the context of the Wikipedia is ambiguous. With countless contributors, the site draws from many sources both pro-suicide and anti-suicide. The result is a mass of information lacking one distinct context. The "reasonable person" test seems to indicate that the context is in fact ambiguous. This second prong of the context review is therefore

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[28] Methods File, "Poison Methods," http://www.ctrl-c.liu.se/~ingvar/methods/poison.html (accessed, May 9, 2009).

[29] Methods File, "Poison Methods," http://www.ctrl-c.liu.se/~ingvar/methods/poison.html (accessed, May 9, 2009).

inapplicable. Based on the first prong findings alone, the affirmative advocacy indicates the context of Wikipedia is unprotected and the site moves to the third test level for review.

To assess the greater value offered by Wikipedia, the third assessment level takes into account the entire site as a whole in conjunction with the SLAPS test. Wikipedia boasts immense popularity providing over 3.5 million articles spanning a substantial scope of topics from contributors around the world.[30] Jonathan Dee, of *The New York Times* cited the importance of Wikipedia not only as an encyclopedic reference but also as a "frequently-updated news resource."[31] While Wikipedia is made up of countless contributors, it is fundamentally an encyclopedia. An encyclopedia is a work that contains information on all branches of knowledge and as such holds immense value for the education and dissemination of knowledge in society. This overarching value of speech that seeks to spread information spanning all topics, including those that are controversial, is indispensable to the freedom of speech and our society. With value attributed, the site fails the last test of the pyramid and is recognized as a protected and legal from of speech under the First Amendment.

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[30] Ken S. Myers, "Wikiminnunity: Fitting the Communications Decency Act to Wikipedia," *Harvard Law Review*, 20 (2006), 163.

[31] Wikipedia, The Free Encyclopedia, "Wikipedia," http://en.wikipedia.org/wiki/Wikipedia (accessed May 9, 2009).

Extending Beyond Suicide Web Sites

The three suicide Web sites reviewed by the pyramid test represent the range of speech concerning suicide that exists in cyberspace. Suicide Web sites comprise merely one type of crime-facilitating speech inhibiting the cyber world. Material discerning bomb making,[32] murder methods,[33] drug production[34] and other unlawful activities is tangible and obtainable to anyone with an Internet connection. The Internet heightens the prevalence and accessibility of this speech and highlights concerns surrounding all crime-facilitating speech. Crime facilitating speech extends far beyond the scope of the Internet and surfaces in countless forms. Manuals, magazines, seminars, books, leaflets, and computer software are a few of the vehicles through which speech can offer assistance to serious crime. Just as suicide Web sites currently fall through a regulatory gap, crime-facilitating speech as a whole lacks attention and legislature.

The pyramid test, while illustrated in light of suicide Web sites, stands to accurately assess the broader category of crime-facilitating speech. The test extends on a larger scale and is fit to apply First Amendment jurisprudence to all forms of speech. Currently crime-facilitating speech poses an intricate and unaddressed problem; the category threatens harm and is complicated by the intrinsic need to uphold coveted free speech values. Integrating the proposed pyramid test works to understand each

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[32] The Anarchist Cookbook, "The Anarchist Cookbook," http://anarchistcookbook.com/
[33] Hit Man Online, "Hit Man: A Technical Manual for Independent Contractors," http://mirror.die.net/hitman/ (accessed May 9, 2009).
[34] Homemade Drugs Library, "Homemade Drugs Homepage," http://www.homemadedrugs.net/ (accessed May 9, 2009).

component of crime-facilitating speech while strongly adhering to the constitution protection standards. As the Internet and all crime-facilitating speech are deeply ingrained in modern communications, a structured review must be implemented for the value and protection of speech and society.