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Inherently Dangerous: The Potential for an Internet-Specific Standard Restricting Speech That Performs a Teaching Function

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By H. BRIAN HOLLAND*

> [Draino Bomb] Take any plastic film canister and fill 3/4 of the cannister [*sic*] with _____. Fill the rest with Draino and put the lid on it. Take this mixture to a cop car and drop it in the gas tank. Run like hell. In about ten minutes the car will explode like in the movie.
>
> www.raisethefist.com[1]

OUR COUNTRY HAS a long and somewhat disquieting history of confronting perceived threats to our political system with laws that muffle voices of dissent, particularly during times of war and great social or economic change. Until the late 1960s, the jurisprudence of language associated with violence and crime reflected this tendency, permitting the restriction of voices that we found dangerous, disruptive, threatening, and even unpatriotic. Then, in perhaps our greatest moment of unrest—at the height of the Civil Rights movement and the Vietnam war—the Supreme Court embraced sweeping protections for the voices of dissent, even those who, in their advocacy, invoked the specter of illegal conduct and violence as a means of achieving social change. In the decades that followed, as America's status in the world grew apparently more dominant and secure, the Court reaffirmed its tolerance for such expression. Our courts, and indeed the people, subsequently embraced the marketplace of ideas

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1. RAISE THE FIST MIRROR WEBSITE, RECLAIM GUIDE: DRAINO BOMB, *at* http://forbiddenspeech.org/ReclaimGuide/draino.shtml (last accessed Dec. 19, 2004) [hereinafter RAISE THE FIST MIRROR WEBSITE, DRAINO BOMB]. Please note that the author has eliminated a single ingredient from each set of instructions.

that flourishes in the absence of these restraints. But now our tolerance runs thin.

Real or not, we perceive the convergence of several dangers—the physical threat of terrorism, both foreign and domestic; the economic threat of recession, corporate scandal, and globalization; and the social threat of new technology that connects, informs, exposes, and overwhelms us. At this moment, certain First Amendment protections are ripe for circumscription. The question, then, is whether our constitutional right of free speech is relative and conditional. The populist answer is yes. The legal answer is much more complicated.

To that end, this Article carries three goals. The first is to highlight parallel signals from the three branches of government suggesting that "dangerous" instructional speech will no longer be tolerated or constitutionally protected. The legislative branch has recently criminalized speech that is understood to promote criminal activity by teaching or demonstrating its methods.[2] The executive branch undertook the first prosecution under this recent statute and instituted new investigative guidelines and procedures designed to aid enforcement of these provisions.[3] Finally, the judicial branch recently signaled its willingness to consider exempting instructional speech from full constitutional protection.

Building on this last point, the second goal of this Article is to establish that the Supreme Court may be poised to announce a new theory of lesser constitutional protection for "dangerous" instructional speech. Here, I suggest that the Court will likely explicitly limit the scope of *Brandenburg v. Ohio*,[4] distinguishing and exempting speech that, through its capacity to perform a teaching function, creates the abstract potential for violence. In its place the Court seems inclined to adopt a derivative of the "public danger" doctrine more akin in application, albeit unintentionally, to a discredited analysis used primarily to sanction political censorship of the Socialist Party in the 1920s and of the Communist Party in the 1950s. *Brandenburg*'s imminence requirement is eliminated as applied to certain types of instructional speech under this approach. The question of public danger, both as a matter of doctrine and proof, will become a function of the speech itself and the context of its distribution. Intent, a question of fact, may be consumed by the scope of the public-danger analysis.

2. *See* 18 U.S.C. § 842(p) (2000).
3. *See infra* note 94.
4. 395 U.S. 444 (1969).

The third and final goal of this Article is to demonstrate that this public-danger derivative will, in application, create a de facto Internet-specific standard, incorporating standards of likelihood and intent that are easily subsumed by the very nature of the network and that will tend to affirm content-based regulation of disfavored online speech that performs a teaching function.

The likelihood of such an outcome is both real and profoundly troubling. The ideal of freedom that lies at the heart of open Internet architecture is intended to secure and promote expression. Yet, the derivative public-danger doctrine that I envision would turn this ideal on its head. Decentralization, data neutrality, immediate and unlimited access, anonymity—the very core of the Internet—would themselves create the pretext of danger, and thus the foundation for curtailing expression. An analytical framework that one might find acceptable in the offline world would create near self-validating restrictions on instructional speech when applied online.

I. Parallel Signals of Pending Change

Within the past few years, the legislative and executive branches of government have embraced the idea that particular types of instructional speech create a public danger that must be curtailed before that danger is realized and, indeed, before action is imminent. They are now pushing the judiciary to condone the constitutionality of legislation criminalizing certain instructional speech and its enforcement. The lower courts have struggled with this question for some time, crafting constitutional principles around existing authority of questionable application. Now, it seems, at least one Supreme Court Justice is eager to address the question. In this climate, it appears unlikely that the Court will avoid the issue of instructional speech for much longer.

A. Congress Criminalizes the Distribution of Bomb-Making Instructions

In 1999, Congress enacted 18 U.S.C. § 842(p) criminalizing the mere distribution of bomb-making instructions and similar materials, with no requirement that such instruction be used in a completed or attempted act of violence.[5] This legislation was enacted not only with a full appreciation of its challenge to the existing constitutional framework, but with the express intent of narrowing the speech protections

5. 18 U.S.C. § 842(p).

recognized in *Brandenburg v. Ohio*.[6] To fully understand the constitutional import of this statute, it is necessary to explore its rather convoluted legislative background. It took over four years, a full constitutional review, and the tragedies in Oklahoma City and Columbine to bring section 842(p) into law. The statute is thus inseparable from the seminal events, public perceptions, and politics that drove its enactment.

On April 19, 1995 at 9:02 A.M., a homemade fertilizer and fuel oil bomb weighing nearly 5,000 pounds was detonated outside the Alfred P. Murrah Federal Building in Oklahoma City. One hundred and sixty-eight people died.[7] Among the possessions of convicted bomber Timothy McVeigh, law enforcement officials discovered two books: *Homemade C-4, A Recipe for Survival* and *Ragnar's Big Book of Homemade Weapons and Improvised Explosives*.[8] Although the seized items were in traditional book form,[9] many have suggested that McVeigh had gathered bomb-making instructions from the Internet through discussion groups, bulletin boards, or websites.[10] This information has, however, never been verified.

Nevertheless, in the wake of the Oklahoma City bombing, the Internet was widely perceived as a repository for illegal and dangerous information—a breeding-ground for terrorism. The Department of Justice ("DOJ") added political fuel to this public fire when, during a Senate hearing, a Deputy Assistant Attorney General testified that instructions explaining how to build a bomb similar to that used in Oklahoma City had been posted on the Internet within hours of the

6. *See* 143 CONG. REC. S5978–S5991 (June 19, 1997) (statement of Sen. Feinstein); U.S. DEP'T OF JUSTICE, 1997 REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION § VI(B) (Apr. 7, 1997), *at* http://www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html (last accessed Dec. 19, 2004) [hereinafter U.S. DEP'T OF JUSTICE, 1997 REPORT].

7. Lois Romano, *Prosecutors Seek Death for Nichols*, WASH. POST ONLINE, Dec. 30, 1997, *at* http://www.washingtonpost.com/wp-srv/national/longterm/oklahoma/stories/nichols1230.htm (last accessed Jan. 15, 2004).

8. 143 CONG. REC. S5990 (statement of Sen. Feinstein). It should be noted that both titles, as well as thirty-six other related titles by Ragnar Benson, are still available from online bookseller Amazon.com, Inc. Barnes & Noble (bn.com) also carries both titles, as well as thirty-two additional titles by the same author.

9. *Id.*

10. *See, e.g.*, RELIGIOUS FREEDOM WATCH, DAVID TOURETZKY: TOURETZKY AND TERRORISM, *at* http://www.religiousfreedomwatch.org/extremists/touretzky2.html (last accessed Dec. 19, 2004) ("Timothy McVeigh used instructions like these, downloaded off the Internet, to build the fertilizer bomb he used to blow up the Oklahoma Federal Building and commit mass murder."); Opinion, *It's Time for a Purge of Government Web Sites*, ST. PETERSBURG TIMES ONLINE (Russia), Apr. 5, 2002, *at* http://www.sptimesrussia.com/archive/times/759/opinion/o_6148.htm (last accessed Jan. 15, 2005).

bombing, complete with diagrams and instructions on how to improve the design.[11] The nearly inevitable political response came just two months later in June 1995, when Senator Dianne Feinstein, a Democrat from California, proposed an amendment to the pending Antiterrorism and Effective Death Penalty Act[12] ("AEDPA"). An express purpose of the Feinstein Amendment was, *inter alia*, to criminalize the distribution of bomb-making instructions and similar material, particularly via the Internet.[13]

Despite Senate approval,[14] the 1995 Feinstein Amendment was not enacted into law at that time,[15] but was replaced with a requirement that the DOJ conduct a study of the problem, as well as potential solutions (the "Report").[16] Specifically, section 709(a) of the AEDPA required the Attorney General to prepare a congressional report on six issues: (1) the public availability of bomb-making instructions and related material; (2) evidence that such information has been used in acts of domestic or international terrorism; (3) the likelihood that such information may be used in future incidents of terrorism; (4) the applicability of current federal law to restrict such material; (5) the need for additional laws; and (6) a First Amendment analysis of these issues.[17] The Report was submitted to the Senate in April 1997.[18]

The Report determined that bomb-making instructions have long been available in a variety of media.[19] Moreover, at the time of the study, two years after the Oklahoma City bombing, instructional guides on the manufacture of explosives remained widely available in bookstores, public libraries, and on the Internet.[20] The Report con-

11. *See* U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6.

12. Pub. L. No. 104-132, 110 Stat. 1214, 1297 (1996).

13. *See* U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6. The Feinstein Amendment, which was part of the Senate version of the AEDPA, would have amended 18 U.S.C. § 842 so as to make it "unlawful for any person to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to . . . the manufacture of explosive materials." *Id.* This prohibition was to be limited by a scienter requirement, that "the person intends or knows, that such explosive materials or information will likely be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a criminal purpose affecting interstate commerce." *Id.*

14. *Id.*

15. In April 1996, during the legislation reconciliation process, the conference committee removed the Feinstein Amendment from the AEDPA. *Id.*

16. *See id.*

17. *See* Antiterrorism and Effective Death Penalty Act § 709(a).

18. U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6 (header).

19. *Id.* § I.

20. *Id.* § I(A). According to the Report, "[A] cursory search of the holdings of the Library of Congress located at least 50 publications substantially devoted to such informa-

cluded that most of the information readily available in print is also available over the Internet.[21] Like many claims regarding the availability of bomb-making instructions on the Internet, however, the Report's best evidence was anecdotal.[22] For instance, the Report relied

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tion, all readily available to any member of the public." *Id.* Sample publications cited in the DOJ Report include:

> *Guerrilla's Arsenal: Advanced Techniques For Making Explosives and Time-delay Bombs* (Paladin Press, 1994); *The Anarchist Arsenal* (Harber, 1992); *Deadly Brew: Advanced Improvised Explosives* (Paladin Press, 1987); *The Anarchist's Handbook* (J. Flores, 1995); *Improvised Explosives: How To Make Your Own* (Paladin Press, 1985); and *Ragnar's Guide to Home and Recreational Use of High Explosives* (Paladin Press, 1988).

Id. In a telling footnote, the DOJ stated:

> The DOJ Committee considered carefully the question whether the inclusion in this Report of titles of, and illustrative excerpts from, bombmaking texts would enhance the availability of such information to persons bent upon fabricating bombs and other destructive devices. The Committee concluded that such information already is so readily available to such individuals that its publication in a Report to Congress will create no additional risk.

Id. at n.2.

Many mainstream publications were also cited. For instance, the August 1993 edition of *Reader's Digest* included fairly detailed information regarding the construction of the pipe bombs used in the murder of a federal judge. *Id.* § I(A). The perpetrator of an unrelated bombing admitted that he used the *Reader's Digest* descriptions to construct his explosives. *Id.* (citing *Hunt for a Mad Bomber*, READER'S DIG., Aug. 1993, at 77, 79). The Report also noted that substantially the same information is available in texts "intended for military training, agricultural and engineering use." *Id.* Sample publications cited in the DOJ Report include *Explosives In Roadworks: User's Guide* (Assoc. of Australian State Road Auths., 1982); *Explosives and Blasting Procedures Manual* (U.S. Bureau of Mines, 1982); *Military Chemical and Biological Agents: Chemical and Toxicological Properties* (Telford Press, 1987); and *Clearing Land Of Rocks for Agricultural and Other Purposes* (Inst. of Makers of Explosives, 1918). In addition to these mainstream publications, the Report noted that bomb-making instructions were widely available in "underground publications" available from alternative booksellers and at local gun shows. *Id.* The DOJ Report also notes that there are "a number of readily available books, pamphlets, and other printed materials that purport to provide information relating to the manufacture, design and fabrication of nuclear devices." *Id.* (citing J. MCPHEE, THE CURVE OF BINDING ENERGY (1974); C. HANSEN, U.S. NUCLEAR WEAPONS: THE SECRET HISTORY (1966); C. HANSEN, THE SWORDS OF ARMAGEDDON (1986)).

21. U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § I(B).

22. For instance, the Deputy Director of the Intelligence Division of the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") testified before Congress that the ATF "recently ran a simple Internet query of 'pipe bomb,' using several commonly used search engines . . . produc[ing] nearly 3 million 'hits' of web-sites containing information on pipe bombs." *See* Special Agent Mark James, ATF Deputy Director of Intelligence Division, Before the Committee on Commerce, Science and Transportation, United States Senate, at 1 (May 20, 1999), http://commerce.senate.gov/hearings/0520jam.pdf (last accessed Oct. 30, 2004) [hereinafter Statement of Special Agent Mark James]. This number seems flawed, however, as running the same search today reveals that nearly all the "hits" are news stories or similar websites. *See, e.g.*, David Armstrong, *Bomb Recipes Flourish Online Despite New Law*, WALL ST. J., Jan. 18, 2001, *reprinted at* http://www.loper.org/cgi-bin/show_georges_month.cgi/~george/trends/2001/Jan (last accessed Oct. 27, 2004) (discussing the cases of teenagers in Michigan, New Mexico, and California; calling 18 U.S.C. § 842(p) a "dud";

on "a single website on the World Wide Web [containing] the titles to over 110 different bombmaking texts," all easily accessible by hyperlink,[23] as well as similar information available from USENET newsgroups.[24]

In an apparent attempt to add statistical credibility to its anecdotal evidence, the Report also cites general statistics from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") indicating that "between 1985 and June 1996, the investigations of at least 30 bombings and four attempted bombings resulted in the recovery of bombmaking literature that the suspects had obtained from the Internet."[25] Similar, although not identical, statistics were cited by the Deputy Director of the Intelligence Division of the ATF in testimony before Congress in 1999. The Deputy Director testified that "bombing incidents . . . *known* to have occurred as a result of bomb-making instructions obtained from computer bulletin boards" had jumped from thirty-five in an eleven-year period (1985–1995) to twenty in 1996 alone, an increase of approximately six hundred percent.[26] However, the Report acknowledged that there was no empirical data correlating the increase in bombing incidents to the availability of bomb-making

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and noting that "[f]ederal prosecutors have yet to record a single prosecution under the statute"); William Kleinknecht, *Web's Readily Accessible Bomb Recipes Worry Authorities*, NEWHOUSE NEWS SERVICE, Mar. 5, 2001, *at* http://www.newhouse.com/archive/story1c030501.html (last accessed Nov. 18, 2004) (suggesting that a Livingston, New Jersey teenager found bomb-making instructions on the Internet). Many are from England, Ireland, the former Soviet Union, and the Middle East. *See, e.g.*, Cameron Simpson, *Ricin Recipes Available on the Internet; Castar Plant Poison Could Be Made Using Kitchen Utensils*, THE HERALD (Glasgow, Scotland), Jan. 9, 2003, at 4 (discussing the availability of ricin instructions on the Internet in the wake of the arrest of several allegedly terrorists in possession of the toxin).

23. *See* U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § I(B). Available titles included "'Calcium Carbide Bomb,' 'Jug Bomb,' 'How To Make a CO2 Bomb,' 'Cherry Bomb,' 'Mail Grenade,' and 'Chemical Fire Bottle.'" *Id.* Another title, captioned "Nifty Things That Go Boom," appears to be a computer adaptation of *The Terrorist's Handbook* (purportedly edited at Michigan State University). The publication contains chapters that describe and address the procurement (legal and otherwise) of necessary explosives, chemicals, and other ingredients; the preparation of chemicals, techniques for transforming such substances into bombs and explosives; and the manufacture of fuses and other ignition systems. *Id.* Another of the accessed texts purports to consist of the "Bomb Excerpts" from *Anarchy Cookbook*. This text explains in minute detail how to construct dozens of different types of bombs and explosive devices, including fertilizer bombs, dynamite, and other explosives made with chemicals and other substances that "can be bought at Kmart, and various hardware supply shops." *Id.* It also provides suggested uses for the explosives, including the destruction of mailboxes, cars, picture windows, and phone booths. *Id.*

24. *Id.*

25. *Id.*

26. *See* Statement of Special Agent Mark James, *supra* note 22, at 1 (emphasis added).

information generally, much less to its availability over the Internet.[27] Likewise, the Report found that it would be "impossible to prognosticate" whether bomb-making information, whether in print or available over the Internet, will continue to be used to facilitate acts of terrorism.[28] In fact, recent statistics indicate that "explosive incidents" have dropped dramatically in the past four years.[29]

Having thus confirmed the danger perceived by Senator Feinstein and others, the Report then turned to the legal issues surrounding the Feinstein Amendment. Specifically, the Report analyzed the applicability of current federal law, the need for additional legislation, and issues of constitutional infirmity.

According to the Report, then-existing federal criminal law provided several theories of culpability for the dissemination of bomb-making information. However, the Report also identified three situations in which federal law failed to provide a ground for prosecution, two of which are most pertinent here.[30] First, federal law did not encompass circumstances in which the disseminator of bomb-making instructions intends to assist others in the commission of a federal crime, but does not conspire with or solicit a particular person, and no crime is actually committed.[31] Second, federal law did not generally apply where the disseminator of bomb-making instructions lacks the specific purpose of assisting another in the commission of a fed-

27. *See* U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § III. Unlike the Deputy Director of the ATF, the DOJ Report is more circumspect regarding the import, reliability, and accuracy of these statistics:

> It is, of course, impossible to prognosticate with any measure of certainty the extent to which persons wishing to engage in acts of terrorism and other criminal activity will rely upon printed and computer-based information instructing them how to manufacture bombs, other dangerous weapons, and weapons of mass destruction. . . . [W]e have no empirical data on what percentage, if any, of the recent increase in the number of bombings is attributable to the increased availability of bombmaking information.

Id.

28. *Id.*

29. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, ARSON AND EXPLOSIVES NATIONAL REPOSITORY-STATISTICS, *at* http://www.atf.gov/aexis2/statistics.htm (last accessed Nov. 21, 2004) (providing statistics for the years 2000–2003). It should be noted that this decline preceded the first prosecution under 18 U.S.C. § 842(p). *See infra* Part I.B.1.

30. The third situation identified by the DOJ Report in which then-existing federal law failed to provide a ground for prosecution was described as follows: "[F]ederal law does not presently reach the person who disseminates bombmaking information intending that it be used to aid the commission of a state or local criminal offense, notwithstanding the utilization of [or effect upon] interstate or foreign commerce." U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § V(1).

31. *Id.*

eral crime, but does possess the knowledge that a particular person intends to use the information to do so.[32] The question, then, was whether and to what extent Congress might act to fill these gaps through additional legislation.

In seeking to identify constitutional limitations on Congress's power to criminalize the dissemination of bomb-making information, the Report was strongly influenced by the constitutional issues explored in *Rice v. Paladin Enterprises, Inc.*,[33] a then-recent decision by the Federal District Court for the District of Maryland.[34] Paladin, the publisher and distributor of "how-to" manuals for aspiring assassins,[35] was the subject of a civil wrongful death action. Liability was predicated on the theory that Paladin had, through the provision of instructional materials, aided and abetted the perpetrator of a triple-homicide.[36] The action was dismissed, however, on a finding that Paladin's how-to books were protected under the First Amendment.[37] In reaching this conclusion, the court applied the incitement standard set forth in *Brandenburg v. Ohio*, finding that the books constituted permissible "advocacy" and "mere abstract teaching," and did not "cross that line" to "incitement or a call to action."[38] Although the Report indicated the authors' belief that the *Paladin* district court decision was incorrectly decided, the Report nevertheless acknowledged that the decision made it "necessary to consider carefully the First Amendment questions that a statute like the Feinstein Amendment would raise."[39]

In attempting to insulate the Feinstein Amendment from such constitutional infirmity, the Report seized on two perceived points of departure from the *Brandenburg* standard. First, the Report observed that "where the publication or expression of information is 'brigaded with action,' in the form of . . . 'speech acts,'" and those "speech acts"

32. *Id.* § V(2) (stating that federal law "generally would not prohibit or punish the dissemination of bombmaking information in the case where the disseminator does not have the specific purpose of facilitating a crime but nevertheless knows that a particular recipient thereof intends to use it for unlawful ends").

33. 940 F. Supp. 836 (D. Md. 1996).

34. At the time of the DOJ Report, the district court's opinion in *Rice v. Paladin* was on appeal to the Fourth Circuit. As discussed *infra* at Part III.A, the district court decision was overturned by the Fourth Circuit on appeal.

35. *Paladin*, 940 F. Supp. at 838–40. The two books at issue were *Hit Man*, which described in detail the specific methods, strategies, and techniques of professional killers, and the aptly-titled *How to Make a Disposable Silencer: Vol. II. See id.*

36. *Id.* at 839–40.

37. *Id.* at 849.

38. *Id.* at 847 (quotations and citations omitted).

39. U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § VI.

constitute an "integral part" of the criminal act, that expression or conduct "may be proscribed without much, if any, concern about the First Amendment."[40] Second, the Report argued that the *Brandenburg* decision itself had "dr[awn] a sharp distinction between 'the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence' and 'preparing a group for violent action and steeling it to such action'"— the former being constitutionally protected, while the latter is not.[41] Thus, the constitutionality of proscriptions on the dissemination of bomb-making instructions would be determined, according to the Report, primarily by the statute's scienter requirements.[42] As to intent, the Report concluded that, where the publication of such information is "motivated by a desire to facilitate the unlawful use of explosives" and "it is foreseeable that the publication will be used for criminal purposes," the *Brandenburg* imminence requirement is irrelevant.[43] As to knowledge, constitutional concerns would be satisfied where the disseminator knew not of some future event, but rather some particular person's present intent.[44]

Incorporating these conclusions, the Report suggested alternate statutory language linking the specific scienter requirement to the speaker's relationship with the recipient.[45] Where the challenged dis-

40. *Id.* § VI(A)(3) (quoting Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (per curiam) (Douglas, J., concurring)).

41. *Id.* (quoting *Brandenburg*, 395 U.S. at 448 (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961))).

42. *Id.* § VI.

43. *Id.* § VI(B)(I). The DOJ Report allows, however, that in the absence of "concerted action between the publisher and any particular recipient of the information," it will be difficult to prove "that the person publishing the information has done so with an impermissible purpose." *Id.* But in an artful move that seeks to elude the *Brandenburg* restrictions, the DOJ Report argues that "[a]lthough, under *Brandenburg*, culpability cannot attach merely because the manuals advocate unlawful action, such advocacy could constitutionally be used as probative evidence that the disseminator of accompanying information on the techniques of bombmaking intended by such dissemination to facilitate criminal conduct." *Id.*

44. *Id.* § VI(B)(2). According to the DOJ Report, "[T]he government would not be required to prove that the disseminator was 'practically certain' of the recipient's intent [but only] that the person providing the information was aware of a 'high probability' that the recipient had an intent to use the information to commit a crime." *Id.* (citations omitted).

45. The suggested alternative language read as follows:

It shall be unlawful for any person—

(a) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of such an explosive, device or weapon, intending that such teaching, demonstration or information

semination involves a particular, known recipient, the scienter requirement is satisfied by either "the specific purpose of facilitating criminal conduct, or . . . knowledge that a *particular* recipient intends to make improper use of the material."[46] Where, however, the challenged dissemination is to unknown persons, only a "conscious purpose of facilitating unlawful conduct" would suffice.[47] In either case, the knowledge and intent of the speaker must refer to the use of the disseminated information.[48]

It is clear from the Report that the element of scienter applied to unknown recipients remained a difficult issue. It would be necessary to strictly construe the "intent" scienter provision, requiring "actual, conscious purpose to bring about the specified result [and] not . . . 'constructive intent' . . . foreseeab[ility] . . . or 'natural consequence.'"[49] So construed, the intent requirement would render the statute constitutional "where the teacher intends that a particular student— or a discrete group of students—use the information for criminal conduct."[50] The same *should* be true even where no crime is ever committed.[51] The "more difficult question is whether criminal culpability can attach to general publication of explosives information [with] the purpose of generally assisting unknown and unidentified readers in the commission of crimes."[52] This difficult question re-

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be used for, or in furtherance of, an activity that constitutes a Federal criminal offense or a State or local criminal offense affecting interstate commerce; or

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

Id. § VI(C).

46. *Id.* § VI(C)(1).

47. *Id.* § VI(C)(2) ("The alternative formulation would make clear that dissemination with [the 'conscious purpose of facilitating unlawful conduct by unknown recipients of the information'] would be proscribed.").

48. *Id.*

49. *Id.* § VI(B)(1).

50. *Id.*

51. *Id.*

52. *Id.* Although professing a belief that "the 'intent' prohibition would be facially constitutional," the DOJ Report nevertheless cautioned that the constitutionality of such a statute would, in application, remain uncertain, "depending on whether the evidence truly demonstrates the improper intent beyond a reasonable doubt." *Id.* § VI(C)(2) (citations omitted).

mained a sticking point for both the Department of Justice and lawmakers.

For more than two years following submission of the Report, the Feinstein Amendment languished in the Senate. Then, on April 20, 1999 at 11:19 A.M., nearly four years to the day of the Oklahoma City bombing, students Eric Harris and Dylan Klebold entered Columbine High School and began shooting their classmates and teachers.[53] In the next forty-nine minutes, fifteen people were killed, including the two gunmen.[54] Guns were only part of the assault, however; home-made explosives were also used.[55] One explosive, set off in a nearby field, was intended as a diversion.[56] Multiple explosives were thrown randomly by Harris and Klebold as they walked through the school, shooting.[57] Explosives were also planted in the cafeteria. All but one, however, failed to detonate as planned.[58] Explosives were also rigged to the gunmen's cars.[59] According to police officials, Harris and Klebold learned to make pipe bombs and other explosive devices from information available on the Internet.[60]

Within four months of the Columbine shootings, the Feinstein Amendment was finally enacted into law.[61] Title 18, section 842 was thereby amended by adding subsection (p), reading in pertinent part:

> (2) Prohibition.—It shall be unlawful for any person—
> (A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or *to distribute by any means* information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, *with the intent* that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence; or
> (B) to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or *to distribute to any person*, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, *knowing that such*

53. *See generally* CBS NEWS, INTERACTIVE: COLUMBINE TRAGEDY, *at* http://cbsnews.com/htdocs/columbine/home.html (last accessed Feb. 26, 2004).

54. *See id.*

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. *See* David M. Spitz, *Heroes or Villains? Moral Struggles vs. Ethical Dilemmas: An Examination of Dramatic Portrayals of Lawyers and the Legal Profession in Popular Culture*, 24 NOVA L. REV. 725, 731 n.32 (2000).

61. *See* Act of Jan. 27, 1999, Pub. L. No. 106-54, 113 Stat 398 (1999).

> *person intends* to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.[62]

Although this formulation is substantially similar to that suggested by the Report, there is one variation of particular note. The Report suggested that subsection (b) refer to the distribution of information to a "particular person" and knowledge of that "particular person's" intent.[63] The word "particular" was stricken in both instances in the section as enacted.

B. The Department of Justice Expands Enforcement

The Department of Justice recently undertook the first prosecution under the Feinstein Amendment. The prosecution provides an excellent lesson regarding how broadly this law might be applied, as well as the practical difficulties of seeking constitutional review of the statute. Moreover, the Department of Justice has recently adopted new investigative guidelines intended, in part, to broaden enforcement of 18 U.S.C. § 842(p).[64] These developments, suggesting that the issue of criminalized instructional speech will soon demand review, are each addressed in turn.

1. The First Prosecution Under 18 U.S.C. § 842(p)

Although enacted into law in 1999, it was nearly three years before a single individual was prosecuted under the provisions of the Feinstein Amendment. In 2002, Sherman Austin, a Los Angeles teenager living with his mother,[65] became the first person to be prosecuted under 18 U.S.C. § 842(p).[66] Austin was charged under subsection (2)(A) of the statute.[67] The basis for this charge was information contained on his website, raisethefist.com, a platform for Aus-

62. 18 U.S.C. § 842(p) (2000) (emphasis added).

63. U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § VI(1).

64. *See infra* Part I.B.2; sources cited *supra* note 6.

65. *See* DAVID TOURETZKY, DAVID TOURETZKY'S PAGE, THE DMCA AND OTHER FIRST AMENDMENT ISSUES: WHAT THE FBI DOESN'T WANT YOU TO SEE AT RAISETHEFIST.COM, *at* http://www-2.cs.cmu.edu/~dst/raisethefist (last accessed Dec. 19, 2004).

66. A search of cited cases and Internet resources failed to uncover anyone else charged under 18 U.S.C. § 842(p). *See also* Armstrong, *supra* note 22 (noting that "[f]ederal prosecutors have yet to record a single prosecution under the statute").

67. United States v. Austin, No. 02-M-232-ALL (C.D. Cal. Feb. 4, 2002), *available at* http://cryptome.org/usa-v-sma-dkt.htm (last accessed Feb. 2, 2005). 18 U.S.C. § 842(p)(2)(A) prohibits the distribution of "information pertaining to . . . the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the *intent* that [it] be used for, or in furtherance of . . . a Federal crime of violence." 18 U.S.C. § 842(p)(2)(A) (emphasis added).

tin's political, pro-Anarchist views. Austin was not accused of committing a specific act of violence.[68] Nor was he accused of providing information to a particular person to carry out a specific act of violence.[69] Indeed, prosecutors offered no connection between the information on Austin's website and the resulting commission of an actual crime.[70] Instead, Austin was charged simply with distributing the information at issue with the intent that some unidentified person might at some time in the future use that information to commit a violent crime.[71]

Austin's website, raisethefist.com, reflects his anarchist politics and anti-globalization views. Prior to Austin's arrest, the website included a section entitled "Break the Bank—DC."[72] According to the introductory text, this section was created to "inspire and inform participants of the upcoming action in [Washington, DC] against the International Monetary Fund and the World Bank."[73] The information available in this section of the website included, *inter alia*, "police tac-

68. *See id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* RAISE THE FIST MIRROR WEBSITE, RECLAIM GUIDE: BREAK THE BANK—DC S30 2001, *at* http://forbiddenspeech.org/ReclaimGuide/reclaim.shtml (last accessed Dec. 19, 2004) [hereinafter RAISE THE FIST MIRROR WEBSITE, BREAK THE BANK]. Following Sherman Austin's arrest, several archived versions of the Raise-the-Fist website were created as mirror sites, including one website maintained by a Columbia University student. *See* RAISE THE FIST MIRROR WEBSITE, RECLAIM GUIDE: WEAPONS, *at* http://forbiddenspeech.org/ReclaimGuide/weapons.shtml (last accessed Dec. 19, 2004) (stating "[t]his is a mirror of some of the files from raisethefist.com, an anarchist website which was raided and shut down by the FBI"). As to the student's motivation for archiving the Raise-the-Fist Website, he writes:

> I feel a special duty to mirror these pages, as John Pi, the FBI investigator who apparently led the RaiseTheFist investigation, claims to be qualified in part because he has a BSCS from Columbia—the same degree that I am studying for. Shows that these degrees can be used for all kinds of purposes, I guess.

Id. The student also indicates that his mirror site was in danger of being censored and removed from the Columbia University computer system:

> Now, this page itself (the one you're looking at) may be under threat. Apparently, someone filed an anonymous complaint with the Columbia webmaster about this page. At a meeting (4 December 02) with some deans from the Student Affairs office, I was told that the University will not force me to remove the page. Hopefully, there will be no further threats to this page; I'll write more here if there are.

Id.; *see also* TOURETZKY, *supra* note 65. This mirror site has also been the subject of recent controversy. *See* Karen Welles, *CMU Professor's Web Site Causing Controversy*, L.A. INDEP. MEDIA CENTER, Aug. 10, 2003, *at* http://la.indymedia.org/news/2003/08/76604.php (last accessed Feb. 2, 2005).

73. *See* RAISE THE FIST MIRROR WEBSITE, BREAK THE BANK, *supra* note 72.

tics and how to defeat them," "defensive weapons," and "basic chemistry."

The "police tactics" section included rudimentary information on defeating police security plans during demonstrations, creating diversions, attacking and seizing buildings, avoiding identification and arrest, and "unarresting" fellow protesters.[74] The "defensive weapons" section provided a list of simple weapons "widely used and effective in executing the goal of the demonstration," including slings, slingshots, and boomerangs.[75] There was also a related section on the construction of shields.[76]

The "basic chemistry" section was the most detailed.[77] The introductory web page noted that "[h]omemade explosives work very well in riots," and provided users with hyperlinks to specific instructions on the construction of rudimentary bombs and incendiary devices, including Molotov cocktails, smoke bombs, fuel-fertilizer explosives, pipe bombs, Draino bombs, soda bottle bombs, and match head bombs.[78] For instance, the hyperlink to "Soda Bottle Bomb" connected to a web page that provided the following instructions:

74. *See* RAISE THE FIST MIRROR WEBSITE, RECLAIM GUIDE: POLICE TACTICS AND HOW TO DEFEAT THEM, *at* http://forbiddenspeech.org/ReclaimGuide/tactics.shtml (last accessed Dec. 19, 2004) (discussing "riot cop gear and equipment," "police tactics and their defeat," and "barricades"). For example, one such tactic described a flanking maneuver designed to lure police into a trap of rushing protesters. Another promoted the use of barricades during demonstrations, stealing barricades from construction zones, and "add[ing] your own things to [them] . . . barbed wire, bricks, basically anything that is heavy," or using cars that "can be easily set on fire." *Id.*

75. *See* RAISE THE FIST MIRROR WEBSITE, RECLAIM GUIDE: DEFENSIVE WEAPONS AND BASIC CHEMISTRY, *at* http://forbiddenspeech.org/ReclaimGuide/weapons.shtml (last accessed Dec. 19, 2004) [hereinafter RAISE THE FIST MIRROR WEBSITE, DEFENSIVE WEAPONS] ("Many different weapons and tools can be used in street fighting. Make sure that you keep them clean of fingerprints, DNA fibers (hair folicles [*sic*], etc.), especially explosives because they may not always ignite."). In regards to slingshots, the website encouraged protesters to "[b]ust out Bart Simpson style and fire some tiny metal pellets at pigs." *Id.* As to boomerangs, the website cautioned protesters regarding the use of "ninja stars" and similar weapons, warning "[w]ith sharp items, though, you can get a stiff attempted murder charge, like the LAPD pushed on a comrade of ours at the DNC." *Id.*

76. *See* RAISE THE FIST MIRROR WEBSITE, RECLAIM GUIDE: SHIELD CONSTRUCTION, *at* http://forbiddenspeech.org/ReclaimGuide/shield.shtml (last accessed Dec. 19, 2004) (referencing http://www.devo.com/sarin/shieldbook.pdf).

77. *See* RAISE THE FIST MIRROR WEBSITE, DEFENSIVE WEAPONS, *supra* note 75.

78. *Id.* This web page included, *inter alia*, the following information:

> Homemade explosives work very well in riots. There is a huge history of the military using homemade explosives in war, so if it works for them, it can work against them. Click on the links for construction methods.
>
> Molotov Cocktails-The most popular choice in street fighting weaponry. A very useful and effective explosive, made purely of house hold items.

> Take a 2 liter plastic soda bottle and fill about a quarter of it with Muramic Acid (pool acid). After this you have to work fast! Drop some _____ into the bottle and put the cap on. Shake it up a bit and throw it. It will create a gas and explode. The fumes are very hazardous, so make sure you won't harm anyone unless you intend to.[79]

> Smoke Bombs-These easily attainable or homemade items are great when dealing with illegal situations. It can shield any media or police cameras from catching anyone on film participating in an illegal act. It can also disorient the police when they are advancing on the crowd. For construction methods, click on the link.
>
> Fuel-Fertilizer Explosives-These will create an overwhelmingly large explosion and should be practiced in large faraway places like the desert before using. Make sure that you will not injure anyone that you do not intend to injure.
>
> Pipe Bombs-Not really the best explosive to use in a street fight but it still works. Causes lots of good damage.
>
> Draino Bomb-A small bomb that is very risky to use. To be used on cars only. Be careful!
>
> Soda Bottle Bomb-A somewhat biowarfare bomb made from aluminum foil and pool acid. The fumes should not be inhaled by anyone you do not want to inhale them.
>
> Match Head Bomb-A small bomb of match heads. Not too fabulous.

Id.

79. RAISE THE FIST MIRROR WEBSITE, RECLAIM GUIDE: SODA BOTTLE BOMB, *at* http://forbiddenspeech.org/ReclaimGuide/bottle.shtml (last accessed Dec. 19, 2004). The website also included, *inter alia*, these instructions for creating a pipe bomb:

> [Pipe Bombs] You want a standard steel pipe (two inches in diameter is a good size) that is threaded on both ends so you can cap it. The length you use depends on how big an explosion is desired. Sizes between 3–10 inches in length have been successfully employed. Make sure both caps screw on tightly before you insert the _____. The basic idea to remember is that a bomb is simply a hot fire burning very rapidly in a tightly confined space. The rapidly expanding gases burst against the walls of the bomb. If they are trapped in a tightly sealed iron pipe, when they finally break out, they do so with incredible force. If the bomb itself is placed in a somewhat enclosed area like a ventilation shaft, doorway or alleyway, it will in turn convert this larger area into a "bomb" and increase the over-all explosion immensely.
>
> When you have the right pipe and both caps selected, drill a hole in the side of the pipe (before _____ is inserted) big enough to pull the fuse through. If you are using a firecracker fuse, insert the firecracker, pull the fuse through and epoxy it into place securely. If you are using long fusing either with a detonator (difficult to come by) timing device or a simple cancerette fuse, drill two holes and run two lines of fuse into the pipe. When you have the fuse rigged to the pipe, you are ready to add the_____. Cap one end snugly, making sure you haven't trapped any _____ in the threads. Wipe the device with rubbing alcohol and you're ready to blast off.
>
> A good innovation is to grind down one half of the pipe before you insert the _____. This makes the walls of one end thinner than the walls of the other end. When you place the bomb, the explosion, following the line of least resistance, will head in that direction. You can do this with ordinary grinding tools available in any hardware or machine shop. Be sure not to have the _____ around when you are grinding the pipe, since sparks are produced.

On January 24, 2002, approximately twenty-five heavily armed federal agents raided Sherman Austin's home.[80] According to an affidavit accompanying the federal search warrant, Austin was suspected of violating federal laws prohibiting "computer intrusions, website defacement and illegal distribution of information relating to explosives, destructive devices, and weapons of mass destruction."[81] Austin was not arrested, but federal agents seized all of his computer equipment and political literature.[82]

Several days later, on February 2, Austin participated in a protest of the World Economic Forum in New York.[83] He was arrested by the New York City Police Department ("NYPD") and charged with loitering.[84] After approximately thirty hours in detention, the charges were dropped and Austin was released.[85] Just minutes after his release by the NYPD, however, Austin was rearrested by agents from the Federal Bureau of Investigation ("FBI") and placed in federal custody.[86] He was charged, *inter alia*, with the distribution of information that teaches or demonstrates the making or use of an explosive, destructive device, or weapon of mass destruction under 18 U.S.C. § 842(p) and possession of an unregistered firearm in violation of 26 U.S.C.

RAISE THE FIST MIRROR WEBSITE, RECLAIM GUIDE: PIPE BOMBS, *at* http://forbiddenspeech.org/ReclaimGuide/pipe.shtml (last accessed Dec. 19, 2004). Austin also provided instructions on how to construct fuel fertilizer explosives, match head bombs, Molotov cocktails, smoke bombs, and Draino bombs. *See* RAISE THE FIST MIRROR WEBSITE, DEFENSIVE WEAPONS, *supra* note 75.

80. *See* Brian McWilliams, *FBI Raid Silences Teen Anarchist's Site*, NEWSBYTES, Jan. 31, 2002, *at* http://www-2.cs.cmu.edu/~dst/raisethefist/msgs/newsbytes-2002-01-31.txt (last accessed Oct. 30, 2004); RAISETHEFIST.COM, UNDER SEIGE, *at* http://www.raisethefist.com/news.cgi?artical=underseige (last accessed Oct. 30, 2004). With the exception of a single article in the New York Post, see Brad Hunter and Larry Celona, *Baby "Bomb" Bust-Teen Econ-Protester Held for Explosives Web Site*, N.Y. POST, Feb. 5, 2002, at 19, the arrest and prosecution of Sherman Austin has been largely ignored by the mainstream press. What information can be found is available primarily from independent media, anarchist websites, discussion groups, bulletin boards, and mirror sites created by anarchists and free-speech advocates. These accounts are remarkably consistent. The description provided here is cobbled together from these various sources, as well as court records.

81. CRYPTOME, FBI SEARCH WARRANT: WRITTEN AFFIDAVIT: SUMMARY OF INVESTIGATION, *at* http://cryptome.org/usa-v-rtf-swa.htm (last accessed Dec. 19, 2004); *see also* McWilliams, *supra* note 80.

82. *See* RAISETHEFIST.COM, *supra* note 80.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

§ 5861(d).[87] Austin spent a total of thirteen days in federal prison, but was then released with all the charges dropped pending further investigation.[88]

A few months later, in August 2002, Austin was re-indicted under these same charges.[89] At first, Austin rejected the prosecutor's plea offer of one month in jail, five months in a half-way house, and three years of supervised release, but not long thereafter he accepted the offer.[90] On September 30, 2002, Austin appeared in court for a plea elocution; however, the judge rejected the plea agreement, branding Austin a "terrorist" who should serve more than twelve months in prison.[91] In August 2003, after nearly a year of negotiation and with a sentencing recommendation from the FBI and Justice Department of

87. Jeremy Parkin & Chantel G., *FBI Raid Youth's Web Site Owner Jailed, Free. Confused?*, CHANGE LINKS, Jan. 23, 2002, *at* http://www.change-links.org/austin.htm (last accessed Oct. 30, 2004).

88. *See id.*

89. *See* Merlin Chowkwanyun, *A Strange and Tragic Legal Journey: The Case of Sherman Austin*, COUNTERPUNCH, Oct. 11–13, 2003, *at* http://www.counterpunch.org/merlin1011 2003.html (last accessed Dec. 14, 2004). One year after the raid on Sherman Austin's home, the RaisetheFist.com website looked very different. All information regarding police tactics, weapons, and basic chemistry had apparently been removed. Instead, it included a new section on "self-defense," including "armed training," "unarmed training," "shield training," and "guerilla warfare." *See* RAISETHEFIST.COM, SELF-DEFENSE FOR THE REVOLUTIONARY COMMUNITY, *at* http://www.raisethefist.com/news.cgi?artical=selfdefense (last accessed Oct. 30, 2004). The "armed training" section focuses on firearms, offering links to training videos available from a third-party bookseller, but no specific information. *See id.* (giving web link to an "Armed Training" page that includes multiple links to www.booktrail.com/ Video_Shooting). The "guerilla warfare" section extols the virtues of the urban guerilla, calling him: "A political revolutionary and ardent patriot . . . a fighter for his country's liberation, a friend of the people and of freedom." *See id.* (giving web link to "Guerilla Warfare"). This section also provides general tactical information via a reprint of a 1969 pamphlet by Carlos Marighella entitled *The Mini-Manual of the Urban Guerrilla. See id.* (giving web link to "Urban Guerilla"). Neither the website, nor the urban guerilla pamphlet, however, includes instructions on explosives, bomb-making, or related activities. Moreover, the website includes a disclaimer that "[t]he information contained within . . . raisethefist.com is for educational purposes only and is NOT intended to encourage anyone to do anything illegal." *Id.* The web site also disclaims that the "website and the domain names [sic] raisethefist.com provide all information for education and research purposes only." *Id.*

90. *See* DAVID TOURETZKY, DAVID TOURETZKY'S PAGE: FEDS TO INDICT RAISETHEFIST.COM WEBMASTER, *at* http://www-2.cs.cmu.edu/~dst/raisethefist/msgs/2002-08-27.txt (last accessed Oct. 30, 2004); Press Release, Senator Dianne Feinstein, Senator Feinstein Urges Department of Justice to Aggressively Enforce Bombmaking Statute: First Person Prosecuted Under Law Is Scheduled to be Taken Into Custody Tomorrow (Sept. 3, 2003), *at* http://feinstein.senate.gov/03Releases/r-bombmaking3.htm (last accessed Oct. 31, 2004) [hereinafter Feinstein Press Release] (stating that "[t]he first plea agreement gave Mr. Austin one month in prison followed by five months in a halfway house").

91. *See* DAVID TOURETZKY, DAVID TOURETZKY'S PAGE: TEXT OF DISCUSSION WITH SHERMAN AUSTIN, *at* http://www-2.cs.cmu.edu/~dst/raisethefist/msgs/2002-10-01.txt (last ac-

four months in prison, four months in a half-way house, and three years probation, Austin returned to court for sentencing.[92] The judge again rejected the prosecutors' recommendations and sentenced Austin to one year in federal prison, plus three years probation.[93]

On September 3, 2003, the eve of Austin's incarceration, Senator Feinstein issued a press release praising his conviction[94] and urged more aggressive enforcement of section 842(p).[95] In an open letter to Attorney General John Ashcroft, Senator Feinstein expressed concern that federal prosecutors were not taking the law "seriously," citing the

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cessed Oct. 30, 2004). According to Austin, the plea agreement was rejected over the protests of prosecutors. *Id.*

92. *See Sherman Austin Sentenced To One Year In Federal Prison*, L.A. INDEP. MEDIA CENTER, Aug. 5, 2003, *at* http://la.indymedia.org/news/2003/08/75677.php (last accessed Oct. 30, 2004); Feinstein Press Release, *supra* note 90 (stating that "the second [plea] agreement gave [Austin] four months custody and four months in a halfway house"). When asked why he agreed to a plea bargain rather going to trial, Austin replied:

> I wasn't going to risk 20 years in prison. At first, I wanted to go to trial. But when I found out the terrorism enhancement . . . applied to my case, I changed my mind. If I knew it was going to be a year in jail, I probably would have taken it to trial.

Declan McCullagh, *A Webmaster's 25th Hour*, C/NET NEWS, Aug. 13, 2003, *at* http://news.com.com/2008-1082-5062481.html (last accessed Oct. 30, 2004).

93. *See* L.A. INDEP. MEDIA CENTER, *supra* note 92. A news media outlet reported as follows:

> Sherman Austin, webmaster of RaisetheFist.com, was sentenced today, August 4, 2003, to one year in federal prison, with three years of probation. Judge Wilson shocked the courtroom when he went against the recommendation of not only the prosecution, but the FBI and the Justice Department, who had asked that Austin be sentenced to 4 months in prison, and 4 months in a half-way house, with 3 years of probation.
>
> Austin's probation stipulates, among other things, that (1) he cannot possess or access a computer of any kind without prior approval of his probation officer, (2) if his probation officer gives permission, the equipment is subject to monitoring and is subject to search and seizure at any time, without notice, (3) he cannot alter any of the software or hardware on any computer he uses, (4) he must surrender his phone, DSL, electric, and satellite bills, (5) he cannot associate with any person or group that seeks to change the government in any way (be that environmental, social justice, political, economic, etc.), and (6) he must pay over $2,000 in fines and restitution. Austin must surrender himself to the Federal Bureau of Prisons by September 3, 2003.

Id.; *see also* Feinstein Press Release, *supra* note 90.

94. Feinstein Press Release, *supra* note 90. Senator Feinstein stated:

> I was pleased to learn recently that Sherman Austin was sentenced earlier this month in federal court in Los Angeles for violating 18 U.S.C. 842(p), a law I authored mandating up to 20 years in prison for anyone who distributes bombmaking information knowing or intending that the information will be used for a violent federal crime.

Id.

95. *Id.* (stating "U.S. Senator Dianne Feinstein (D-Calif.) has called upon the Department of Justice to aggressively enforce" section 842(p)).

pursuit of a single prosecution since passage of section 842(p) in 1999[96] and the "lenient" sentencing recommendations proffered in the Austin case.[97] Senator Feinstein revealed that she had met with then Deputy Assistant Attorney General Alice Fisher and FBI Director Robert Mueller in May 2003, both of whom had assured Senator Feinstein that information regarding section 842(p) would be widely distributed throughout both agencies.[98] Although the FBI had apparently done so,[99] it was unclear whether the DOJ had similarly complied.[100] Senator Feinstein therefore asked Ashcroft for his "assistance in getting the word out to all appropriate components of the Department of Justice about this statute."[101]

2. New Investigative Guidelines and Procedures

Evidence of the DOJ's intent to more aggressively enforce section 842(p) can be found in the USA PATRIOT Act[102] and related investi-

96. *See id.* ("It is dismaying that there has only been one conviction under section 842(p) in the four years that the law has been on the books.").

97. *Id.* In her letter to U.S. Attorney John General Ashcroft, Senator Feinstein expressed dismay that "once that [single] conviction was obtained, a federal judge described the final recommended plea bargain for the convicted individual as 'shocking' in its leniency." *Id.* Feinstein wrote:

> A few weeks ago, because of Mr. Austin's admitted violation of section 842(p), U.S. District Court Judge Stephen Wilson sentenced him to 12 months of custody, a $2000 fine, three years probation, as well as other restrictions. However, I was dismayed to learn that Judge Wilson imposed this sentence only after throwing out two previous plea agreements reached with Mr. Austin as too lenient. The first plea agreement gave Mr. Austin one month in prison followed by five months in a halfway house and the second agreement gave him four months custody and four months in a halfway house.
>
> According to press reports, Judge Wilson stated at a hearing on the second plea agreement that, while the Austin case had "national and international implications," the government was not taking it "seriously" and that in fact the plea agreement was "shocking."

Id.

98. *See id.*

99. *See id.* (stating that the FBI has sent "an electronic communication to all field offices encouraging awareness and enforcement of section 842(p)").

100. *Id.*

101. *Id.* In her letter to Attorney General Ashcroft, Senator Feinstein stated: "I remain concerned by reports that federal prosecutors may not be taking this important anti-terrorism tool seriously. Thus, I write to request your assistance in ensuring that DOJ personnel know about section 842(p) and are aggressively enforcing it." *Id.*

102. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.) (2001).

gative guidelines.[103] The PATRIOT Act effectively removes many of the procedural and substantive limitations on government power to surveil United States citizens in their use of the Internet.[104] In line with these changes, then Attorney General John Ashcroft released amended investigative guidelines that authorize and encourage law enforcement to "surf[ ] the Internet as any member of the public might do to identify, e.g., public websites, bulletin boards, and chat rooms in which bomb making instructions [are] openly traded or disseminated, and observ[e] information open to public view in such forums to detect terrorist activities and other criminal activities."[105] The logical thrust of Attorney General Ashcroft's statements is that law enforcement utilize its expanded authority to more broadly enforce 18 U.S.C. § 842(p).

C. A Signal from the Supreme Court?

With Congress pushing new laws and the executive branch expanding its investigative authority, all that remained was a sign from

103. *See* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, THE ATTORNEY GENERAL'S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS (2002), *at* http://www.usdoj.gov/olp/generalcrimes2.pdf (last accessed Oct. 30, 2004) [hereinafter U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES]. These investigative guidelines establish several "overriding principles" for law enforcement and investigation. First, "the war against terrorism is the central mission and highest priority" of federal law enforcement. Second, "terrorism prevention is the key objective." Third, "unnecessary procedural red tape must not interfere with the effective detection, investigation, and prevention of terrorist activities." Finally, law enforcement "must draw proactively on all lawful sources of information to identify terrorist threats and activities." *Id.* Related to this fourth principle, the investigative guidelines recognized that "[c]urrent counterterrorism priorities and the advent of the Internet have raised a number of [new] issues" related to investigative techniques. *Id.*; *see also* Mary W.S. Wong, *Electronic Surveillance and Privacy in the United States After September 11 2001: The USA PATRIOT Act*, 4 SINGAPORE J. LEGAL STUD. 214, 262 (2002).

104. *See generally* 18 U.S.C. § 201 (2000). The actual impact of the USA PATRIOT Act on the power of law enforcement and foreign intelligence agencies to monitor Internet activity has been widely debated. *Compare* ELEC. FRONTIER FOUND., ANALYSIS OF THE PROVISIONS OF THE USA PATRIOT ACT THAT RELATE TO ONLINE ACTIVITIES, *at* http://www.eff.org/Privacy/Surveillance/Terrorism//20011031_eff_usa_patriot_analysis.php (last accessed Oct. 30, 2004) (criticizing the expansion of surveillance power), *with* Orin S. Kerr, *Internet Surveillance Law After the USA PATRIOT Act: The Big Brother That Isn't*, 97 Nw. U. L. REV. 607 (2003) (arguing that criticisms of the surveillance provisions are misplaced).

105. *See* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES, *supra* note 103 ("The FBI is authorized to carry out general topical research, including conducting online searches and accessing online sites and forums as part of such research on the same terms and conditions as members of the public generally."); *id.* ("For the purpose of detecting or preventing terrorism or other criminal activities, the FBI is authorized to conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally.").

the judiciary that such movement would be constitutionally permitted. In its 1997 Report, the DOJ sought to steer a careful course around existing legal protections. Directed communications intended to bring about a violent act by a known individual were, under the DOJ's analysis, outside the reach of *Brandenburg v. Ohio.* But as applied to general publication in the Internet environment—web pages, bulletin boards, etc.—*Brandenburg*'s imminence and likelihood requirements remained troublesome, particularly because Congress failed to incorporate key limiting language in the statute. Then came Justice John Paul Stevens's rather unexpected statements in *Stewart v. McCoy.*[106]

Jerry Dean McCoy met a few young gang members at a barbeque.[107] He told them a few stories about his old gang and the way it operated, sometimes in the form of advice, including suggesting that the gang continue their initiation practices and increase tagging (graffiti).[108] For this act alone, McCoy was convicted of participating in a street gang and sentenced to fifteen years in jail.[109]

In a federal petition for habeas corpus, McCoy argued that his speech was mere abstract advocacy of lawlessness, not directed at inciting imminent lawless action, and was therefore protected by the First Amendment under *Brandenburg.*[110] The Ninth Circuit agreed. The court noted that "[u]nder *Brandenburg* timing is crucial, because speech must incite imminent lawless action to be constitutionally proscribable."[111] The Supreme Court had made this explicit in *Hess v. Indiana*, stating that "a state cannot constitutionally sanction 'advocacy of illegal action at some indefinite future time.'"[112] Applying this standard, the Ninth Circuit found that McCoy's activities "fit more closely the profile of mere abstract advocacy of lawlessness," and "ideas . . . not aimed at any particular person or any particular time."[113] As such, the speech for which he had been convicted was protected by the First Amendment.

In October 2002, the Supreme Court denied the State's petition for a writ of certiorari, but it apparently did so on other grounds.[114]

106. 537 U.S. 993 (2002).
107. McCoy v. Stewart, 282 F.3d 626, 628 (9th Cir. 2002).
108. *Id.* at 629–30.
109. *Id.* at 628–29.
110. *Id.* at 630.
111. *Id.* at 631.
112. *Id.* (quoting Hess v. Indiana, 414 U.S. 105, 108 (1973)).
113. *Id.* at 631–32.
114. *See* Stewart v. McCoy, 537 U.S. 993, 993–95 (2002) (Stevens, J., respecting the denial of the petition for writ of certiorari). The district court granted McCoy's petition for writ of habeas corpus on one of four claims of error, insufficiency of the evidence. *See*

Moreover, Justice Stevens issued an unusual statement "respecting" the denial of certiorari. In that statement, Stevens first took issue with the Ninth Circuit's conclusion that McCoy's speech was mere abstract advocacy and did not incite imminent lawless action.[115] Accepting this conclusion, however, Justice Stevens then called into question speech that performs a teaching function:

> [W]hether right or wrong, [this case] raises a most important issue concerning the scope of our holding in *Brandenburg*, for our opinion expressly encompassed nothing more than "mere advocacy." The principle identified in our *Brandenburg* opinion is that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." While the requirement that the consequence be "imminent" is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function. As our cases have long identified, the First Amendment does not prevent restrictions on speech that have "clear support in public danger." Long range planning of criminal enterprises—which may include oral advice, training exercises, and

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McCoy v. Stewart, No. CIV 98-433-TUC-WDB, 2001 U.S. Dist. LEXIS 23689, at *16 (D. Ariz. Apr. 4, 2001). Specifically, the court interpreted the statute as requiring that "the gang [to which advice is given] have perpetrated a felony, had done so at the direct behest of the Petitioner, and the Petitioner specifically intended that result," and found that these requirements were "not proven at trial." *Id.* at *14. Confusion over the bases for the court's decision seems to arise from the context of this analysis, which is immediately premised by the following discussion:

> When illegal conduct occurs in the context of a generally constitutionally protected activity, such as speech or association, then there must be "precision of regulation." Thus, to punish illegal conduct related to association with a group with both legal and illegal aims, there must be "clear proof that a defendant specifically intended to accomplish [the illegal conduct]." For liability to be imposed by reason of association, the court must determine that group held unlawful goals and the individual held a specific intent to further those illegal aims. Accordingly, this Court has searched the trial transcripts to determine whether the prosecution offered the jury sufficient evidence for it to find that Petitioner specifically intended to further the [gang's] alleged goal to commit felonies.

Id. at *11. Here, the district court seems determined to find a constitutional basis for the intent requirement, regardless of the statute's requirement of the same. Given the district court's own recitation of the alternate habeas requirements, the court's Herculean effort to squeeze McCoy's claim into the first of these options remains unexplained. These requirements were stated as follows:

> [H]abeas relief may only be granted when the state court's decision was (1) contrary to clearly established Federal law or involved an unreasonable application of that law, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. at *7.

115. *McCoy*, 537 U.S. at 994–95.

> perhaps the preparation of written materials—involves speech that should not be glibly characterized as mere "advocacy" and certainly may create significant public danger. Our cases have not yet considered whether, and if so to what extent, the First Amendment protects such instructional speech. Our denial of certiorari in this case should not be taken as an endorsement of the reasoning of the Court of Appeals.[116]

Justice Stevens' statement clearly places the constitutional treatment of instructional speech—or speech that performs a teaching function—at issue. And with the Legislature and Executive pushing criminal penalties, in addition to Justice Stevens advocating for judicial recognition of a lesser degree of constitutional protection, it seems likely that the Court will soon address the issue. The remainder of this Article envisions how this question might be resolved to reflect Justice Stevens's view and suggests that such a formulation will, in application, create a de facto Internet-specific standard that favors content-based regulation of disfavored online speech that performs a teaching function.

II. Divining Justice Stevens's General Theory of Lesser Constitutional Protection for "Dangerous Instructional Speech"

Justice Stevens's view is best understood in two parts. First, he seeks to explicitly limit the heightened standard of protection recognized in *Brandenburg v. Ohio,* distinguishing and exempting speech that, through its capacity to perform a teaching function, creates the abstract potential for violence. Second, he appears to recall, and thus reinvigorate, a derivative of the public-danger doctrine, a largely discredited analysis used primarily to sanction political censorship of the Socialist Party in the 1920s and of the Communist Party in the 1950s. These issues will be addressed in turn.

A. Limiting the Scope of *Brandenburg v. Ohio*

Recognizing that statutes regulating speech on the basis of content are generally subject to strict scrutiny, *Brandenburg* holds that the state is prohibited from proscribing "advocacy of the use of force or of law," or "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence."[117] Within this oth-

116. *Id.* at 994–95 (citations omitted); *see also* Thomas v. Collins, 323 U.S. 516, 530 (1945).

117. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (quotations and citations omitted).

erwise protected category, the Court recognizes an explicit exception for speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[118] It also distinguishes the protected category—mere advocacy and abstract teaching—from speech that "prepare[s] a group for violent action and steel[s] it to such action."[119]

In the full context of its exceptions and distinctions, *Brandenburg* is best understood as premised on a speech-act rationale as a manifestation of causation,[120] focusing on the consequences of speech rather than its perceived social value. The speech-act doctrine maintains that speech that is either in its effect tantamount to legitimately proscribable non-expressive conduct by the speaker[121] or so proximate to the acts of another as to merge with that conduct may be constitutionally regulated pursuant to generally applicable statutes.[122] *Brandenburg*

118. *Id.* at 447.

119. *Id.* at 448.

120. The speech-act doctrine seeks to capture, in part, the standard of strict scrutiny requiring that the government employ the least restrictive means available when proscribing speech on the basis of content:

> When the strict scrutiny test is being employed by a court, the insistence that the law be 'narrowly tailored' to effectuate its purposes, often articulated in terms of the requirement that the government use the 'least restrictive means' at its avail, is a manifestation of the causation principle. For in requiring that government employ the least restrictive means, courts are insisting on a close causal nexus between the harm that the government seeks to prevent and the speech that will allegedly generate that harm.

1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 4:21 (2004) (footnotes omitted).

121. *Cf.* Cohen v. Cowles Media Co. 501 U.S. 663, 669 (1991). Indeed, in his *Brandenburg* concurrence, Justice Douglas described certain speech that is "brigaded with action," so as to be "inseparable." *Brandenburg*, 395 U.S. at 456 (Douglas, J., concurring). In such cases, Douglas reasoned, "a prosecution can be launched for the overt acts actually caused" without offending the First Amendment. *Id.* at 456–57. Speech-acts are to be distinguished from symbolic speech, which is non-verbal conduct intended to express a particular idea or message. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 695 (2000) (Stevens, J., dissenting).

122. This speech-act concept was apparently first articulated in the early case of *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949), which held that picket lines set up with "the avowed immediate purpose" of compelling that distributor "to agree to stop selling ice to nonunion peddlers," constituted "speech or writing used as an integral part of conduct in violation of a valid criminal statute," and was thus entitled to less constitutional protection. *Id.* at 492, 498, 504. The substance of this holding was reaffirmed, and refined, in *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Court held "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a significantly important governmental interest in regulating the nonspeech element can justify *incidental limitations* on First Amendment freedoms." *Id.* at 376 (emphasis added). *See also* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). *Ohralik* upheld the state bar association's decision to discipline an attorney for in-person solicitation of a client and quoted *Giboney* directly, finding "it has never been deemed an abridgement of freedom of speech or press to

pushes the limits of the speech-act doctrine by allowing the govern-

make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Id.* The *Ohralik* Court found that the regulation of in-person solicitation by an attorney, by mixing conduct with elements of speech, was subject to a "lower[ ] level of . . . judicial scrutiny." *Id.* at 457. *See also* Brown v. Hartlage, 456 U.S. 45, 55 (1982). There the Court stated:

> Although agreements to engage in illegal conduct undoubtedly possess some element of association, the State may ban such illegal agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it, or upon the underlying conduct, the constitutional immunities that the First Amendment extends to speech.

Id.

The Court of Appeals for the District of Columbia has stated further "[t]hat 'aiding and abetting' of an illegal act may be carried out through speech is no bar to illegality." National Organization for Women v. Operation Rescue, 37 F.3d 646, 656 (D.C. Cir. 1994). This doctrine has recently been revived, reaffirmed, and expanded into the area of computer code. *See* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 451 (2d Cir. 2001). In *Corley*, the Second Circuit addressed the anti-trafficking provisions of the Digital Millennium Copyright Act ("DMCA"), which restrict the availability and distribution of computer code capable of circumventing encryption technology designed to protect copyrighted works. *Id.* at 434 (discussing 17 U.S.C. §§ 1201–1205 (2004)). The application of these provisions implicated a basic First Amendment question: Whether computer code is to be treated as pure speech and is thus subject to the same rigorous constitutional standard. The defendants, website owners accused of posting and linking to decryption software, argued that "code is no different, for First Amendment purposes, than blueprints that instruct an engineer or recipes that instruct a cook," both of which are protected a pure speech. *Id.* at 451. This argument was rejected by the court, however, because "[u]nlike a blueprint or a recipe, which cannot yield any functional result without human comprehension of its content, human decision-making, and human action, computer code can instantly cause a computer to accomplish tasks and instantly render the results of those tasks available throughout the world via the Internet." *Id.* The Second Circuit also found that a hyperlink ("a cross-reference . . . appearing on one web page that, when activated by the point-and-click of a mouse, brings onto the computer screen another web page") consists of "both a speech and a nonspeech component." *Id.* at 455–56. Specifically, "[i]t conveys information, the Internet address of the linked web page, and has the functional capacity to bring the content of the linked web page to the user's computer screen." *Id.* At the heart of this result was the court's treatment of computer code as a combination of speech and non-speech elements; i.e., "functional and expressive elements." *Id.* The court recognized

> that the functional capability of computer code cannot yield a result until a human being decides to insert the disc containing the code into a computer and causes it to perform its function (or programs a computer to cause the code to perform its function). Nevertheless, this momentary intercession of human action does not diminish the nonspeech component of code, nor render code entirely speech, like a blueprint or a recipe.

Id. at 451. *Accord* United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1128 (N.D. Ca. 2002). *Elcom* states:

> In the digital age, more and more conduct occurs through the use of computers and over the Internet. Accordingly, more and more conduct occurs through "speech" by way of messages typed onto a keyboard or implemented through the use of computer code when the object code commands computers to perform certain functions. The mere fact that this conduct occurs at some level through

ment, in certain circumstances, to prohibit speech before there is an action with which that speech can be said to have merged. In its place, *Brandenburg* accepts the potential for action. It is not surprising, then, that the requirements for invoking this legal fiction—specific intent, imminence, and likelihood—have been so strictly applied.[123]

Thus described, *Brandenburg* embodies the modern formulation of the "clear and present danger" ("CPD") standard.[124] At one time, CPD was the standard against which nearly all content-based restrictions were to be judged. Over the past thirty-five years, however, its influence has greatly diminished. Certain categories of speech—those deemed to be of little or no social value—are now seen as outside the full scope of First Amendment protection and thus removed from the CPD analysis. This includes, *inter alia*, fighting words,[125] obscenity,[126] child pornography,[127] and fraud,[128] and to a lesser extent commercial speech[129] and defamation.[130] Initially, Justice Stevens's rejection of the *Brandenburg* standard might thus seem an unremarkable continua-

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expression does not elevate all such conduct to the highest levels of First Amendment protection.

Id. These functional elements must "inform and limit the scope of [the computer code's] First Amendment protection," implicating a lesser constitutional standard. *Corley*, 273 F.3d at 442, 453. Thus, where the target of governmental regulation is the non-speech elements of a particular conduct, rather than the speech elements of that conduct, intermediate scrutiny is applied. *See id.*; *Elcom*, 203 F. Supp. 2d at 1127–28 (adopting intermediate scrutiny to decryption technology and finding that "[w]hen speech and non-speech elements are combined in a single course of conduct, a sufficiently important government interest in regulating the non-speech element can justify incidental intrusions on First Amendment freedoms").

123. *See, e.g.*, Collin v. Smith, 578 F.2d 1197, 1202 (7th Cir. 1978) ("[I]n very narrow circumstances, a government may proscribe content on the basis of imminent danger." (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam)). *See also* SMOLLA, *supra* note 120, § 2:12 (describing the *Brandenburg* analysis as a doctrine of heightened scrutiny, "tailored to [a] specific topic area . . . that [is] highly protective of freedom of speech").

124. As Rodney Smolla has observed:

> The modern "clear and present danger" test is the most famous articulation of the currently prevailing causation rule. In its current form, the test provides that advocacy of force or criminal activity may not be penalized unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

SMOLLA, *supra* note 120, § 4:22 (quoting *Brandenburg*, 395 U.S. at 447).

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

126. *See id.*

127. *See* N.Y. v. Ferber, 458 U.S. 747, 763–64 (1982).

128. *See* Donaldson v. Read Magazine, 333 U.S. 178, 190–91 (1948).

129. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976).

130. *See Chaplinsky*, 315 U.S. at 571–72.

tion of this developing free-speech jurisprudence. His approach does not appear, however, to fall within this line of categorical exemption. Instead, Stevens seems to evoke an analytical model, developed in the lower courts, that draws upon the very foundations of *Brandenburg* to distinguish its application.

Brandenburg's exacting requirements create an exceedingly narrow exception that has proven insufficient for many courts, leading them to seek alternate avenues of avoiding its protections where the proximity between speech and criminal act is not imminent.[131] In doing so, these courts have eschewed the social value approach of categorization and instead attempted, in line with *Brandenburg*'s underlying rationale, to leverage the speech-act doctrine as a conceptual basis for further exemptions. Central to this approach is the need to link speech with an act such that they effectively merge. Such an analysis has been employed, most analogously, by several federal circuits applying the federal criminal aiding and abetting statute[132] to the publishers of instruction manuals that describe how to evade payment of taxes or manufacture illegal drugs. Because Justice Stevens's view may be understood to embrace the basic notion of these analyses, it is helpful to recall these models.

The Eighth Circuit has addressed the issue of tax-evasion instructions on at least two occasions. In *United States v. Buttorff*,[133] the court

131. *See, e.g.*, Rice v. Paladin Enterprises, 128 F.3d 233 (4th Cir. 1997); United States v. Barnett, 667 F.2d 835 (9th Cir. 1982); United States v. Moss, 604 F.2d 569 (8th Cir. 1979); United States v. Buttorff, 572 F.2d 619 (8th Cir. 1978).

132. 18 U.S.C. § 2 (2004) (providing, in pertinent part, that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal").

133. 572 F.2d 619 (8th Cir. 1978). In *Buttorff*, the defendants spoke at public and private meetings in which they counseled that the federal income tax was unconstitutional. *Id.* at 622. These meetings included discussion of W-4 federal income tax withholding forms and methods of completing those forms that would greatly reduce or eliminate all withholding. *Id.* at 622–23. The only evidence of "affirmative action" by the defendants was the delivery of a W-4 form to one of the participant's house. *Id.* at 623. There was no evidence that the defendants actually assisted the participants in the filling out of these forms. *Id.* However, all of the participants indicated that they filed fraudulent tax forms as a direct result of these meetings and paid the defendants various amounts for a range of tax-related services. *Id.* Addressing the defendant's First Amendment challenge, the court suggested that the speech at issue in *Buttorff* fell somewhere between mere advocacy and speech that incites imminent lawless activity, and, therefore, the speech was not protected under *Brandenburg*. *Id.* at 624. The court stated:

> Although the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. [Defendants] explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law . . . . This speech is not entitled to first amendment protection.

found that where advocacy of tax evasion was paired with the slightest amount of assistance, resulting in a criminal act by the listener, such speech was not protected. This conclusion was affirmed in *United States v. Moss.*[134] In *United States v. Barnett,*[135] the Ninth Circuit reached a similar conclusion in regards to the sale of instructions describing the manufacture of illegal drugs, finding that "[t]he first amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose."[136] In each instance, and despite the absence of searching analysis, *Brandenburg*'s imminence requirement was found not to apply.

The basic principles set forth in these criminal cases were more recently extended to the civil context. In *Rice v. Paladin Enterprises, Inc.*,[137] the Fourth Circuit found that such speech does not enjoy the protection of the First Amendment,[138] at least where the defendant

Id. at 624.

134. 604 F.2d 569 (8th Cir. 1979). In *Moss*, the defendant gave speeches challenging the constitutionality of the federal income tax and describing how to avoid federal withholding tax. *Id.* at 570. Several people heard Moss interviewed on the radio, in a recorded speech given by Moss at a local hotel, or at a speech given at their place of business. *Id.* "Motivated by [Moss's] speech, the principal defendants filed falsified W-4 forms." *Id.* The court again rejected a First Amendment defense, simply citing and quoting *Buttorff* without further analysis. *Id.* at 571.

135. 667 F.2d 835 (9th Cir. 1982).

136. *Id.* at 842. In *Barnett*, a convicted drug manufacturer obtained instructions on the manufacture of phencyclidine, or PCP, from a mail order publisher who advertised in *High Times* magazine. *Id.* at 838. The publisher was charged with aiding and abetting and raised a First Amendment defense. *Id.* at 842. The defendant's First Amendment defense was raised, somewhat clumsily, in a challenge to the validity of a search warrant; nevertheless, the court dealt with the issue thoroughly. The court rejected the defense under a speech-act rationale. *Id.* at 842. The court noted that a similar argument had been rejected in *Buttorff*, a case in which "the defendants had virtually no personal contact with the persons who filed false income tax returns [but instead] gave speeches before large groups." *Id.* at 842–43. Thus, the fact that Barnett conducted his business by mail, rather than in person, was of no consequence. *Brandenburg* was not cited by the court.

137. 128 F.3d 233 (4th Cir. 1997). In *Rice*, the court considered the constitutionality of imposing civil liability on the publisher of two books—*Hit Man*, which described in detail the specific methods, strategies, and techniques of professional killers, and the aptly-titled *How to Make a Disposable Silencer: Vol. II*—used in the contract killing of three people. *Id.* at 239–41. Following the killer's murder conviction, the victims' survivors filed a civil wrongful death action against Paladin under the theory that the publisher had aided and abetted the killer. Rice v. Paladin, Enters., Inc., 940 F. Supp. 836, 839–40 (D. Md. 1996). For a discussion of the role this case played in the formulation and ultimate passage of the Feinstein Amendment, 18 U.S.C. § 842(p), see *supra* Part I.A.

138. *Paladin*, 128 F.3d at 245 (relying on *Barnett* and citing United States v. Freeman, 761 F.2d 549, 551–52 (9th Cir. 1985)). Interestingly, the Fourth Circuit chose a quote from *Freeman* that suggests an imminence-like requirement for distinguishing a speech-act:

> [T]he First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are *so close in time and purpose to a substantive evil* as

has the specific purpose of assisting and encouraging commission of such conduct[139] and the alleged assistance and encouragement takes a form other than abstract advocacy.[140] In reaching this conclusion, the court followed a three step analysis: (1) *Brandenburg* protects only abstract advocacy of lawlessness;[141] (2) speech that is "tantamount to legitimately proscribable nonexpressive conduct may itself be proscribed;"[142] and (3) criminal aiding and abetting cases have established that such speech-acts fall within the ambit of proscribable nonexpressive conduct.[143] The court characterized Paladin's speech as concrete "aid and assistance," bearing "no resemblance to . . . 'theoretical advocacy.'"[144] Indeed, the court found that such "detailed, focused instructional assistance"[145] was "the antithesis of speech protected under *Brandenburg*."[146]

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to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone.

Id. (quoting *Freeman*, 761 F.2d at 552) (emphasis added).

139. The court found, specifically, that the First Amendment may require more than "mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose." *Paladin*, 128 F.3d at 247. The court noted that this requirement might be necessary to "meet the quite legitimate, if not compelling, concern of those who publish, broadcast, or distribute to large, undifferentiated audiences, [where] the exposure to suit under lesser standards would be intolerable." *Id.* At the same time, however, the court distinguished cases in which a speaker "acts with the purpose of assisting in the commission of crime," arguing that the First Amendment would fail to insulate that speaker "simply because he may have disseminated his message to a wide audience." *Id.* at 248.

140. *Id.* at 243.

141. *Id.*

142. *Id.*

143. *Id.* at 244–46. The court recognized, however, that the *Brandenburg* standard might apply equally to civil penalties for abstract advocacy, as it does for criminal penalties. *Id.* at 248–49.

144. *Id.* at 249. The category of speech protected under *Brandenburg* was alternately described as "the advocacy of 'principles divorced from action,' the 'doctrinal justification,' [and] 'the mere abstract teaching [of] the moral propriety or even moral necessity for a resort to force and violence.'" *Id.* (citations omitted).

145. *Id.* ("It is the teaching of the 'techniques' of violence, the 'advocacy and teaching of concrete action,' the 'prepar[ation] . . . for violent action and [the] steeling . . . to such action.'" (citations omitted)).

146. *Id.* The district court had relied on *Brandenburg* as a bar to recovery. Paladin had moved for summary judgment on the ground that the First Amendment permitted the book's publication and barred recovery. Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 838 (D. Md. 1996). In response, the plaintiffs argued that the court should adopt the First Amendment analysis applied to criminal aiding and abetting statutes in *Buttorff, Moss*, and *Barnett*, suggesting that speech, when in the form of instructions on how to commit a criminal act, merges analytically with the act itself. *See id.* at 842–43. Although Paladin agreed to two startling stipulations: (1) that it had "engaged in a marketing strategy *intended* to attract and assist criminals and would-be criminals who desire information on how to commit

This analysis implicates interwoven rationales. The first thread of the analysis entails a somewhat mechanical consideration of the character of the speech itself, seizing primarily on the words "mere" and "abstract" as limiting principles that exclude detailed and directed instructions from *Brandenburg*'s protection of advocacy. The second thread of the analysis builds on this categorical distinction by invoking the speech-act doctrine. Once specific instructional speech is linked to the commission of a particular illegal act, both in intent and effect, the speech merges with that illegal conduct and may be constitutionally regulated. There is no separate requirement of intended imminence or proximity between the moment of expression and the moment of criminal action. Justice Stevens embraces this approach in *McCoy*, yet pushes the reach of the analysis dramatically forward.

As an initial matter, Justice Stevens describes a broad category of instructional speech—or "speech that performs a teaching function"—falling outside of *Brandenburg*'s protections.[147] This includes "oral advice, training exercises, and perhaps the preparation of written materials."[148] Here, Justice Stevens closely follows the rationale established by the prior referenced decisions in analyzing the character of the speech, suggesting that criminal advice, if "specific" enough,[149] is to be distinguished from "mere advocacy."[150]

It is in the second thread of the analysis, however, that Justice Stevens points to the possibility of a more wide-reaching effect. His

crimes," and (2) that it "*intended* and *had knowledge* that their publications *would be used, upon receipt*, by criminals and would-be criminals to plan and execute the crime of murder for hire in the manner set forth in the publications," the district court nevertheless found both books to be protected under the First Amendment. *Id.* at 840 (emphasis added). In reaching this conclusion the court applied the *Brandenburg* incitement standard, finding that the books constituted permissible "advocacy" and "mere abstract teaching," and did not "cross the line" to "incitement or a call to action." *Id.* at 847 (quotations and citations omitted). Moreover, the court specifically "decline[d] Plaintiff's invitation to create a new category of speech unprotected by the First Amendment—speech that arguably aids or abets murder." *Id.* at 849.

147. Stewart v. McCoy, 537 U.S. 993, 995 (2002).

148. *Id.*

149. Justice Stevens characterizes McCoy's speech as "specific advice on how to operate their gang." *Id.* at 994.

150. Although Justice Stevens admittedly equivocates on this point, clearly wishing to avoid the issue, he does so rather unconvincingly:

> [T]he Court of Appeals held that respondent's speech "was mere abstract advocacy" that was not constitutionally proscribable because it did not incite "imminent" lawless action. Given the specific character of respondent's advisory comments, that holding is surely debatable. But whether right or wrong, it raises a most important issue concerning the scope of our holding in *Brandenburg* . . . .

Id. (footnotes omitted).

initial statement is only somewhat remarkable in that it merely rejects *Brandenburg*'s imminence requirement as applied to this category of specific instructional speech.[151] Unlike the courts of appeal, however, Justice Stevens does not anchor this rejection to a speech-act rationale premised on the merger of instructional speech with a completed illegal act by a third-party. Instead he requires only that the unprotected instructional speech constitute "long range planning of criminal enterprises."[152] This raises the question of whether Justice Stevens, having expressly rejected an imminence requirement, also intends to entirely unhinge the constitutionally permissible punishment of instructional speech from the actual commission of a particular illegal act, as those cases that have addressed aiding and abetting have required.

The facts of *McCoy* suggest precisely this result. First, the statute itself under which McCoy was charged criminalizes the mere furnishing of "advice or direction in the conduct, financing or management of a criminal syndicate's affairs with the intent to promote or further the criminal objectives of a criminal syndicate."[153] There is no facial requirement that such "advice or direction" be employed by the listener to complete a criminal act. Second, as to McCoy specifically, there was "no evidence in the record that [the gang members with whom McCoy spoke] engaged in any crime as a result of his advice."[154] "Indeed, there [was] no evidence that McCoy's speech played any part at all in any crime committed by the [gang]."[155] It was on this point that the Ninth Circuit found McCoy's speech to constitute "mere abstract advocacy of lawlessness,"[156] protected by *Brandenburg*. The court did, however, allow for this conclusion to fail "if the state could prove that the speech actually caused imminent lawless action."[157] But Justice Stevens appears to reject the Ninth Circuit's view,

151. *Id.* at 995.

152. *Id.*

153. ARIZ. REV. STAT. § 13-2308(A)(3) (2004).

154. McCoy v. Stewart, 282 F.3d 626, 631 n.6 (9th Cir. 2002). The court also stated:

> No witness at McCoy's trial testified that McCoy ever told him or her to go out and commit a crime. No witness testified that he or she was incited by hearing McCoy's words. No evidence adduced at the trial suggested that McCoy was offering anything more than his own belief or blueprint on how a successful gang should be run.

Id. at 631.

155. *Id.* at 631 n.6. The court stated moreover that, "while the evidence demonstrated that members of the [gang] were involved in crimes, nothing indicates that their criminal activity was in any way inspired by or 'proximate' to McCoy's speech." *Id.*

156. *Id.* at 631.

157. *Id.* at 631 n.6.

indicating that he sees no required link between the objectionable speech and the actual commission of a particular illegal act, at least where there exists some (as yet undefined) intent on the part of the speaker to promote or further the criminal acts of another.

Here, the legal fiction is laid bare. *Brandenburg* required imminence and likelihood as links between speech and act, allowing government restrictions to rest on established doctrine. The aiding-and-abetting cases, in homage to that doctrine, bypassed these requirements only where the character of the speech, instructional assistance, and later events, coupled with the utilization of those instructions in an attempted or completed criminal act, provided the necessary linkage. Justice Stevens may thus appear ready to do away with the legal fiction altogether, such that in certain contexts the government may constitutionally proscribe speech as speech, rather than as speech merged with action.

On this point, however, Justice Stevens's analysis is not necessarily as radical as it might first appear. The range of analyses that might be applied to instructional speech is thus far book-ended by *Brandenburg* and the aiding-and-abetting cases. The aiding-and-abetting cases are doctrinally somewhat conservative, as they rely on specific criminal conduct, either attempted or completed, with which to link the instructional speech such that speech and act merge. *Brandenburg*, by implying the link between speech and act without requiring that the act itself be completed or even attempted, pushes the limits of the speech-act doctrine even further, but tempers that leap through the imminence and likelihood requirements. In this respect, and perhaps contrary to popular perception, *Brandenburg* is in fact more radical than the aiding-and-abetting cases. Under either analysis, however, the gravity of the ultimate act is not expressly considered, and once the merger between speech and act is established, the First Amendment becomes essentially non-applicable. Under Justice Stevens's approach, this effect is tempered.

On one hand, Justice Stevens might be seen as pushing the speech-act doctrine even beyond *Brandenburg* by doing away with the legal fictions of imminence and likelihood required to satisfy the merger concept, and also potentially allowing for the regulation of speech as speech. But an alternate interpretation is equally sound. If we begin with the idea that the speech-act rationale must be respected, at least formally, then in the absence of a specific action (attempted or completed) with which to link and merge the objectionable speech, the Court must find a legal fiction to bridge this gap.

Justice Stevens' statement may be read to suggest that this function can be served by a blending of specificity and probability, as defined by context and intent. Once these elements are satisfied, the speech-act link is established. This frees Justice Stevens's approach from the burden of regulating speech as speech,[158] and places it on to comfortable ground for the Court as a whole.

B. Reinvigorating a Derivative of the Public Danger Doctrine

In articulating the constitutional standard to be applied to instructional speech once the link between speech and act has been established, Justice Stevens rests on a general statement of the public-danger doctrine: The "First Amendment does not prevent restrictions on speech" where those restrictions "have 'clear support in public danger.'"[159] *Brandenburg* is widely understood as the modern formulation of the public-danger doctrine. Yet, Justice Stevens expressly rejects *Brandenburg* as inapplicable. How, then, can these statements be squared?

In place of *Brandenburg*, Justice Stevens cites the Supreme Court's 1945 decision in *Thomas v. Collins*,[160] and in doing so, transports First Amendment jurisprudence to another era.[161] *Thomas* holds, and Jus-

158. It might be argued that there is precedent for this approach in the "true threat" doctrine, first articulated in *Watts v. United States*, 394 U.S. 705 (1969) (upholding the facial constitutionality of a federal statute criminalizing threats to the life or body of the President). In *Watts*, the Court emphasized that "a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind." *Id.* at 707. "What is a threat must be distinguished from what is constitutionally protected speech," and the government bears a heavy burden in proving the existence of an actual, true threat. *Id.* at 707–08. In making this determination, a court focuses on both the speaker's intent in making the comments and objective evidence demonstrating the likelihood that the speaker will commit a specific act. *See* NAACP v. Claiborne Hardware, 458 U.S. 886, 927–29 (1982). In applying this rule, it has generally been suggested that threats constitute an exception to *Brandenburg* because threats embody a linking of expression and conduct, so as to lessen First Amendment protections. *See* United States v. Kelner, 534 F.2d 1020, 1027 (2d Cir. 1976) (upholding the constitutional regulation of what it termed "inchoate conduct," where expression "has become 'so interlocked with violent conduct as to constitute for all practical purposes part of the (proscribed) action itself'"). Further, that linking does not require imminence. *See* SMOLLA, *supra* note 120, § 10:22:50. That de-linking, however, is justified by the nature of the harm sought to be prevented—"the fear of violence and the disruption that fear engenders." *Id.* The harm sought to be prevented by instructional speech is, by comparison, the violence itself, and not the fear of its occurrence. Thus, the true threat doctrine does not provide support for the speech-as-speech approach.

159. Stewart v. McCoy, 537 U.S. 993, 993 (2002).

160. 323 U.S. 516 (1945).

161. Although facially laudable, as it struck down the prior restraint of speech by a union organizer, the *Thomas* case was a battle fought on ground that may now seem unfa-

tice Stevens reasserts, that any attempt by the state to restrict an individual's First Amendment liberties "must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[162] Thus, "whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending."[163] This standard is derived, according to the *Thomas* majority, from a watershed series of cases from the early part of the century, in which the Supreme Court sanctioned political censorship of the Socialist Party—the majority decision in *Schenck v. United States*,[164] and Justice Holmes's dissents in *Abrams v. United States*[165] and *Gitlow v. New York*.[166] An analysis of Justice Stevens's position thus begins with an examination of these cases.

Schenck was the lead decision in a trio of Espionage Act cases written by Justice Holmes in March of 1919.[167] It was here that the Supreme Court first articulated the CPD standard for speech that advocates illegal conduct. The *Schenck* defendants, both members of the Socialist Party, were prosecuted for the attempted circulation of an anti-conscription pamphlet calculated to cause "insubordination . . . in the military and naval forces [and] to obstruct . . . recruiting

miliar. The import and implication of Justice Stevens' citation to that case may be understood, therefore, only by revisiting that struggle.

162. *Thomas*, 323 U.S. at 530.

163. *Id.*

164. 249 U.S. 47 (1919).

165. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

166. 268 U.S. 652, 672 (Holmes, J., dissenting); *see Thomas*, 323 U.S. at 530 n.19 (directing the reader to note 12). Note 12 reads as follows:

> *Cf. Schenck v. United States*, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470; Mr. Justice Holmes dissenting in *Abrams v. United States*, 250 U.S. 616, 624, 40 S.Ct. 17, 20, 63 L.Ed. 1173, and in *Gitlow v. New York*, 268 U.S. 652, 672, 45 S.Ct. 625, 632, 69 L.Ed. 1138; *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192. A recent statement is that made in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639, 63 S.Ct. 1178, 1186, 87 L.Ed. 1628: "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

Id. at 527 n.12.

167. *See Schenck*, 249 U.S. at 48; Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919).

and enlistment."[168] Upholding the defendants' convictions against a First Amendment challenge, Justice Holmes wrote: "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."[169] In making this analysis, the Court cautioned that it was to be "a question of proximity and degree," that is, a factual analysis focused on the circumstances in which the words are spoken and their likely effect in those circumstances.[170] Thus, the issue of actual intent was equated, and perhaps even subordinated, to the perceived character of the speech, permitting the criminalization of advocacy that has the "tendency" to result in some identified harm.[171]

Just eight months later, however, Justice Holmes was in the minority as he sought to articulate limiting principles for the "clear and present danger" standard—limitations that would more strenuously protect dissident speech.[172] In *Abrams v. United States*,[173] Holmes argued that even "opinions that we loathe and believe to be fraught with death" must be tolerated "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is *required to save the country*."[174] Only in times of great "emergency" and "immediate dangerousness" should such opin-

168. *Schenck*, 249 U.S. at 48–49. The pamphlet argued in "impassioned language" that conscription was unconstitutional, "despotism in its worst form and a monstrous wrong against humanity," and urged those called for service to "Assert Your Rights." *Id.* at 51.

169. *Id.* at 52 (emphasis added). *Schenck* also contains Justice Holmes's famous example of unprotected speech: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Id.*

170. *Id.* (stating, for instance, the "circumstance" of "war").

171. *Id.* at 51–52 (discussing the "tendency of this circular" and equating the import of "the act . . . its tendency and the intent with which it is done"); *Debs*, 249 U.S. at 216. In *Debs*, the court noted that

> the jury were [sic] most carefully instructed that they could not find the defendant guilty for advocacy of any of his opinions unless the words used had as their *natural tendency* and reasonably probable effect to obstruct the recruiting service, &c. [sic], and unless the defendant had the *specific intent* to do so in his mind.

Id. (emphasis added). *See also Frohwerk*, 249 U.S. at 206 (stating that "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language," and giving as an example "the counselling [sic] of a murder").

172. *See* Abrams v. United States, 250 U.S. 616, 624 (1919). The majority in *Abrams* dismissed defendants' First Amendment arguments with a single statement that these issues had been decided in *Schenck* and *Frohwerk*. *Id.* at 619. The *Abrams* majority did not reject the "clear and present danger" test out of hand, but rather its application to a particular type of statute. *See supra* note 166 and accompanying text.

173. 250 U.S. 616 (1919).

174. *Id.* at 630 (Holmes, J., dissenting) (emphasis added).

ions be removed from the marketplace of ideas, where their truth or falsity would be revealed.[175]

Given this tolerant pedigree, how are we to interpret Justice Stevens's reliance on *Thomas* and the public danger standard? Clearly, Justice Holmes sought a heightened standard, both as to the gravity of the harm and the imminence of the threat. But Justice Stevens expressly rejects any imminence requirement for the type of "dangerous" instructional speech at issue in *McCoy*, and *Thomas* itself raised no imminence issue.[176]

A possible answer may lie with *Dennis v. United States*,[177] a decision involving the American Communist Party that was issued just six years

175. Justice Holmes's dissent in *Gitlow v. New York* took much the same route. *See* 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting) (upholding against a First Amendment challenge Gitlow's conviction for advocating criminal anarchy through the publication of radical Socialist writings that urged the use of unlawful means to overthrow the United States government). The majority in *Gitlow* took a step back from the *Schenck* trinity, albeit not in the direction Justice Holmes would have preferred. In upholding Gitlow's conviction against a First Amendment challenge, the majority effectively cabined off the "clear and present danger" test by limiting its application to a narrow class of cases, like *Schenck*, in which a statute "merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and [the statute] is sought to [be applied] to language used by the defendant for the purpose of bringing about the prohibited result." *Id.* at 670–71. This was contrasted against the criminal anarchy statute at issue in *Gitlow*, which sought to limit a certain and specific type of advocacy. *Id.* at 671. In such cases, the Court held, the danger and likelihood of harm is not at issue:

> [W]hen the legislative body has determined . . . that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration.

Id. at 670. Moreover, the majority flatly rejected an imminence requirement, arguing that "where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character," the government need not wait for "[a] single revolutionary spark [to] kindle a fire." *Id.* at 669–71. Regarding the actual threat and imminent danger presented by the defendant's writings, Justice Holmes famously replied that "[e]very idea is an incitement . . . [e]loquence may set fire to reason." *Id.* at 673. He also wrote:

> It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. . . . The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason.

Id. Arguing that Gitlow's conviction should be overturned, Holmes maintained that the "clear and present danger" standard was the proper measure of a statute that proposed to criminalize pure speech. *Id.* at 672–73.

176. *Thomas* was a case of prior restraint, in which the speech occurred and the defendant was found in contempt of court. Likewise, the fourth case upon which *Thomas* relies, *Bridges v. California*, 314 U.S. 252, 262 (1941), finds the State's restrictions on speech—again in the contempt context—to fail the "substantial danger" requirement of the "clear and present danger" standard.

177. 341 U.S. 494 (1951).

after *Thomas*. *Dennis* finally acknowledged that the majority opinions in *Gitlow* and *Whitney* had been eclipsed by the "Holmes-Brandeis rationale."[178] Yet, while embracing the CPD standard, the Court managed to pay little more than lip service to the Holmes-Brandeis formulation of that test. First, as to the gravity of a potential harm, the majority simply asserted that the "[o]verthrow of the Government by force and violence is certainly a substantial enough interest for the government to limit speech."[179] *Thomas* was distinguished on this point as implicating insufficient state interests.[180] Second, the majority leveraged the gravity of this perceived danger to marginalize, if not eliminate, both the imminence requirement and the probability factor.[181] As to imminence, the Court argued that the presence of such a grave threat eviscerated the need to "wait until the putsch is about to be executed, the plans have been laid and the signal is awaited."[182] As to probability or likelihood, the leverage was perhaps even more direct: "Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent."[183]

178. *Id.* at 507. Justice Brandeis, who had joined Justice Holmes's dissent in *Gitlow*, wrote a concurring opinion in the Court's 1927 decision, *Whitney v. California*, 274 U.S. 357 (1927), this time joined by Justice Holmes. *Id.* at 372–80 (Brandeis, J., concurring in the result only). The majority applied the *Gitlow* standard in assessing the defendant's First Amendment claim and upheld the conviction. *Id.* at 371–72. Brandeis, although concurring on other grounds, attacked the *Gitlow* standard with a now-famous discourse on First Amendment principles. *Id.* at 375–76. Chastising the Court for failing to articulate a coherent standard, Brandeis argued that the "clear and present danger" doctrine must set a high bar to government restriction of speech. Specifically, the danger must be likely, imminent, and gravely serious: "To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced." *Id.* at 376. Seizing on Holmes's dissents in *Abrams* and *Gitlow*, Brandeis placed the questions of gravity and imminence front-and-center, declaring that "[o]nly an emergency can justify repression." *Id.* at 377. "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State." *Id.* at 378.

179. *Dennis*, 341 U.S. at 509.

180. *See id.* at 509–10 ("[T]his Court has reversed convictions by use of [the clear and present danger test] based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. In this category we may put such cases as . . . *Thomas v. Collins* . . . .").

181. Indeed, the Court went so far as to argue that "[t]he damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt." *Id.* at 509.

182. *Id.*

183. *Id.* Although the majority explicitly "reject[ed] the contention that success or probability of success is the criterion," it nevertheless seemed obsessed with the disciplined nature of the organization, as well as world events:

The *Dennis* decision is made all the more important—and its significance in interpreting Justice Stevens's position all the more clear—by virtue of its role in the move towards *Brandenburg*. Arguably, the holding of *Dennis* was refined, and perhaps revised, by the Court in *Yates v. United States*.[184] Although professing to avoid the constitutional issue,[185] the Court appeared to reinterpret both the statute and the grounds for conviction in that case, so as to alter the constitutional aspects of its holding. Specifically, the *Yates* decision characterized *Dennis* as holding that the "indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to 'action' . . . [and] violence . . . and employing 'language of incitement,' . . . is not constitutionally protected when the group is of sufficient size and cohesiveness."[186] *Yates* argued that this conclusion rested, in large part, on the likelihood of harm. Thus, such speech was not protected where a large and coordinated group "is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur."[187] According to the *Yates* decision, each of these aspects were present in *Dennis*, if not the case at bar. This refinement of *Dennis*, incorporating at least the consideration of imminence and likelihood, was a key step towards the Court's decision in *Brandenburg*.

This illuminates the divide. *Dennis*, read in light of earlier decisions, presents the public danger standard as a three-factor calculus in which imminence, probability, and gravity of the harm are weighed to determine the constitutionality of restrictions on the objectionable speech. In this calculus, just one factor may be of such great weight as to tilt the calculus dramatically in favor of restriction. *Brandenburg*, on the other hand, replaces this calculus with required elements: If speech advocates the use of force or violation of the law, thus consti-

> The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders . . . felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that [the trial court's finding that the requisite danger existed was] justified on this score. . . . If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added.

Id. at 510–11.

184. 354 U.S. 298 (1957) (overruled on other grounds).

185. *Id.* at 319 ("We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe the statute.").

186. *Id.* at 321.

187. *Id.*

tuting potential harm, regardless of its gravity, the government must show both the imminence and likelihood of such action in order to restrain that speech.[188] By expressly rejecting the imminence requirement and emphasizing the significance of the potential harm, Justice Stevens clearly recalls the calculus approach that broadens the reach of government restriction.

This interpretation of Justice Stevens' statement in *McCoy* fits well with, and finds support in, his general approach to the law of free speech.[189] Rather than imposing a strict categorization of speech restrictions as content-based or content-neutral, Justice Stevens has championed a multi-factor balancing approach, described as a "constitutional calculus," that considers the content, character, and context of the expression, as well as the nature and scope of the challenged restriction.[190] These factors "all contribute to an evaluation of the extent of the restriction on expression, which in turn is used to calibrate the quantum of proof that the government must adduce in order to justify the restriction."[191] As part of this evaluation, Justice Stevens has indicated a willingness to vary the evidentiary requirements in certain

188. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

189. *See, e.g.*, Wilson R. Huhn, *Assessing the Constitutionality of Laws that are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 809–12 (2004).

190. *Id.* Huhn describes Justice Stevens's approach to the content-based versus content-neutral question as follows:

> Justice Stevens'[s] characterization of the law of freedom of expression as a "constitutional calculus" in *Bartnicki* is significant because it concisely and accurately describes the multi-factor balancing approach that he employs in deciding difficult freedom of expression cases.
>
> Justice Stevens identified five factors that affect the constitutionality of a content-based law. First, the subject matter of the speech, its "content," in part determines its constitutional value and consequently the level of review to which it will be subjected. Second, the "character" of the expression, that is, whether it is written, spoken, or expressive conduct, also affects the level of constitutional protection to which it is entitled. The third factor influencing Justice Stevens'[s] "constitutional calculus" is the "context" of the expression, for example whether the speech takes place in the context of a labor relations dispute, a university environment, a secondary school, a public forum, or a nonpublic forum. Fourth, Justice Stevens noted that whether the restriction on speech is a prior restraint and/or viewpoint-based affects the analysis, factors which he characterized as bearing upon the "nature" of the restriction. Justice Stevens identified the fifth element of the constitutional calculus to be the "scope" of the law regulating expression; for example, whether the law is merely a limitation on the places or times of expression.

Id. at 810–12 (footnotes omitted).

191. *Id.* at 813.

cases,[192] perhaps deferring to legislative judgments as to matters of security.

Justice Stevens' citation to *Thomas*, a case in which the challenged restrictions were found to be unconstitutional, does not alter this conclusion. *Thomas* belongs to a series of cases in which the State's interest—the evil sought to be prevented—was found by the Court to be insufficient to justify the restriction of speech.[193] Rather than the threat of violence or the overthrow of the government, these statutes were only intended to protect against fraud[194] and to insure the fair administration of justice[195] and the like. Although professing to include a consideration of imminence as part of the CPD standard, imminence was neither at issue, nor a basis for the Court's decision. As a factual matter, therefore, Justice Stevens' statement fits easily within a strict reading of *Thomas* and indeed leverages its contrary implication that the sufficiency of the State's interest, defined by the gravity of the public harm, is the primary test of the government's ability to regulate against that danger.

III. A Constitutional Standard Crafted for the Internet

One need not accept the precise borders of Justice Stevens's analysis, nor how specifically it has been described, nor believe that a majority of the Supreme Court will entirely embrace his approach, to recognize the potential for judicial action removing instructional speech from *Brandenburg*'s protections and creating a more deferen-

192. *See id.* at 852–53. Huhn indicates that Justice Stevens has

> called for substantial deference to Congress for three reasons: (1) because the institution is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions, (2) because of the inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change, and (3) out of respect for [Congress's] authority to exercise the legislative power.

Id. at 852 (quotations, citations, and footnotes omitted).

193. The Court in *Dennis* stated:

> In this case we are squarely presented with the application of the "clear and present danger" test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect itself too insubstantial to warrant restriction of speech. In this category we may put such cases as *Schneider v. State* . . . *Cantwell v. Connecticut* . . . *Martin v. Struthers* . . . *West Virginia State Board of Education v. Barnette* . . . *Thomas v. Collins* . . . [and] *Marsh v. Alabama.*

Dennis v. United States, 341 U.S. 494, 508–09 (1951).

194. *See* Thomas v. Collins, 323 U.S. 516, 532 (1945).

195. *See* Bridges v. California, 314 U.S. 252, 259 (1941).

tial test. The surrounding circumstances certainly support the ultimate likelihood of resolution—Congress is passing laws it knows to press the bounds of existing constitutional doctrine; the Executive has begun enforcing those laws and is instituting new investigative guidelines intended to result in additional prosecutions; and the federal courts of appeal are charting new territory in legal analysis that confines the reach of *Brandenburg* and lifts instructional speech from full First Amendment protections. At the same time, terrorist threats create a climate of fear in which the perception of public danger is altered as the potential consequences of certain disfavored speech seem disproportionately grave. Moreover, there is simply a thread of common sense and a visceral response in the view that "detailed, focused instructional assistance" bears "no resemblance to the 'theoretical advocacy,' the advocacy of 'principles divorced from action,' . . . 'the mere abstract teaching [of] the moral propriety or even moral necessity for a resort to force and violence,' or any other forms of discourse," protected by *Brandenburg*.[196] The question, then, is how the Supreme Court will resolve the issue. Might they bow, as they did in the first half of the century, to the heat of political passion and war? In this final section, I argue that such a result is entirely possible, even if unintentional, and that the emergence of the Internet makes it more so.

A. Sketching the Borders of Instructional-Speech Analysis

Although the specific framework of instructional-speech analysis is uncertain,[197] the touchstones of the speech-act doctrine and of the public danger doctrine will almost undoubtedly remain. Moreover, the essential constituents of this analysis are unlikely to change—the link between speech and act, the nature and severity of the ultimate act sought to be prevented, and the likelihood that such an act will result if the offending speech is not curtailed. In its formulation, the

196. Rice v. Paladin Enters., Inc., 128 F.3d 233, 249 (4th Cir. 1997) (quotations and citations omitted).

197. Initially, one of two approaches is possible. The first is to reposition *Brandenburg*, not as the modern formulation of the CPD standard, but just one expression thereof. The second is to limit the reach of the CPD standard, as the Court has done in the past, in the form of a social-value categorization placing certain speech outside the reach of the First Amendment. As a practical matter, it may make no difference which approach is taken. Although exemption from *Brandenburg* might well be expressed in categorical social-value terms, that effort would simply return to the issue of public danger, arguably gaining nothing. At the same time, this approach might appear more palatable because it fits within the framework of recent First Amendment jurisprudence. It also leaves *Brandenburg* intact, and a more controversial expression of the public danger doctrine at rest.

Court will certainly endeavor to preserve *Brandenburg*, while distinguishing its application. As such, the Court will need to address imminence, likelihood, and intent as methodological expressions of the public danger calculus. What follows is a broad approximation of the potential evolution of this analysis.

I begin with the requirement of specificity—expressed as "detailed, focused instructional assistance"[198]—which attends several needs. First, it serves a gate-keeping function, much like the requirement of "mere advocacy" in *Brandenburg*, circumscribing the category of instructional speech to which this analysis applies. Second, as a doctrinal matter, it creates a necessary link between speech and act, as do *Brandenburg*'s imminence and likelihood requirements. Third, it provides a non-contextual measure, closely related to its doctrinal role, of the likelihood that the offending act will occur. Finally, it may evidence some degree of intent on the part of the speaker to facilitate the criminal acts of another.

Considered next is the nature and severity of the ultimate act sought to be prevented. The *Brandenburg* formulation places little or no significance on the gravity of the potential harm, only broadly referencing force, violence, and lawless action.[199] It is suggested, however, that some minimum level of harm is required to justify a more liberal interpretation of the speech-act doctrine and the causation principle to which that doctrine is related.

Throughout the first half of the century, the CPD doctrine was limited by a dichotomy between speech perceived to threaten the democracy[200] and that perceived merely as a threat to lesser state interests. Indeed, *Dennis* seized on this distinction in an attempt to reconcile the Holmes-Brandeis approach with its own.[201] Yet, Justice Stevens, writing after the terrorist attacks of September 11th and perhaps anticipating the application of his instructional-speech standard to activities more directly related to anti-terrorism efforts, suggests a more fluid definition of sufficient harm. According to Justice Stevens, speech that teaches certain common criminal behavior, such as that at issue in *McCoy*, "certainly may create significant public danger" such that it may be restricted.[202] This lessening of the harm requirement also has the effect of altering the implicit intent requirement. No

198. *Paladin*, 128 F.3d at 249.
199. Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).
200. *See supra* note 193 and accompanying text.
201. Dennis v. United States, 341 U.S. 494, 508–10 (1951).
202. Stewart v. McCoy, 537 U.S. 993, 995 (2002).

longer must the speaker intend so drastic a result as the overthrow of the government and target his speech accordingly; rather, it is enough merely to intend a general criminal act. For the Court as a whole, this seems fertile ground for accepting but limiting the reach of a new instructional speech analysis.

Finally, there is the likelihood that such an act will result if the offending speech is not curtailed. As in *Brandenburg*, this inquiry blends content and context, although content is addressed largely in terms of specificity and the danger sought to be prevented. Assuming no question of imminence, the focus is instead on the availability and distribution of the speech, and the nature of surrounding language or circumstances—e.g., encouragement, suggestion, or incitement. Here, likelihood also plays a role in and indeed may seem to merge with the intent requirement, as it evidences reckless disregard, foreseeability, or some similar measure of constructive intent.

What makes this analysis distinct from *Brandenburg*, apart from that just described, is that there is no contextual tipping point, no minimum requirement of imminence as a prerequisite of dangerousness. Remember that, in *Brandenburg*, imminence—a contextual determination—serves as a doctrinal bridge for speech-act principles and causation, as well as evidence of dangerousness. Here, these roles are subsumed by an overall consideration of specificity and likelihood. Thus, abstract dangerousness is presumed for speech that specifically instructs a sufficiently harmful act, limited only by the likelihood of resulting action and divorced from a strict temporal connection. Once the speech is categorized, there is no quantifiable minimum of dangerousness, but instead an overall perception that the availability of particular material may itself be dangerous. In certain cases, then, the only limiting principle is the context of that speech and its relationship to the intent of the speaker.

The issue of intent, even apart from the particular evidentiary requirements discussed above, remains a difficult issue. In some of the early CPD cases, the issue of actual intent was equated, and perhaps even subordinated, to the perceived character of the speech, permitting the criminalization of advocacy that has the "tendency" to result in some identified harm.[203] This approach seems now firmly rejected. In its study, the DOJ suggested a two-track approach, based on the speaker's relationship with the recipient of instructional speech.[204]

203. *See supra* note 171.

204. The suggested alternative language read as follows:

It shall be unlawful for any person—

Where the challenged dissemination involves a particular, known recipient, the scienter requirement is satisfied by either "the specific purpose of facilitating criminal conduct, or . . . knowledge that a *particular* recipient intends to make improper use of the material."[205] Where, however, the challenged dissemination is to persons unknown, it is not enough to show constructive intent or foreseeability.[206] Rather, only a "conscious purpose of facilitating unlawful conduct" would suffice.[207] In either case, the knowledge or intent of the speaker must refer to the use made of the information that the person disseminates.[208] As the DOJ recognized, the "more difficult question is whether criminal culpability can attach to general publication of explosives information [with] the purpose of generally assisting unknown and unidentified readers in the commission of crimes."[209] The text of 18 U.S.C. § 842(p) fails to fully incorporate these DOJ suggestions, however, by omitting the requirement that the speaker distribute bomb-making information to a *particular* person with the knowledge of that *particular* person's intent to use that information in a crime of violence.[210] In *Paladin*, the Fourth Circuit found that the First Amendment did not apply to the instructional speech at

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

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

U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § VI(C).

205. *See id.* (emphasis added).

206. *See id.*

207. *Id.* ("The alternative formulation would make clear that dissemination with [the 'conscious purpose of facilitating unlawful conduct by unknown recipients of the information'] would be proscribed." (citations omitted) (alterations in original)).

208. *Id.*

209. *Id.* § VI(B). Although professing a belief that "the 'intent' prohibition would be facially constitutional," the DOJ Report nevertheless cautioned that the constitutionality of such a statute would, in application, remain uncertain "depending on whether the evidence truly demonstrates the improper intent beyond a reasonable doubt." *Id.* (citations omitted).

210. For a full discussion of the issue of intent, see *supra* Part I.A.

issue in that case, in part because the defendant had the specific purpose of assisting and encouraging commission of a crime.[211] In resolving the issue, the Court is likely to favor a strict intent requirement, such that it balances an expansive view of causation.

B. Internet Architecture and Community: Tilting the Public-Danger Calculus

Taken in the abstract, this result may not seem troubling. Most would probably agree that government has an interest in preventing bombings, tax evasion, the manufacture of illegal drugs, and murder-for-hire. We might also agree that when these evils occur, government has the right to punish those who intentionally assisted the perpetrator with his crime, including those who provide him with detailed instructions on how to carry it out. That agreement may also stretch to instances where the illegal conduct is about to occur, but the government steps in to stop it by silencing the speaker who intends that result. Putting these potential areas of agreement to one side, let us instead consider the reach of 18 U.S.C. § 842(p).

As previously described, section 842(p)(a) criminalizes the distribution of bomb-making instructions with the intent that those instructions be used by someone, known or unknown, to commit a crime of violence.[212] There is no requirement that anyone actually commit or attempt to commit a crime utilizing those instructions.[213] Is this more troubling? What about the conviction of Sherman Austin under this statute? Austin posted bomb-making instructions on his website. Those instructions were made available to anyone who chose to visit his page, which was itself intended to reach fellow Anarchists participating in mass demonstrations. Although the evidence may support a finding that Austin intended his instructions to be used by his target audience to commit a crime of violence, there is no evidence that

211. The court found, specifically, that the First Amendment may require more than "mere foreseeability or knowledge that the information one imparts could be misused for an impermissible purpose." Rice v. Paladin Enters., Inc., 128 F.3d 233, 247 (4th Cir. 1997). The court noted that this requirement might be necessary to "meet the quite legitimate, if not compelling, concern of those who publish, broadcast, or distribute to large, undifferentiated audiences, [where] the exposure to suit under lesser standards would be intolerable." *Id.* At the same time, however, the court distinguished cases in which a speaker "acts with the purpose of assisting in the commission of crime," arguing that the First Amendment would fail to insulate that speaker "simply because he may have disseminated his message to a wide audience." *Id.* at 248.

212. *See* U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § I(A).

213. *Id.* In this sense, section 842(p)(a) is remarkably similar to the statute at issue in *McCoy*. *See* U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § I(C).

Austin intended them to reach a particular person or knew that anyone in particular intended to so use the instructions. There is also no evidence that the instructions were actually used by anyone, known or unknown, or that their use was imminent. Is this still within the bounds of First Amendment protections? Within the general outline of the analysis I have just described, I believe the answer is yes.

As an initial matter, let us presume that the instructions are sufficiently specific to constitute detailed and focused instructional assistance, and that the gravity of the potential harm—the use of bombs to kill or injure police, other public officials, or private citizens—is of sufficient gravity to be regulated.[214] If the question of imminence is removed from the analysis, we are then left with the issues of likelihood and intent. It is my contention that these considerations, perhaps acceptable to some as sufficient limitations on governmental power in the off-line world, are in fact unworkable as applied to the most common forms of Internet speech. I would argue that under this analysis, speech available on the Internet that specifically instructs a criminal act will be found, as a matter of architecture, community, and perception, to be inherently dangerous.

First, consider the political reality of perception. Printed bomb-making instructions have circulated nearly unabated in mainstream bookstores for nearly thirty years, yet their publication remains largely unregulated. For instance, in January 2003, I conducted a simple search for *The Anarchist's Handbook*—considered by many to be the "Bible" of armed anarchist resistance—on the website of the most popular online bookseller.[215] The Amazon.com website was extremely helpful. The search produced two results: *The Anarchist Handbook, Vol. 1*[216] and *The Anarchist Handbook 3*.[217] Amazon then suggested that "customers who bought this book also bought" the following five books: *Home Workshop Explosives, Second Edition*;[218] *Poor Man's James Bond*;[219] *Silent Death, Second Edition*; *Ragnar's Action Encyclopedia of Prac-*

214. Although this falls somewhat short of overthrowing the democracy, a goal legitimately ascribable to Anarchists, it seems grave enough to satisfy our hypothetical. At the very least, section 842(p)'s restriction of instructions on the making of weapons of mass destruction would satisfy this requirement.

215. Although the author conducted this search online, most of the titles cited are also readily available from traditional bricks-and-mortar bookstores.

216. ROBERT WELLS, ANARCHIST HANDBOOK (1985).

217. ROBERT WELLS, ANARCHIST HANDBOOK 3 (1992).

218. UNCLE FESTER, HOME WORKSHOP EXPLOSIVES (2d ed. 2002).

219. KURT SAXON, THE POOR MAN'S JAMES BOND (12th ed. 1991).

tical Knowledge and Proven Techniques;[220] and *The Chemistry of Powder and Explosives*.[221] On the same web page, a reader known as "zombie_boy1134" offered his own list of suggested book titles for readers interested in "how to anything . . . for anarchy."[222] That list included books entitled: *Special Forces Operational Techniques*[223] and *Secrets of Methamphetamine Manufacture: Including Recipes for Mda, Ecstasy & Other Psychedelic Amphetamines*.[224] A simple search of the Amazon.com website also revealed that "Uncle Fester," the author of *Secrets of Methamphetamine Manufacture*[225] and *Home Workshop Explosives, Second Edition*,[226] has also published *Practical LSD Manufacture*,[227] *Advanced Techniques of Clandestine Psychedelic & Amphetamine Manufacture*,[228] *Silent Death*,[229] and *Vest Busters*.[230]

220. RAGNAR BENSON, RAGNER'S ACTION ENCYCLOPEDIA OF PRACTICAL KNOWLEDGE AND PROVEN TECHNIQUES (Rev. ed. 1999).

221. TENNY L. DAVIS, THE CHEMISTRY OF POWDER AND EXPLOSIVES (1972).

222. *See* Amazon.com, Listmania! How to anything . . . for anarchy, *at* http://www.amazon.com/exec/obidos/tg/listmania/list-browse/-/278MROYXQZ8IA/ref=cm_aya_av.lm_more/104-2208537-8065548 (last accessed Feb. 9, 2005).

223. U.S. GOVERNMENT, SPECIAL FORCES OPERATIONAL TECHNIQUES (Paladin Press 1980).

224. UNCLE FESTER, SECRETS OF METHAMPHETAMINE MANUFACTURE: INCLUDING RECIPES FOR MDA, ECSTASY & OTHER PSYCHEDELIC AMPHETAMINES (5th ed. 1999). As of February 13, 2005, this and other how-to books from "Uncle Fester" cited *infra* were offered for sale at Amazon.com and other online booksellers.

225. *Id.*

226. *See id.*

227. UNCLE FESTER, PRACTICAL LSD MANUFACTURE (Rev. ed. 1997).

228. UNCLE FESTER, ADVANCED TECHNIQUES OF CLANDESTINE PSYCHEDELIC & AMPHETAMINE MANUFACTURE (1998).

229. UNCLE FESTER & DONALD B. PARKER, SILENT DEATH (2d ed. 1997). Amazon.com touts that "[t]his book details the home or clandestine manufacture of poisonous materials, with an emphasis upon guerrilla war applications. Topics covered in detail include nerve gases, ricin, botulin toxin, and much more. The Aum cult in Tokyo used this book as their lab manual." See Amazon.com's product review at http://www.amazon.com/exec/obidos/tg/detail/-/0970148534/qid=1108329010/sr=1-6/ref=sr_1_6/104-9670174-0185508?v=glance&s=books. Indeed, Steve Preisler, who wrote the book under the name "Uncle Fester," described the book in an interview with CBS news anchor Dan Rather as a "how-to manual of chemical warfare." *Forty-Eight Hours* (CBS television news broadcast, Jan. 30, 2002). Reportedly, the book was found among the research materials belonging to members of the Aum Shinrikyo cult, which used sarin gas to kill twelve people in the Tokyo subway in 1995. *Id.*

230. *See* UNCLE FESTER, VEST BUSTERS (2000). VEST BUSTERS is described as a "concise and readable [book on] the interaction between bullets and body armor." *See* AMAZON.COM, EDITORIAL REVIEW: VEST BUSTERS, *at* http://www.amazon.com/exec/obidos/tg/detail/-/0970148518/qid=1107996200/sr=8-1/ref=sr_8_xs_ap_i1_xgl14/103-7078001-1701460?v=glance&s=books&n=507846 (last accessed Feb. 9, 2005). According to Amazon's editorial review, VEST BUSTERS presents details "of the construction and teflon coating of projectiles suitable to defeat armor;" and "[l]ow profile methods for obtaining teflon resin

If most of the bomb-making information currently available on the Internet has been available in books and other printed materials for decades,[231] why does the availability of these same materials via the Internet[232] result in a legal and political maelstrom? It would seem that the emergence of a new distributive technology has altered the perception of the danger created by the availability of this information. It is not as simple as mere perception, however powerful as that intuitive reaction may be. The analytic tools by which we measure the likelihood of harm, absent the need for imminence, are, I would argue, subsumed by the nature of the distributive network. Here, I suggest two points of concern: First, the near elimination of certain structural and relational frictions[233] in the online environment; and second, the emergence of isolated virtual communities. The same is

. . . along with names and phone numbers of distributors." *Id.* The editor's advice: "Be a victor, not a victim!" *Id.*

231. For more information on the availability and treatment of printed materials, see U.S. DEP'T OF JUSTICE, 1997 REPORT, *supra* note 6, § I(A). *See also supra* note 8 (discussing the availability on both Amazon.com and the Barnes and Noble website, bn.com, of two instruction manuals found in the possession of Oklahoma City bomber Timothy McVeigh). The government itself has made this point. *See* Statement of Special Agent Mark James, *supra* note 22, at 13 ("Publications that at one time were primarily marketed only through counterculture markets and anti-Government conferences are now published in their entirety on the Internet."). The DOJ Report also makes this point. Examining in detail "the extent to which published bombmaking information has facilitated the manufacture and use of explosives in acts of terrorism and other criminal activity," the DOJ discusses six specific cases and numerous reported federal cases—all of which involve weapons instructions obtained from printed materials, as opposed to the Internet. *See supra* notes 20–28.

232. Even in the absence of reliable statistics, it is nevertheless clear that bomb-making instructions are readily available on the Internet for users possessing a modicum of technical expertise. At various times in December 2002 and January 2003, I conducted searches for bomb-making instructions on the Internet using popular commercial search engines www.google.com, www.msn.com, and www.yahoo.com. Each time, I was able to easily find bomb-making instructions, usually reprinted from a popular book on the subject.

233. The term "frictionless," when applied to the Internet, often refers to a business model that imagines near-perfect information, low barriers to entry, and dramatically lower transaction and distribution costs. Most famously, Microsoft CEO Bill Gates has described the Internet as moving us toward a state of "friction-free capitalism," in which near-perfect information, low barriers to entry, and dramatically lower transaction and distribution costs "help[ ] create Adam Smith's ideal marketplace." BILL GATES, BUSINESS @ THE SPEED OF THOUGHT: CHAPTER OVERVIEWS (2004), *at* http://www.microsoft.com/billgates/speedofthought/looking/chapter_5.asp (last accessed Nov. 1, 2004). "In 1995, in *The Road Ahead*, I used the term 'friction-free capitalism' to describe how the Internet was helping create Adam Smith's ideal marketplace in which buyers and sellers can easily find one another without taking much time or spending much money." *Id.* "The Internet is driving down transaction costs and value of distribution. The Web is moving us toward friction-free capitalism." *Id.* The phrase "friction-free capitalism" has been defined by a third-party as "[a]n extremely efficient market in which buyers and sellers can find each other easily, can interact directly, and can perform transactions with only minimal overhead costs." THE WORD SPY, FRICTION-FREE CAPITALISM (1997), *at* http://www.wordspy.com/words/friction-

potentially true of intent, if that standard becomes too reliant on inferences drawn from the content of the speech and its availability.

The concept of "structural" friction is constructed around the architecture of the Internet.[234] The frictionless nature of this architecture, at least in the sense meant here,[235] is manifested primarily in the principle of network design[236]—simple networks, smart applications[237]—that lies at the heart of the Internet as it currently exists. The resulting network can be termed frictionless precisely because it is so simple, with open protocols and a non-discriminatory data transfer system.[238] It is borderless and decentralized, with the potential for unlimited data capacity. As this suggests, digital data is also in a sense frictionless, both in its own right and in its relationship to the network. It is easy to create and manipulate. It is also easily copied, with essentially no degradation in quality. Perhaps most importantly, however, it is easy to access and distribute. This relates, in part, to the nature of the network, which is designed simply to move packets of information without discrimination. The decentralized nature of the network also makes it difficult to exercise external, network-based control over the data once it is released.[239]

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freecapitalism.asp (last accessed Nov. 1, 2004) (using Dell Computers as an example of this business model). This is not, however, the conception of friction to which I refer.

234. Lawrence Lessig, building on the communication-systems work of Yochai Benkler, has described the Internet as a system in three layers. *See* Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1786, 1788–90 (2002). The bottom layer is physical. *See id.* at 1788–89. It is made up of "wires and computers, and wires linking computers." *Id.* This physical layer is controlled by those who own the property in use (i.e., the wires and the computers). *See id.* at 1789. The middle layer is "logical." *Id.* It consists of multiple protocols, or rules that govern the exchange of information across a network, grouped together under the heading TCP/IP. *Id.* The top layer is content—web pages, email, newsgroups, downloadable files, etc.—in the form of digital data. *Id.* at 1789–90.

235. As issues of architecture and data are not the intended focus of the Article, this discussion is sharply limited. For those more interested in these subjects, I would recommend, in addition to the materials cited in note 234 *supra*, the following source: Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1189–93 (1999) (discussing the importance of a layered network architecture and end-to-end design, as critical to any legal analysis of the Internet).

236. Lessig, *supra* note 234, at 1789.

237. As Lessig describes it, "[T]he core of the Internet's design is an ideal called 'end-to-end' (e2e) . . . [which contemplates networks designed] so that intelligence rests in the ends, and the network itself remains simple." *Id.*

238. *See id.* ("The network [is] simple, or 'stupid,' in David Isenberg's sense, and the consequence of stupidity, at least among computers, is the inability to discriminate [on the basis of data content]." (footnotes omitted)).

239. *See* Reno v. ACLU, 521 U.S. 844, 853 (1997) (quoting lower court finding number 86, *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996), which said that "[o]nce a provider posts its content on the Internet, it cannot prevent that content from entering any commu-

What I term "relational" friction refers to the nature of online interactions. This concept is, admittedly, a bit more amorphous and, in many ways, emerges from the lack of structural friction that I have just described. I refer generally, however, to five basic characteristics of online interactions: interactivity, immediacy,[240] anonymity,[241] scope,[242] and permanency.[243] Each mode of Internet communication

nity"). Of course, the absence of external, network-based control should be distinguished from content management tools existing within the data itself.

240. The immediacy of online interaction, although fairly self-explanatory, is amplified by the decentralized nature of the network and the potential loss of control over data. *See, e.g., id.*; *see also* Jason Kay, *Sexuality, Live Without a Net: Regulating Obscenity and Indecency on the Global Network*, 4 S. CAL. INTERDISC. L.J. 355, 385 (1995) (noting that "[t]he Internet is unique as a communications entity due to both the size of its audience and the immediacy of communication between people"). For instance, "[a] full page of English text is about 16,000 bits. A fast modem can move about 57,000 bits in one second." MATISSE ENZER, GLOSSARY OF INTERNET TERMS, *at* http://www.matisse.net/files/glossary.html (last accessed Nov. 1, 2004). A Digital Subscriber Line ("DSL"), as commonly configured, "allows downloads at speeds of up to 1.544 megabits (not megabytes) per second, and uploads at speeds of 128 kilobits per second." *Id.*

241. As Michael Froomkin has observed, "Basically, anything you can do with words and pictures, you can do anonymously on the Internet." A. Michael Froomkin, *Anonymity and Its Enmities*, J. ONLINE L. (1995), *at* http://www.wm.edu/law/publications/jol/95_96/froomkin.html (last accessed Dec. 19, 2004). For an interesting early discussion of anonymous online speech, see Lee Tien, *Who's Afraid of Anonymous Speech? McIntyre and the Internet*, 75 OR. L. REV. 117 (1996). The opportunity for anonymity is a product of both the data and the network. Because Internet communications are digital, "the only identifying marks they carry are information inserted by the sender, the sender's software, or by any intermediaries who may have relayed the message while it was in transit." *See* Froomkin, *supra*, at 415. In its current incarnation, identification by the decentralized network that carries (or "relays") your message can be largely avoided. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 26–28, 217 (Basic Books 1999). Thus, anonymous online speech and interaction remains a viable option, made available by the network architecture, technologies of anonymity, and user choice. *See, e.g.*, Froomkin, *supra*; *see also* Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 574–75 (1998); Mathius Strasser, *Beyond Napster: How the Law Might Respond to a Changing Internet Architecture*, 28 N. KY. L. REV. 660, 707–08 (2001) (describing peer-to-peer architecture, Freenet, and anonymous nodes). For a discussion of the benefits of online anonymous speech, see Tien, *supra*.

242. The scope of the Internet, as I use it here, refers both to raw distribution and to the vast, almost borderless nature of the network. It has been said that the Internet does not respect national borders, or county, city, town, or village borders for that matter. Thus, Internet speech is available—whether by choice, lack of control, or unsolicited delivery—to a multitude of communities, cultures, customs, sensibilities, businesses, and laws. *See* Reno v. ACLU, 521 U.S. 844, 853 (1997) (quoting lower court finding number 86). This alters both the nature of online communication and its impact. It should be remembered, of course, that this too is a choice, architected by network design principles. *See* LESSIG, *supra* note 241, at 217. Lessig states:

> Cyberspace . . . has different architectures. . . . An extraordinary amount of control can be built into the environment that people know there. What data can be collected, what anonymity is possible, what access is granted, what speech will be heard—all these are choices, not "facts." All these are designed, not found.

such as the World Wide Web,[244] bulletin boards,[245] USENET groups,[246] web logs ("blogs"),[247] email,[248] etc.—incorporates these characteristics in different measure.

Id.; *see also* Joseph Kahn, *China Has World's Tightest Internet Censorship, Report Finds*, N.Y. TIMES, Dec. 4, 2002, at A13. Kahn reports that that China was able to "block[ ] up to 50,000 sites at some point in the six-month period" because the Internet, unlike telephones for instance,

> has common checkpoints. All traffic passes through routers that make up the telecommunications backbone here. China blocks all access to many sites, and it has begun selectively filtering content in real time—even as viewers seek access to it—and deleting individual links or Web pages that it finds offensive.

Id.

243. Permanency is a simple concept, but its importance is often overlooked in the context of networked data; with countless computers constantly caching Internet content, data seldom, if ever, disappears. Indeed, it is rather easy to view the Internet as always "on" with data permanently stored on millions of servers and instantly available day or night.

244. According to Matisse Enzer,

> "World Wide Web" (or simply "the Web" for short) is a term frequently used (incorrectly) when referring to "The Internet"[;] WWW has two major meanings:
> First, loosely used: the whole constellation of resources that can be accessed using *Gopher, FTP, http, telnet, USENET, WAIS*, and some other tools.
> Second, the universe of hypertext servers (*http servers*), more commonly called "web servers", which are the servers that serve *web pages* to *web browsers*.

MATISSE ENZER, *supra* note 240.

245. A Bulletin Board System is described as a

> computerized meeting and announcement system that allows people to carry on discussions, upload and download files, and make announcements without the people being connected to the computer at the same time. In the early 1990's there were many thousands (millions?) of BBS's around the world, most are very small, running on a single IBM clone PC with 1 or 2 phone lines. Some are very large and the line between a BBS and a system like AOL gets crossed at some point, but it is not clearly drawn.

Id. Today, "in the United States alone, there are tens of thousands of BBSs." WEBOPEDIA, BULLETIN BOARD SYSTEM, *at* http://www.webopedia.com/TERM/b/bulletin_board_system_BBS.html (last accessed Feb. 15, 2005).

246. USENET is "[a] worldwide bulletin board system that can be accessed through the Internet or through many online services. The USENET contains more than 14,000 forums, called *newsgroups*, that cover every imaginable interest group. It is used daily by millions of people around the world." WEBOPEDIA, USENET, *at* http://www.webopedia.com/TERM/U/USENET.html (last accessed Feb. 15, 2005).

247. As defined:

> A blog is basically a journal that is available on the web. The activity of updating a blog is "blogging" and someone who keeps a blog is a "blogger." Blogs are typically updated daily using software that allows people with little or no technical background to update and maintain the blog. Postings on a blog are almost always arranged in chronological order with the most recent additions featured most prominently.

MATISSE ENZER, *supra* note 240.

248. Email is described as "[m]essages, usually text, sent from one person to another via computer. E-mail can also be sent automatically to a large number of addresses." *Id.*

It is these unique features of Internet connectivity and communication, be they structural or relational, that effectively eliminate certain real-world limitations within the medium. Printed books on bomb-making may reach thousands of people, but their reach is sharply limited by issues of access and incentives including availability, distribution, cost, return, and others. Online bomb-making instructions carry no such limitations. There is little or no cost to create the work, to make it available, or to copy and distribute it free-of-charge to millions of people, all while retaining your own copy. Access is immediate, simultaneous, and anonymous. Those receiving the bomb-making instructions, moreover, may likewise make them available to millions others under the same conditions.

Applied to the likelihood of harm, this absence of limitations is striking. After all, the question is whether the speech at issue is likely to produce lawless action.[249] Apart from the nature of the speech itself, specifically instructing the means of committing a criminal act, and excluding the imminence requirement, this becomes essentially an issue of numbers and probability. Billions of people can access the Internet, millions upon millions of those within the United States. For the most part, everyone who can access the Internet can access your website, and therefore if your website contains bomb-making instructions, those instructions are available to everyone at once with few limitations. Thus, for certain speech, the likelihood analysis is subsumed by the network.

The question of intent presents a similar problem. If we accept the DOJ formulation, there are at least two acceptable tests of intent: First, the knowledge that a particular recipient of the information intends to make improper use of the material; and second, the specific purpose of facilitating criminal conduct by unknown persons. Under either standard, there is a significant risk that the nature of the information will be leveraged against the nature of the network, such that intent will be lost as a limiting principle. Why make bomb-making instructions available if you do not intend their use? And if you make those instructions available to millions of people without limitation, knowing that some will use them for illegal purposes, must you not intend their use for those purposes? Is this legally suspect? Perhaps. But, as a matter of evidence, it is strongly persuasive.

And what about Sherman Austin? He knew that his website was visited by fellow Anarchists, many of whom he knew personally. Austin

249. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969).

knew that some of these readers clashed with police before and would likely do so again at upcoming protests against the International Monetary Fund and World Bank. Austin suggested that the weapons for which he provided instructions might be used in those protests, to thwart police action, free fellow protesters from arrest, and destroy police property. There was no evidence, however, that Austin distributed his information on a targeted basis via email, directed bulletin board postings, or USENET groups. Rather, he posted it on a website for anyone to proactively access. Might this scenario satisfy the intent requirement?

Adopting the DOJ formulation, it appears so. Austin's words might certainly be interpreted as encouraging fellow anarchists to utilize the instructions he provides to create weapons (including explosive devices) to be used against police officers during two particular upcoming protests. Assuming that Austin was aware that particular individuals—fellow Anarchists—visited, read, and utilized his website, that evidence might support a finding that Austin knew that a particular recipient of the information intended to make improper use of it. Even without such knowledge, however, this reading of the facts would seem to provide adequate evidence of Austin's "specific purpose" to facilitate criminal conduct by a class of persons, even if individually unidentified.

The second phenomena to be considered, in addition to structural friction, is the emergence of isolated virtual communities. A full discussion of the effect of the Internet on existing communities, as well as its potential to facilitate new conceptions of community, is well beyond the scope of this Article. Nevertheless, a few words are of assistance to our analysis.

It is important to remember that the Internet is, at its core, simply a network for the transmission of data. That data, or content, takes many forms, each of which incorporates, to varying degrees, interactivity, immediacy, anonymity, permanency, and access restrictions. There is a tendency, however, even among those versed in the technology, to focus sociologically on the World Wide Webcast as a hyperlinked buffet of diverse information.[250] This is the "mass" in mass

250. *See, e.g.*, DAVID WEINBERGER, SMALL PIECES, LOOSELY JOINED: A UNIFIED THEORY OF THE WEB (Perseus 2002). Weingberger explains:

> [T]here is more and more to distract us—more sites to visit, more arguments to jump into, more dirty pictures to download, more pure wastes of time. The fact that the Web is distracting is not an accident. It is the Web's hyperlinked nature to pull our attention here and there. But it is not clear that this represents a weakening of our culture's intellectual powers, a lack of focus. . . . Maybe set free

media, the vision towards which corporate content, service, and bandwidth providers will necessarily gravitate. Yet, this perception only scratches the surface. Other end-user data platforms, such as email, bulletin boards, and USENET groups, hold the potential for deepening one's online relationships, providing a more focused, tightly-knit space for communication. Here is where we find insularity.[251]

Internet technology, although potentially a powerful tool of enlightenment, also provides the means of limiting one's experiences, filtering out the objectionable and permitting only the agreeable. Beyond the dictates of physical proximity—a real world "friction" that limits your ability to structure your interactions—lie the tools to define, search for, and discover your own community, not targeted *at* you, but *by* you.[252] At this point, the same technology that opened the

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> in a field of abundance, our hunger moves us from three meals a day to day-long grazing. . . . Perhaps the Web isn't shortening our attention span. Perhaps the world is just getting more interesting.

Id. at 69.

251. In his recent book, *Republic.com*, Professor Cass Sunstein expresses growing concern that the Internet, far from expanding one's exposure to diverse realities, instead contributes to fragmentation and isolation. *See* CASS SUNSTEIN, REPUBLIC.COM (Princeton 2001) (expressing a concern that that such isolation—the ability to pre-select the information and experiences to which you are exposed, and filter out the undesirable—will undermine the common experiences upon which democratic values and systems thrive). The result: Insular "'echo chambers' of our own opinions, magnifying and confirming our inclinations and resulting in a deeply polarized society." Anupam Chander, *Whose Republic?*, 69 U. CHI. L. REV. 1479, 1480 (2002) (reviewing CASS SUNSTEIN, REPUBLIC.COM (2001)). Sunstein's vision, although embraced by some, has generally been rejected as failing to recognize the Internet's scope of access and capacity for discovery. *See generally* James Fallows, *He's Got Mail*, N. Y. REV. BOOKS, Mar. 14, 2002, *at* http://www.nybooks.com/articles/15180 (collecting and discussing various critical reviews of Republic.com) (last accessed Nov. 1, 2004). In the face of such criticism, Sunstein was moved to publish a response in which he appeared to recast, and perhaps reject, his original argument. Restating his contention—"The Internet is bad for democracy, because it is reducing common experiences and producing a situation in which people live in echo chambers of their own design" —Sunstein then went on to reject it outright: "I do not endorse [this] claim. I believe that [it] is basically wrong, because the Internet is allowing millions of people to expand their horizons and to encounter new worlds of topics and ideas." *Id.* (quoting Sunstein's response to the BOSTON REVIEW). Thus, what might have embodied a bold statement about the nature of Internet "community," appears abandoned.

252. Try this experiment. Assume that you are angry about globalization—it is draining jobs from the United States, exploiting workers in foreign countries, and ruining the environment. Through mainstream network news, you hear that negotiations towards an agreement creating a free-trade zone across the Americas ("Free Trade Area of the Americas" or "FTAA") are entering their final phase. You want more information, so you go to www.google.com and search for "FTAA." The first entry in your search results is a web page headlined "Stop the FTAA!" That hyperlink leads you to a web page providing information on FTAA opposition and plans to demonstrate at the latest round of negotiations in

world can just as quickly close it. Certain end-user platforms are intentionally structured to facilitate limitation. The fact that a particular group of individuals uses a global network to trade data packets does not necessarily create openness. Indeed, it is the ability to tag that data, define its content, and structure its dissemination that creates isolation. A single anarchist may at first employ Internet technology as a tool of exploration, through which he discovers other Anarchists from around the country who share his views—they connect, they bond, they create community. As these relationships deepen, however, that same Internet technology becomes a tool of exclusion, lending an ability to self-define to the tendency to do so—they retreat, they support, they incite, they embolden. They act?

Indeed, a compelling argument can be made that the Internet facilitates the creation of smaller communities comprised of individuals who are isolated from society at large because of a particular trait and from one another by physical space and difficulties of recognition. Specifically, the Internet provides the means of connecting individuals with concealed,[253] marginalized identities (ideological, sexual,

Miami. *See* STOP THE FTAA *at* http://www.stopftaa.org (last accessed Feb. 10, 2005). It also invites you to "Plug into the indymedia matrix for FTAA Miami! . . . a collective of independent media organizations and thousands of journalists offering grassroots, non-corporate coverage," by clicking on another hyperlink. *Id.* This leads you to the Independent Media Center's (Indymedia) FTAA website, see http://www.ftaaimc.org/en/index.shtml (last accessed Nov. 1 2004), and then, via hyperlink, to the Indymedia home page, see http://www.indymedia.org. You live in a small town outside of Los Angeles, so you click on the hyperlink to Los Angeles Independent Media. *See* http://la.indymedia.org (last accessed Nov. 1, 2004). On the left-hand side of the web page is a hyperlink to "Raise the Fist." *Id.* This leads you to a series of stories about Sherman Austin, see http://la.indymedia.org/features/Raise_The_Fist (last accessed Nov. 1, 2004), and eventually his website and (formerly) bomb-making information, see http://www.raisethefist.com/index1.html (last accessed Nov. 1, 2004). Thus far your journey might be characterized as one of discovery and exposure, but is that a realistic stopping point? Intrigued by Austin's information on anarchism, you return to www.google.com to search for more information on "anarchy." The Google "Groups" section lists five anarchist message boards. The "Web" search returns links to multiple anarchist organizations and individuals. The "Directory" section does the same. You discover an entire community that shares your view of globalization. Do you ever go back to www.google.com, re-run your search for the "FTAA," and click on that second search result—the official website of the FTAA? *See* http://www.ftaa-alca.org/alca_e.asp (last accessed Nov. 1, 2004). Instead, bulletin boards lead to USENET groups, which lead to email; the circle becomes tighter.

253. For a comparison to conspicuously marginalized individuals, *see, e.g.*, obesity, race, or visible handicap. *See* Katelyn Y. A. McKenna & John A. Bargh, *Coming Out in the Age of the Internet: Identity "Demarginalization" Through Virtual Group Participation*, 75 J. PERSONALITY & SOC. PSYCH. 681 (1998).

and the like), promoting approval of these identities and self-esteem grounded in social acceptance.[254] Indeed,

> the emergence of virtual groups and internet newsgroups enable this group of concealed marginalized persons to connect with their similar others, resulting in identity demarginalization—a process by which participation in a group of similar others creates positive changes in one's identity, where there was formerly only isolation and feelings of being different.[255]

Such approval, not only of self, but of ideas, beliefs, and practices that might be characterized as socially unacceptable, creates a perception of danger—small groups of like-minded individuals supporting one another in deviant behavior.

The effect of this phenomena on the specifics of our analysis is admittedly difficult to quantify, but nonetheless real. It plays into our fears and preconceptions. Eric Harris and Dylan Klebold were social outcasts. They found solace and support in an online community of likewise disaffected individuals, connected to people and information otherwise inaccessible. They found bomb-making materials and used them to kill their classmates. Most of their online activities were practically untraceable. Foreign terrorists find support, both material and spiritual, in online communities. Websites extol their "sacrifice" and encourage others. Instant messaging provides untraceable communication. Detailed blueprints of United States landmarks are sent by email, along with instructions on how to make the bomb to destroy them. These are the stories that the media tells us.

These insular communities, and the perceptions they engender, are potentially powerful influences on the instructional speech analysis. As regards consideration of the dominant factors of that analysis, likelihood of harm and intent, this might be seen as the flip-side of

254. *Id.*

255. *See id.* The authors state:

> Internet newsgroups allow individuals to interact with others in a relatively anonymous fashion and thereby provide individuals with concealable stigmatized identities a place to belong not otherwise available. Thus, membership in these groups should become an important part of identity. Study 1 found that members of newsgroups dealing with marginalized-concealable identities modified their newsgroup behavior on the basis of reactions of other members, unlike members of marginalized-conspicuous or mainstream newsgroups. This increase in identity importance from newsgroup participation was shown in both Study 2 (marginalized sexual identities) and Report 3 (marginalized ideological identities) to lead to greater self-acceptance, as well as coming out about the secret identity to family and friends. Results supported the view that Internet groups obey general principles of social group functioning and have real-life consequences for the individual.

Id.

the "scope" argument discussed above. There, likelihood becomes an issue of raw probability based on the breadth of exposure, while evidence of intent is derived from one's willingness to provide "dangerous" information to a massive, undifferentiated audience (some portion of who undoubtedly harbor malicious purposes). In the context of isolated virtual communities, however, it is the opposite—namely the limited and insular nature of the group—that creates evidence of both likelihood of harm and intent. Most importantly, the individual providing the bomb-making instructions often knows important facts about those receiving the information, their political beliefs, past actions, intentions, and the like. The provider may also know that the community itself will support and encourage the use of those instructions in the commission of criminal acts. Why make bomb-making instructions available to individuals that you know to be inclined to use them? Why participate in a community that supports such a use? As a practical matter, these rhetorical questions can certainly by persuasive.

Conclusion

In their famous dissents from *Abrams* and *Gitlow*, Justices Holmes and Brandeis repudiate the "bad tendency" test set forth in *Schenck*. That test allowed the proscription of speech that has the natural tendency and probable effect of bringing about a substantive evil that the government has the right to prevent. In *Dennis*, that test was cleverly described, all claims to the contrary, such that tendency became a measure of the speech itself and probability became a question of numbers. The more grave the harm, the fewer adherents required. Justices Holmes and Brandeis understood the potential injury that this formulation posed to First Amendment rights. The very speech most worthy of protection—dissident speech, political expression, democratic discourse—if spoken at a time of perceived vulnerability, might well be characterized as the most dangerous to the republic. That characterization, defined by legislative fiat, could control the constitutional analysis.

As we wait for the Supreme Court to address the constitutional treatment of instructional speech, we sit on the precipice of a return, perhaps unintentional, to the "bad tendency" test. For speech that specifically instructs a sufficiently harmful act, abstract dangerousness is presumed, limited only by the likelihood of the resulting action and divorced from temporal connection. The gravity of the evil to be prevented remains a commanding measure of danger. The likelihood of

such harm, freed from imminence, becomes a question of context. That context is skewed by the very nature of the Internet, such that an analysis of the likelihood of the harm becomes conclusory. The factual question of intent is overwhelmed by the convergence of these considerations. Speech becomes regulated as speech alone—just as Justices Holmes and Brandeis feared.

In *Whitney v. California*,[256] Justice Brandeis warned that context remained the essential touchstone for the judicial restraint of government censorship:

> [A] legislative declaration [of public danger] . . . does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution . . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether . . . the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.[257]

But in the scenario I have described, with the requirement of imminence elided and the questions of contextual dangerousness, likelihood of harm, and intent subsumed in the very nature of the frictionless network, the legislative dictate of dangerousness emerges as authoritative. Restrictions on online speech become nearly self-validating.

It is precisely this sort of reactionary outcome—justified on the basis of perceived threats to traditional power structures—that led Justices Holmes, Brandeis, and others to repudiate and reform the public danger doctrine. In crafting an analysis that incorporates contextual factors, *Brandenburg* and its progeny preserve a judicial check on government repression of dissident speech. With those contextual factors effectively purged from the analysis, however, government is left to define a "public danger" as most advantageous to its maintenance of authority. The likelihood of such an outcome, particularly in the context of online speech, is deeply troubling. For many of us, the beauty of open Internet architecture is most profoundly realized in free expression. It would be anathema to use the very core of that ideal as the foundation for analytical validation of greater governmental control.

256. 274 U.S. 357 (1927).

257. *Id.* at 378–79 (Brandeis, J., concurring).