1997

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Regulation of the Internet: The Application of Established Constitutional Law to Dangerous Electronic Communication

BY ADAM R. KEGLEY*

INTRODUCTION

The purpose of this Note is not to address generally the recent attempts to regulate the Internet. The current legal literature is replete with articles concerning nearly all aspects of the Internet and other computer-related legal issues: general First Amendment discussion; personal jurisdiction; domestic regulation; international regulation; on-line liability; "cashless commerce;" discovery; libel; theft of

* J.D. expected 1998, University of Kentucky.


8 See Jeremy Stone Weber, Note, Defining Cyberlibel: A First Amendment
computer files;\textsuperscript{9} employer access to employee e-mail;\textsuperscript{10} encryption and privacy;\textsuperscript{11} marketing of pornography on the Internet;\textsuperscript{12} and the battle surrounding the Communications Decency Act.\textsuperscript{13} Rather, this Note seeks


\textsuperscript{10} See Laure Thomas Lee, \textit{Watch Your E-Mail! Employee E-Mail Monitoring and Privacy Law in the Age of the “Electronic Sweatshop,”} 28 J. MARSHALL L. REV 139 (1994); Julia Turner Baumhart, \textit{The Employer's Right to Read Employee E-mail: Protecting Property or Personal Prying?}, 8 LAB. LAW 923 (1992) (student-written work).


\textsuperscript{13} Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133; see also Electronic Frontier Foundation Homepage (visited Mar. 1, 1997) <http://www.eff.org/pub/Censorship/HTML/hot.html> (includes the latest information on debates between scholars and the current status of the Communi-
generally to address the issue of dangerous or violent speech on the Internet. Specifically, the Note argues that established case law on the constitutional protection of speech applies to proposals to criminalize the publication of bomb-making information on the Internet.

Part I of the Note examines the characteristics of the Internet itself, with an emphasis on those characteristics that have been identified as being essential to the assertion that the Internet is a revolutionary communications medium. Part II considers Brandenburg v. Ohio, United States v. Progressive, Inc., and Rice v. Paladin Enterprises, Inc. for their treatment of the constitutional implications of attempts to restrict speech or impose liability for dangerous or violent speech. Part III examines an amendment to the United States Code proposed by Senator Dianne Feinstein that would have criminalized the teaching of bomb-making techniques and the subcommittee testimony preceding its adoption by the Senate. The Note seeks to demonstrate that the very existence of this amendment was a response to a perceived threat that in fact does not exist. Part IV questions Cass Sunstein’s assertion that “[w]hen messages advocating murderous violence flow to large numbers of people, the calculus changes.” This Note concludes that the Internet is not fundamentally unlike other mass media and that existing laws addressing the publication of bomb-making materials are readily applicable to the evolving medium.

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14 See infra notes 22-42 and accompanying text.
15 See infra notes 44-84 and accompanying text.
19 See infra notes 85-106 and accompanying text.
20 See infra notes 107-34 and accompanying text.
21 Cass R. Sunstein, Is Violent Speech a Right?, 22 AM. PROSPECT 34, 36 (1995). This question has been proposed in various formulations, such as: “Suppose a terrorist posts on the Internet instructions on how to make out of common household materials a bomb that is sufficiently powerful to destroy a large building. Can this be prohibited?” GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1170 (3d ed. 1996) (Sunstein is a co-author). Sunstein recognizes that, through the Internet, people may find large audiences for speech advocating murderous violence. He then asserts that this increased potential mass audience might justify a stricter application of existing law, or creation of new law, to proscribe messages “advocating the illegal use of force to kill people.” Sunstein, supra at 36.
I. CHARACTERISTICS OF THE INTERNET AND
THE DIFFERING CONCEPTUALIZATIONS OF THE MEDIUM

Physically, the Internet is nothing more than a network of computer networks.\(^{22}\) It was created in 1969 as a Department of Defense experiment designed to maintain stable networked links between computers in the event of a nuclear attack.\(^{23}\) Individual computers are linked together through telephone lines and they communicate via modems. Within this network, some computers are those of individual users; other computers function as servers, or high-capacity computers that store larger bundles of information. Servers are maintained by individuals, companies, and institutions. Internet service providers lease dedicated phone lines from companies that in turn lease lines from telecommunications carriers. Thus, when a user connects to the Internet, his or her call is made directly to an Internet service provider that maintains a server that is connected to other servers through telephone lines linked and routed by a series of switches.\(^{24}\) The result is that an individual can obtain Internet access for a nominal monthly fee, or without charge through services provided by many universities, that will enable him or her to communicate quickly and efficiently with other computers around the world.

The typical services to which Internet users have access include e-mail,\(^{25}\) newsgroups,\(^{26}\) chat rooms,\(^{27}\) and homepages.\(^{28}\) These services


\(^{23}\) See Knoll, supra note 4, at 276 (citing ED KROL, THE LAWYER'S GUIDE TO THE INTERNET 11-18 (1995)).

\(^{24}\) For a more complete, yet basic, discussion, see BILL GATES, THE ROAD AHEAD 91-111 (1995).

\(^{25}\) E-mail is an electronic mailbox with a unique address for each user that is stored on a service provider's mail server. See BRYAN PFaffenberger, NETSCAPE NAVIGATOR 2.0: SURFING THE WEB AND EXPLORING THE INTERNET 277 (1996).

\(^{26}\) Newsgroups are sites of discussion on a variety of subjects. Users contribute messages to particular newsgroups for all other subscribers to read. There are over 15,000 different newsgroups. See id. at 345.

\(^{27}\) Chatrooms are similar to newsgroups except that users communicate through real time messages. See id. at 305.

\(^{28}\) A homepage is a World Wide Web document that is a home for a certain type of information. Individuals, corporations, and schools, among other entities,
have become well-known, even to those who have never used the Internet, and share basic attributes that are relevant to the scope of this Note. Essentially, such services allow individuals or groups to communicate with other individuals or groups without the restrictions of geographical boundaries, postage, long-distance charges, or editorial intervention. Putting physical and technical differences between these services aside, they all generally allow Internet users to transmit letters, books, or "real-time" messages to other users with relative anonymity. Basically, this communication is nothing more than the reading of written words on a computer screen with no physical contact. The process is similar to posting a message, with sound and still or moving pictures, on thousands of bulletin boards around the world, possibly for no one or for millions of people to read. Similarly, individuals now have the ability to send thousands of messages to thousands of addresses culled from an enormous address book. Alternatively, one may leave his or her ramblings posted at just one location waiting to be discovered by whomever happens to stumble upon the message.

Mike Goodwin has said there are three important characteristics that make the Internet unique: (1) it is possible to achieve "many-to-many communication;" (2) it is possible to reach large audiences at very low cost; and (3) it is "possible to reach your audience without editorial intermediation." Goodwin asserts that the Internet is the first mass medium to combine the experience of a private telephone call with the scope of broadcast or print media. The implications of such assertions are unclear except to illustrate the fact that, through the Internet, one person may reach a potential audience of millions without the investment of capital required of a broadcast company or a publisher. However, the word potential cannot be emphasized strongly enough; although one may "publish" a work on the Internet without expense, that work must still be "discovered" by a reader. It is possible that publication may go complete-

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29 Mike Goodwin is general counsel for the Electronic Frontier Foundation, a California-based group dedicated to the promotion of civil liberties in cyberspace. Its homepage is located at <http://www.eff.org> (visited Mar. 1, 1997).


31 See id.

32 Id. at 551.

33 See id. at 550.
ly unnoticed because, as Goodwin indicates, the Internet is not intrusive in the same manner as television or radio. Communication on the Internet does not just pour forth from a user's screen, rather "[t]he choices of content are user-driven. in fact it is the most user-driven technology since the book."34

The Internet has evolved to the point where it has become a sprawling and arguably boundless communications medium, limited only by access to a computer and a telephone line. Currently, approximately eighteen million Americans and Canadians have access to the Internet.35 In April 1995, it was estimated that the then-current forty million worldwide users of the Internet would reach over two hundred million by 1999.36 As the total number of users has continued to increase at a phenomenal rate, the Internet itself has steadily grown at a comparable pace. In July 1995, it was estimated that "the Web is growing about 50 percent a month, with the number of Web sites doubling every 53 days."37 The accuracy of such figures is unreliable because of the Internet's explosive growth and the decentralized nature of the medium. In fact, companies attempting to gather this information have created a niche market for themselves.38 Nevertheless, when considered merely for illustrative purposes, these figures support the assertion that the Internet has become, and will continue to be, a pervasive medium.

The growth of the Internet has precipitated extreme reactions, based primarily upon different conceptualizations of the medium itself. The Internet is perceived by nearly everyone as a medium with the potential to change fundamentally the way we provide education and entertainment, conduct business, and communicate among ourselves. For some, these opportunities are viewed as being positive: helping to create a better-educated population, a thriving industry of online commercial transactions, and the breakdown of racial and ethnic distinctions.39

34 Id. at 555.
37 Id.
38 For example, one such company, International Data Corporation, advertises itself to be "the world's leading provider of information technology data, analysis, and consulting." International Data Corporation (visited Nov. 3, 1996) <http://www.idcresearch.com>
39 In a speech given on September 21, 1995, President Clinton stated:
While these goals are laudable, other people fear that such promise will not be realized without a cost. The Internet is also perceived as a vehicle conducive to the wide-spread promotion of child pornography, fraud, copyright infringement, gambling, and other crimes. The fact that the Internet is so pervasive, decentralized, and unregulated is sometimes seen as a threat that should be curtailed. For instance:

On April 27th [1995] the US Congress held a hearing on terrorism in the wake of the bomb that killed 167 people in a federal building in Oklahoma. Senator Edward Kennedy waved a 76-page “Terrorist’s Handbook” that his staff had downloaded from the Internet, and explained that it contained instructions for building different types of bombs, including the ammonium nitrate bomb used in Oklahoma: “Right now we’re considering a telecommunications reform bill in the Senate that is trying to do something about porn on the Internet — we should do something about this terrorist information, too.”

Senator Dianne Feinstein did attempt to do something about the “terrorist information” on the Internet to which Senator Kennedy referred. Feinstein proposed an amendment to the United States Code section governing the importation, manufacture, distribution, and storage of explosive materials. Although the amendment did not specifically refer to the Internet, Feinstein clearly was motivated by her conception of the

“By the end of this school year, every school in California — 12,000 of them — will have access to the Internet and its vast world of knowledge. By the end of this school year, fully 20 percent of California’s classrooms will be connected for computers. I want to get the children of America hooked on education through computers.

“Computers give us a world where people are judged not by the color of their skin or their gender or their family’s income, but by their minds — how well they can express themselves on those screens. If we can teach our children these values, they can learn to respect themselves and each other. Then we can be certain we’ll have stronger families, stronger communities, and a stronger America in the 21st century.”


Internet as a dangerous medium. Feinstein's position will be explained more completely in Part III.

II. Restricting the Dissemination of Violent or Dangerous Information

A. Brandenburg v. Ohio: Free Speech and Violence Generally

In Brandenburg v. Ohio, the Supreme Court interpreted the First Amendment as protecting violent speech to the extent that such speech was neither intended nor likely to provoke imminent lawless action. Brandenburg was an active Ku Klux Klan member convicted under an Ohio statute that criminalized the advocacy of violence as a means of achieving political reform and also prohibited groups advocating political violence from meeting. Brandenburg attended a Klan rally and gave a brief speech while other Klan members, some of whom were armed, circled a burning cross. Brandenburg was filmed stating: "'We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.'" This was the most explicit statement Brandenburg made, and he did not incite any immediate violent action in response to his statements.

Quoting Noto v. United States the Court stated: "'the mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.'" The Court went on to declare the Ohio statute unconstitutional because it failed to distinguish between speech that merely advocated violence and speech that fueled violence. "A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments." The methodology of Brandenburg is clear; it is necessary to consider the nature of the speech, the intent of the speaker, and the

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42 See infra notes 100-06 and accompanying text.
43 See infra notes 85-106 and accompanying text.
45 See id. at 445.
46 See id.
47 Id. at 446.
48 Id. at 448 (quoting Noto v. United States, 367 U.S. 290, 297-98 (1961)) (citations omitted).
49 Id.
context in which he or she is speaking. Brandenburg, therefore, establishes the rule for the regulation of dangerous speech: speech advocating violence may be proscribed if it is intended to provoke imminent illegal action that is likely to occur.\(^5\) The question for this Note is whether the publication of bomb-making instructions on the Internet is the sort of dangerous speech that fails the Brandenburg test because of the imminent danger of ensuing terrorism.

**B. United States v Progressive, Inc.** Free Speech and National Security Considerations

Factually, United States v. Progressive, Inc.\(^5\) bears a striking resemblance to the question posed by this Note.\(^5\) That case arose

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\(^5\) See id. at 447 The intimacy and level of emotion exchanged between parties in a face-to-face confrontation appear to be critical in satisfying the requirement that speech must be intended to provoke imminent illegal action that is likely to occur. In other words, incitement arguably requires an action component that is possible only in a face-to-face communication. Although communication via the Internet, even "real time" in a chat room, is arguably more immediate than publication, such communication is fundamentally distinct from face-to-face interaction.

Justice Douglas' concurrence further illustrates the distinction between speech and action. According to Douglas, "[t]he line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts." Id. at 456 (Douglas J., concurring). Under Douglas' definition it is difficult to imagine how communication over the Internet—that fundamentally lacks face-to-face interaction—could ever be classified as action rather than speech.


\(^5\) While the Progressive case is similar on the facts, its legal posture is dramatically different from Brandenburg. Rather than seeking criminal punishment for dangerous speech after the fact as in Brandenburg, the government, in Progressive, sought to suppress dangerous speech in advance. In general, in a prior restraint case such as Progressive, the burden on the government is even heavier than in a case like Brandenburg. In addition to Progressive, New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (the Pentagon Papers case) is the other famous prior restraint case. While the Progressive court was willing to enjoin the magazine's publication of H-bomb plans, the Pentagon Papers Court refused to enjoin the publication of classified materials relating to the United States' involvement in the Vietnam War.

The intricacies of prior restraint law are beyond the scope of this Note; however, it must be acknowledged that willingness to enjoin the publication of
because in 1979, ten years after Brandenburg, Howard Morland wrote an article entitled *The H-Bomb Secret: How We Got It — Why We're Telling It* for publication in the *Progressive*. Morland culled information from public sources for the article, intending to demystify the United States' nuclear weapons program. As *Progressive* editor Erwin Knoll stated: “Many people believed — and still believe — that there is an ‘H-Bomb secret’ that can be written down on the back of an envelope (or in a magazine article).” According to Knoll, such a conception was ridiculous. Morland’s article attempted to demonstrate that the United States’ development of the bomb was such a monumental and expensive project that only major governments were equipped for such an undertaking. Morland also sought to prove that such a “secret” was in fact a myth and “[t]he basics of nuclear fission, and in some cases the

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“dangerous” material is quite different from the decision to punish an individual for publishing that same information. For a discussion of prior restraint issues, the Feinstein amendment, and bomb manuals on the Internet, see Eric B. Easton, *Closing the Barn Door After the Genie Is Out of the Bag: Recognizing a “Futility Principle” in First Amendment Jurisprudence*, 45 DePaul L. Rev. 1 (1995). Professor Easton considers such issues in terms of a “futility principle,” which he describes by stating: “[T]he First Amendment imposes a presumption against the suppression of speech when suppression would be futile. Suppression is futile when the speech is available to the same audience through some other medium or at some other place.” Id. at 6.

Additionally, both the *Progressive* and the *Pentagon Papers* cases raise issues concerning the source of “dangerous” information as grounds for suppression, namely the misappropriation of government secrets and threats to national security. The misappropriation and national security issues are not addressed in this Note. In fact, given the publication of the *Blaster’s Handbook* (in which ammonium nitrate/fuel oil explosives are described) by the Department of Agriculture, the government could not plausibly argue that bomb-making instructions represent classified information or a threat to national security. See *The Availability of Bomb-Making Information on the Internet: Hearing Before the Subcomm. on Terrorism, Technology, and Government Information of the Senate Comm. on the Judiciary*, 104th Cong. 42 (1995), available in LEXIS, Legis. Library, CNGTST File, *Hearing on Mayhem Manuals and the Internet* [hereinafter *Capitol Hill Hearing Testimony*] (statement of Frank Tuerkheimer, Professor, University of Wisconsin Law School; former United States Attorney).

55 See id.
configuration of the bomb, were known to thousands of people around
the world and could be found in undergraduate physics texts, encyclope-
dias, and documents declassified long ago by the U.S. Government. Nevertheless, the Progressive was enjoined for "six months and nineteen
days" from publishing the article.  

Judge Robert W Warren, the federal judge who heard the Progressive case, stated that "the question before this Court involves a clash between allegedly vital security interests of the United States and the competing constitutional doctrine against prior restraint in publication." The government asserted that, if published, Morland's article would likely violate two sections of the Atomic Energy Act "prohibit[ing] anyone from communicating, transmitting or disclosing any restricted data to any person 'with reason to believe such data will be utilized to injure the United States or to secure an advantage to any foreign nation.'" On this basis, the government sought to enjoin the Progressive from publishing Morland's article.

Judge Warren based his decision to grant the injunction on Near v. Minnesota, in which the Supreme Court determined that prior restraint was justified to restrict the communication of troop transport dates during a time of war. Warren concluded that the publication of Morland's article was analogous to such publication. According to Warren, "[n]ow war by foot soldiers has been replaced in large part by war by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war could be commenced."

In his evaluation of the national security and First Amendment values at stake, Judge Warren's reasoning was motivated by his explicit concern that the price for a mistake in the case could be fatal. Warren stated: "The case at bar is so difficult precisely because the consequences of error involve human life itself and on such an awesome scale." It was

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56 Id. at 706-07 (citations omitted).
57 Id. at 705.
58 Id. at 991.
59 Id. at 994 (quoting § 2274 of the Atomic Energy Act).
60 Near v Minnesota, 283 U.S. 697 (1931).
61 See Progressive, 467 F Supp. at 992 (citing Near, 283 U.S. at 716).
62 See id. at 996.
63 Id.
64 Id. at 995. Warren also wrote: "Faced with a stark choice between upholding the right to continued life and the right to freedom of the press, most jurists would have no difficulty in opting for the chance to continue to breathe and function as they work to achieve perfect freedom of expression." Id.
also reported that Warren said he wanted "to think a long hard time before [giving] a hydrogen bomb to Idi Amin." While he focused on the drastic repercussions of a mistake in the case, Warren failed to consider the lack of immediacy of the potential threat. As one commentator noted, "Warren must have understood the lack of immediacy, but he did not respond." For several reasons the Progressive case does not answer the question posed in this Note. First, the case involved the revelation of national security information, arguably in violation of the Atomic Energy Act. Second, the case revolved around prior restraint rather than punishment after the fact. Third, Judge Warren misapplied Brandenburg by treating the possibility of nuclear proliferation as a sufficiently imminent threat.

C. Rice v Paladin Enterprises, Inc. Free Speech and Murder Manuals

This Note asks whether the government could constitutionally criminalize the posting of bomb-making instructions on the Internet on the grounds that terrorists, or other criminals, might use those directions to make a bomb. In Rice v. Paladin Enterprises, Inc., a federal district court considered whether a publisher, Paladin, could be held civilly liable for a murder committed according to techniques described in the publisher's books. Obviously, Paladin is similar to the question posed by this Note, but the case does not resolve the basic dilemma: the Paladin case involved a wrongful death suit brought by survivors of a family murdered by an individual who had purchased two of Paladin's books. While the case was civil rather than criminal, the court correctly applied the Brandenburg test, concluded that Paladin was protected by the First Amendment, and granted summary judgment in Paladin's

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68 See id. at 838.
69 See id. at 848.
favor. The facts of this case are tragic, bizarre, extreme, and particularly relevant to this Note; therefore, they will be conveyed in detail.

In January 1992, James Perry responded to an advertisement and purchased the books Hit Man: A Technical Manual for Independent Contractors and How to Make a Disposable Silencer, Vol. II from Paladin. At some point, Perry conspired with Lawrence Horn to murder Horn’s ex-wife and son. On March 3, 1993, Perry did murder Horn’s ex-wife, Horn’s son, and the son’s nurse by following Hit Man to the letter. Perry used the specific rifle recommended by Hit Man; he altered the rifle, both before and after the murders, in the manner described by the book; he followed instructions on how to construct

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70 Id. at 849.
71 See id. at 838. In its catalog, Paladin described Rex Feral, the author of Hit Man, as follows:

"Rex Feral kills for hire. Some consider him a criminal. Others think him a hero. In truth, he is a lethal weapon aimed at those he hunts. He is a last recourse in these times when laws are so twisted that justice goes unserved. He is a man who feels no twinge of guilt at doing his job. He is a professional killer.

"Learn how a pro gets assignments, creates a false identity, makes a disposable silencer, leaves the scene without a trace, watches his mark unobserved and more. Feral reveals how to get in, do the job and get out without getting caught. For academic study only."

Id. (quoting Paladin’s mail order catalog).
72 See id. at 839
73 See id.
74 See id. Hit Man recommends the AR-7.
"What other basic equipment will the beginner need as essential tools of his trade? [an] AR-7 rifle. The AR-7 rifle is recommended because it is both inexpensive and accurate. The barrel breaks down for storage inside the stock with the clip. It is lightweight and easy to carry or conceal when disassembled."

Id. (quoting REX FERAL, HIT MAN: A TECHNICAL MANUAL FOR INDEPENDENT CONTRACTORS 21, 22 (1983)).
75 See Rice, 940 F Supp. at 839. Hit Man describes this procedure as follows:

"The AR-7 has a serial number stamped on the case, just above the clip port. This number should be completely drilled out. The hole left will be unsightly but will not interfere with the working mechanism of the gun or the clip feed. Use a rat-tail file, alter the gun barrel, the shell chamber, the loading ramp, the firing pin and the ejector pin. Each one of these items leaves its own definite mark and impression on the,
a silencer; and he shot his victims three times in the eyes from a distance of three feet, as recommended.

Although advertising that *Hit Man* was to be used "[f]or academic study only," Paladin conceded that criminals, in addition to individuals seeking entertainment and education, were part of the intended audience for its books. As the court noted:

Paladin engaged in a marketing strategy intended to attract and assist criminals and would-be criminals who desire information and instructions on how to commit crimes. In publishing, marketing, advertising and distributing *Hit Man* and *Silencers*, Paladin 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.

shell casing, which if any shells happened to be left behind, can be matched up to the gun under a microscope in a police laboratory. Of primary importance now too, is changing the rifling of the murder weapon. This should be done even before you leave the crime scene. That way, even if you get picked up or stopped with the weapon in your possession, its ballistics will not match the bullets you left behind in the mark."

*Id.* at 839-40 (quoting *Hit Man*, supra note 74, at 23, 25, 105).

76 *Id.* at 839. Silencer instructions were written as follows:

"The directions and photographs that follow show in explicit detail how to construct a silencer for a Ruger 10/22 rifle. The same directions can be followed successfully to construct a silencer for any weapon, with only the size of the drill rod used for alignment changed to fit the inside dimension of the barrel."

*Id.* (quoting *Hit Man*, supra note 74, at 39).

77 *Id. Hit Man* advises:

"Close kills are by far preferred to shots fired over a long distance. You will need to know beyond any doubt that the desired result has been achieved. When using a small caliber weapon like the 22, it is best to shoot from a distance of three to six feet. You will not want to be at point blank range to avoid having the victim’s blood splatter you or your clothing. At least three shots should be fired to insure quick and sure death — aim for the head — preferably the eye sockets if you are a sharpshooter."

*Id.* (quoting *Hit Man*, supra note 74, at 24).

78 *Id.* at 838 (quoting Paladin's mail order catalog). *See supra* note 71.

79 *Rice*, 940 F Supp. at 840.
Despite the fact that Perry’s actions closely followed the text of *Hit Man* and that Paladin knew that criminals and would-be criminals would read its books for instruction, the court granted summary judgment for Paladin.\(^8\)

The court concluded that *Brandenburg* set the appropriate standard for consideration of the First Amendment issue and stated that the *Brandenburg* standard “is not inherently limited to political speech cases.”\(^9\) Paladin’s publication of *Hit Man* was protected for three reasons: (1) Paladin’s knowledge of the potential purchasers of its books was irrelevant; (2) Paladin did not intend that imminent lawless activity result from the purchase of its books; and (3) although *Hit Man* is “morally repugnant, it does not constitute incitement or ‘a call to action.’”\(^8\) “Nothing in the book says ‘go out and commit murder now!’ Instead, the book seems to say, in so many words, ‘if you want to be a hit man this is what you need to do.’ This is advocacy, not incitement.”\(^8\)

Paladin was shielded from liability not only because its publication was protected by the First Amendment, but also because *Paladin* was a civil action for aiding and abetting wrongful death and Maryland does not recognize such a claim.\(^8\) Had this been an action based on the violation of a criminal statute, the result possibly could have been different. Otherwise, the case represents a particularly relevant application of *Brandenburg*. Like Paladin, someone who posts bomb-making on the Internet is not necessarily knowingly communicating with any particular person or directly inciting specific acts. If lawless activity did result from the posting of instructions, the intervening time required for the construction of a bomb would defeat any claim of imminence.

### III. THE SENATE AND THE INTERNET

On May 11, 1995, one month after the Oklahoma City bombing, the Senate Judiciary Subcommittee on Terrorism, Technology, and Government Information held a hearing on “The Availability of Bomb-Making Information on the Internet.”\(^8\) Senator Arlen Specter, Chair of the

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\(^8\) See id. at 849.
\(^9\) Id. at 846 (citations omitted).
\(^8\) Id. at 847 (citations omitted).
\(^9\) Id.
\(^8\) See id. at 842.
\(^9\) *Capitol Hill Hearing Testimony*, supra note 15.
Subcommittee, described the purpose of the hearing as "[to focus] on the use of the Internet by a variety of groups and individuals to propagate 'mayhem manuals,' which, as [their] name suggests, are guides to assist people in committing acts of violence."86 After describing the physical breadth of the Internet, Specter called it "a revolutionary form of mass communication."87 Specter also emphasized that the Internet enables people to communicate with a world-wide audience, without the restrictions of editors, publishers, "time constraints,"88 or "the vagaries of the market."89 Specter explicitly noted that "[a]mong those who communicate on the Internet are purveyors of hate and violence."90 The fact that information detailing the construction of explosives is available on the Internet, "even [to] a 10-year-old child,"91 prompted Specter to say that "I am troubled that we may one day fondly recall the days of prank phone calls once these mayhem manuals permeate our schools."92

Specter identified the issues as "the extent of [the use of the Internet to disseminate information on explosives] and whether anything can or should be done to curb it."93 According to Specter, if the government attempted to regulate such speech on the Internet, two problems would arise. First, Specter questioned "whether it is technologically feasible to restrict access to the Internet or to censor certain messages."94 If such restriction is not technologically feasible, then "the government would only be able to act after the fact to punish those who misuse the Internet."95 Second, as Specter noted, free speech concerns would be implicated by any governmental attempt to restrict or censor speech on the Internet. Specter stated that Brandenburg provided the governing standard on the issue, and he mentioned the Progressive case as a rare instance where such speech had been successfully restricted.96

Specter's statements raise a number of questions. He repeatedly described people who make bomb recipes available on the Internet as "misus[ing] the Internet" and implied that the government should either

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86 Id. at 3 (statement of Sen. Arlen Specter (R-Pa.)).
87 Id. (statement of Sen. Specter).
88 Id. (statement of Sen. Specter).
89 Id. (statement of Sen. Specter).
90 Id. (statement of Sen. Specter).
91 Id. (statement of Sen. Specter).
92 Id. (statement of Sen. Specter).
93 Id. at 4 (statement of Sen. Specter).
94 Id. (statement of Sen. Specter).
95 Id. (statement of Sen. Specter).
96 See id. (statement of Sen. Specter).
restrict, censor, or punish the publication of such recipes. However, Specter also correctly asserted that *Brandenburg* was the governing standard and stated that its holding was "that speech could not be punished unless it was an incitement to imminent unlawful action." Thus, Specter's position is unclear. His choice of examples implies that he advocates restricting, censoring, or punishing the posting of bomb recipes even when such speech is not intended to provoke imminent illegal action that is likely to occur. Yet the legal test he acknowledges would not allow any such limitations.

While Specter's intentions were somewhat unclear at the hearings, Senator Feinstein's were more obvious. Feinstein stated that "[she had] a problem with people teaching others how to build bombs that kill." Feinstein was not persuaded by the fact that experts present at the Subcommittee hearing suggested that most bomb recipes on the Internet were protected by the First Amendment. Instead, Feinstein asserted that "there is a difference between free speech and teaching someone to kill [and all we're doing here is protecting terrorist information] under the mantle of free speech." Feinstein clearly had no tolerance for the communication of bomb-making recipes in general, and the fact that such information was available on the Internet increased her concern. Feinstein said "'[t]his isn't a remote book hidden on the back shelf of a

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97 See id. at 3-4 (statement of Sen. Specter).
98 Id. at 4 (statement of Sen. Specter).
99 Specter mentioned that *The Big Book of Mischief* was available on the Internet. "This 93-page document details explosives formulas, how to purchase explosives and propellants, and how to use them." Id. at 3 (statement of Sen. Specter). However, Specter never stated whether this book encourages its readers to use the recipes for illegal activities. Specter also noted that in the days following the Oklahoma City bombing, there was a message in a newsgroup inquiring if readers would like plans for a bomb like that used in Oklahoma City. The anonymous poster also said that he or she could provide information to show how the Oklahoma bomb could have been more effective. See id. (statement of Sen. Specter). As Specter said, such a message is indeed disturbing and "[t]he individual who posted this message deserves condemnation" Id. (statement of Sen. Specter). However, it is not clear whether Specter would seek to prosecute this individual or to censor his or her message. Furthermore, under *Brandenburg*, such speech would surely be protected by the First Amendment.
101 See infra notes 118-32 and accompanying text.
102 Meeks, supra note 100 (editorial comment in original).
Motivated by her desire to restrict the publication of bomb recipes on the Internet, Feinstein proposed to amend the United States Code section governing the importation, manufacture, distribution, and storage of explosive materials. Feinstein's amendment would have made it a felony "to teach or demonstrate the making of explosive materials, or to distribute by any means information pertaining to, in whole or in part, the manufacture of explosive materials, if the person intends or knows, that such explosive materials or information will be used [to commit a crime]." This amendment passed the Senate on June 7, 1995.

Obviously, Feinstein believed that the Internet posed a unique threat much more serious than a college library. However, in her haste to respond to an act of domestic terrorism, Feinstein ascribed undue weight to a tangential issue (bomb recipes on the Internet) and created legislation that ignored existing statutory law and Supreme Court precedent.

IV THE MEANS OF COMMUNICATION IS BUT ONE OF SEVERAL FACTORS TO BE CONSIDERED IN THE ATTEMPT TO RESTRICT VIOLENT OR DANGEROUS SPEECH

After noting that bomb recipes are regularly posted on the Internet and that a number of organized hate groups use the Internet to communicate, University of Chicago law professor Cass Sunstein considered whether existing legal standards concerning violent speech should change with emerging technology. Sunstein asserted that "[i]t is likely, perhaps inevitable, that hateful and violent messages carried over the airwaves and the Internet will someday, somewhere, be responsible for acts of violence. Is that probability grounds for restricting such speech?" Sunstein suggested that the Brandenburg test seems to protect most speech on the Internet; however, he also suggested

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105 S. 735, 104th Cong. § 901 (1995).


107 See Sunstein, supra note 21.

108 Id. at 35.

109 See supra Part II.A (notes 44-50 and accompanying text).
that *Brandenburg* may be inadequate in the case of speech that expressly advocates the use of illegal violence. According to Sunstein, "*Brandenburg* made a great deal of sense for the somewhat vague speech in question where relatively few people were in earshot." However, with the Internet, potentially millions of people are in earshot and Sunstein asserted that this fact alone changes "the calculus."

Yet Sunstein was unwilling to suggest that *Brandenburg* is inadequate for speech similar to bomb recipes. Instead, he switched the debate from the audience to the message and drew a distinction between vague speech and speech expressly advocating the use of illegal violence. Vague speech, in Sunstein's terms, is speech such as G. Gordon Liddy telling millions of listeners in his radio audience how to shoot federal agents. Speech expressly advocating the use of illegal violence would include a threat to kill the President. Sunstein suggested that "restrictions be limited to express advocacy of unlawful killing because it is the clearest case."

It is clear, at least for Sunstein, that while the potentially large Internet audience might complicate the analysis, ultimately speech such as the publication of bomb recipes would be protected. Furthermore, he

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110 See Sunstein, supra note 21, at 36.
111 Id.
112 Id. If changing the calculus means altering the *Brandenburg* formula, then Sunstein errs somewhat in focusing on the size of the audience alone. While the audience may grow, the intimacy decreases, thus reducing the likelihood and imminence of illegal conduct. The loss of face-to-face contact also alters the degree to which the speaker knows the likely effect of his or her words. In other words, if the Internet changes the *Brandenburg* calculus, those changes argue both for and against the punishment of dangerous speech.

113 See id. at 36-37
114 See id. at 34. "Liddy explained how to shoot agents of the Bureau of Alcohol, Tobacco, and Firearms: 'Head shots, head shots. Kill the sons of bitches. Shoot twice to the belly and if that does not work, shoot to the groin area.'" Id.
115 See id. at 37 Sunstein also noted that "Congress has made it a crime to threaten to assassinate the president, and the Court has cast no doubt on that restriction of speech." Id. at 36-37 However, Liddy's statements are vague enough that they "might receive protection insofar as they could be viewed as unlikely to produce imminent illegality." Id. at 36. It is important to note that by discussing a threat to the President, Sunstein again dramatically changes the debate by moving into a particularly dangerous and highly regulated form of speech.

116 Id. at 37 Even express advocacy may fail the *Brandenburg* test, however.
argues that the intent of the speaker and not merely the means of communication, is an essential element to be considered when restricting violent or dangerous speech. Unlike Senator Feinstein, a number of experts who testified at the Senate Subcommittee hearings would also agree.  

Frank Tuerkheimer, a law professor who was the U.S. Attorney who sought the injunction against the Progressive, said that “our obligation to remain true to the basic values that characterize our system of government and make it unique should not be weakened by the horrors of the moment.” After discussing examples of both possibly legal and illegal dissemination of bomb-making materials on the Internet, Tuerkheimer suggested that any legislative response should focus on the intent of the speaker. Any other focus, such as Feinstein’s fixation on the medium itself, would be misplaced because such information is already widely available in other media.

Another witness, Jerry Berman, argued that there was less of a connection between Internet speech and violence than between a street

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117 See infra notes 118-25 and accompanying text.
119 Id. at 43 (statement of Frank Tuerkheimer).
120 See id. at 44 (statement of Frank Tuerkheimer).
121 For example, Tuerkheimer said:

Attached to this statement is a copy of pages 275-282 of Volume 21 of the 1986 Encyclopedia Britannica. It reveals great detail on explosive manufacture, similar in many respects to the information disseminated electronically of concern to the Committee and others, including, on page 279, a description of the Ammonium Nitrate/Fuel Oil mixture used in the Oklahoma City bombing. Also attached is a list of books containing similar information to the kind transmitted electronically. The books on this list were obtained from the Engineering and Agriculture libraries at the University of Wisconsin in the one day between the invitation to appear before this Committee and the preparation of this statement and are generally available. Among these books is a “Blasters Handbook” published by the Department of Agriculture Forestry Service which in turn includes a description of the Ammonium Nitrate/Fuel Oil explosive used in Oklahoma City along with the recommended mixture of the two chemicals.

Id. at 44.
122 Jerry Berman is Executive Director of the Center for Democracy and Technology, a public interest policy organization dedicated to the protection of individual liberty in digital media. Id. at 3 (statement of Sen. Specter).
demonstration and violence.123 “Words sent over the Internet may inspire or incite, but the nexus between the words and subsequent action is far more attenuated than any case in which the Court has approved criminal sanction.”124 If this is true, then the publication of bomb recipes on the Internet could not satisfy the Brandenburg requirement that such speech must inspire imminent violence.125

Deputy Assistant Attorney General Robert Litt also acknowledged that not only were bomb recipes widely available on the Internet, but that such materials have been available in bookstores and libraries for years.126 As Litt said, “most Americans, including those few inclined to violence, understand that bombs can be made from commonly available materials.”127 Litt, when questioned by Specter, also asserted that he did not think that the Department of Justice had “an ability to assess, at this point, how many people get information off the Internet, how many people get it from other sources.”128 Rather than focus on the Internet itself, Litt suggested that under existing law, one could be prosecuted for the dissemination of bomb recipes in certain circumstanc-

es.129 For example, there is a federal statute that “specifically prohibits demonstrating how to make an explosive device if one intends or knows that it will be used in a civil disorder involving acts of violence affecting interstate commerce.”130 Litt cited United States v. Featherston131 as

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123 Id. (statement of Sen. Specter). “Unlike the crowded street in which demonstrators circle a building, no matter how incendiary the words sent over the Internet may be, they are still a long way from causing criminal harm.” Id. at 37 (statement of Jerry Berman).

124 Id.

125 Id. (statement of Jerry Berman).

126 Id. at 16 (statement of Robert Litt).

127 Id. (statement of Robert Litt).

128 Id. at 47

129 Id. at 16 (statement of Robert Litt).

130 Capitol Hill Hearing Testimony, supra note 15, at 16 (statement of Robert Litt). The statute Mr. Litt refers to is 18 U.S.C. § 231 (1994). Section 231(a), (c) provides for fines or imprisonment for “teach[ing] or demonstrat[ing] the use, application, or making of any firearm or explosive knowing or having reason to know or intending that the same will be unlawfully employed for use in a civil disorder ” Id. § 231(a).

131 United States v. Featherston, 461 F.2d 1119 (5th Cir. 1972). Featherston was convicted under 18 U.S.C. § 231 for giving “instructions at a meeting on how to make and assemble explosive and incendiary devices in order to prepare the attendees for ‘the coming revolution.’” Capitol Hill Hearing Testimony, supra note 15, at 16 (statement of Robert Litt).
an example of the successful application of this statute. However, Featherston was convicted for giving a bomb-making presentation "to a cohesive, organized group preparing for 'the coming revolution,' ready to strike quickly, and including some members regularly trained in explosives" \(^{132}\). Litt cited no case where an individual had been punished for the abstract communication of bomb recipes in a context not likely to incite imminent violence because there is no such case. The *Progressive* case\(^{133}\) is the closest example; but *Progressive* is unique because it involved the publication of information restricted by the Atomic Energy Act at the height of the cold war.

Although the Feinstein amendment included a requirement that a person teaching others how to make explosives intend that illegal activity result from the teaching, the amendment itself is redundant given the statute cited by Litt.\(^{134}\) Such redundancy indicates that Feinstein's proposed amendment was the result of an emotional response to a national tragedy combined with fear of a new technology. Existing law, particularly *Brandenburg*, makes it clear that the means by which dangerous or violent speech is conveyed is but one of many elements to be considered before such speech should be restricted. There are no authorities to indicate that the test set forth in *Brandenburg* is not as applicable to today's technology as it was to violent speech uttered to a small group of people standing in a field.

**CONCLUSION**

The Internet is a unique communications medium because of its ability to reach large audiences cheaply and without editorial interference. Yet it is not unlike other mass media: users are merely transmitting written words on a computer screen with no physical contact. Notwithstanding the large number of potential Internet users, only Internet speech that expressly advocates imminent specific acts of illegal violence should possibly be restricted. The emotionally-charged environment of face-to-face discussion is missing even from "real-time" communications among Internet users. Thus, although directions for bomb-making posted on the

\(^{132}\) *Capitol Hill Hearing Testimony, supra* note 15, at 16 (statement of Robert Litt).

\(^{133}\) See *supra* Part II.B (notes 53-66 and accompanying text).

\(^{134}\) Id. at 16 (statement of Robert Litt). Both 18 U.S.C. § 231 and the Feinstein Amendment make it a federal criminal offense to teach or demonstrate to others how to make explosive devices, if that person intends or knows that the information will be used in a federal crime (Feinsteim) or civil disorder (§ 231).
Internet may indirectly motivate or induce terrorist behavior, the connection between the speech and the ensuing acts is too remote to allow criminal sanctions.

Clearly, when speech crosses the line from merely advocating violence to fueling violence, in the *Brandenburg* sense, the speech may be censored or punished. However, established solutions to familiar problems should not be discarded merely because technology is rapidly changing. *Brandenburg* effectively allowed the prohibition of face-to-face communications intended to provoke imminent violence.\(^{135}\) In *Paladin*, *Brandenburg* was forcefully applied to published information.\(^{136}\) *Brandenburg* thus provides a rational, effective, time-tested standard that balances public and private security interests against constitutional concerns for freedom of expression. Because *Brandenburg* allows consideration of all the unique characteristics of the Internet, there is no reason to formulate new jurisprudence merely because of new technology.

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